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Introduction

Labor Law in Argentina

Labor relationships in Argentina are governed by the Constitution, international treaties and conventions, and Labor Contract Law Number 20,744 (Ley de Contrato de Trabajo or the “Labor Contract Law”).

The Constitution contains the overriding principles governing labor relationships, such as freedom of employment, the right to work in a dignified and equal manner, the right to earn appropriate wages which cannot fall below a minimum declared by law, the right to be entitled to paid breaks and vacations, and equal remuneration for equal work.

The Labor Contract Law sets minimum statutory thresholds and governs every aspect of labor relationships, such as remuneration, termination, vacations, timetables, and leave of absence, among others. The labor justice structure is divided among the provinces and the city of Buenos Aires. No court has the power to control another, but only to review appealed decisions in some cases, depending on the jurisdiction.

In principle, case law has no precedential effect, except only in a full-bench judgment in which all the judges of the National Labor Court of Appeals participate. These judgments determine legal doctrine and the criterion adopted by the court in that case is mandatory for ten years for all of its ten chambers and for all first instance labor courts sitting in Buenos Aires.

Appeals against judgments rendered by the National Labor Court of Appeals or by the Superior Courts of each province may be filed as extraordinary appeals before the National Supreme Court of Justice, which is an exceptional appeal aimed at preserving the supremacy of the Constitution and is only applicable in very specific situations.

Employment law and the power of the unions depend on the political party in office at the time. Pro-union politics also has resulted in judges with increased tendency to be protective of employees.
Recent Developments in Labor Law

While the main rights and obligations of the parties involved in the employment contract remain still without any significant changes in the last twelve months, we do have observed a growing tendency in case law and regulations with respect to the registration of the employment contract before the Administrative and Tax authorities.

In fact, companies are now more controlled than they used to be as to the fulfilment of an employee’s registration requirements. This affects particularly the definition of “remuneration”, given that certain benefits that companies grant to their employees as non-remunerative additional items, such as company’s cellular phone, vehicle, laptop, housing allowance, and in broad terms, any concept that could be considered a saving for the employee (and, thus, not registered and exempt from social security and tax contributions) are now tending to fall under the broad concept of “remuneration” and are subject to withholdings and contributions to the social security system and tax authorities.

In relation to employees’ salaries, this year the minimum wage has been modified by the Wage Council, a group comprising workers and employers in order to review periodically the amount of the wages in relation to the costs of the economy and its equivalence. In this sense, the general minimum monthly salary has been raised from AR$ 1,840 up to AR$ 2,300.

The courts frequently adopt decisions disregarding severance caps, especially when highly compensated employees are involved, and recently honoring certain Supreme Court criteria existing since 2004. Recent political climate also has resulted in the unions repeatedly clamoring for and obtaining salary increases, which are considered partially remunerative and partially non-remunerative.

Legal Relationship of Employer and Employee

Labor Relationship

A labor relationship exists when a person provides personal services to another in exchange for remuneration while in a legally, economically, and technically subordinate position. This arrangement need not be in writing to constitute a legally binding agreement between the worker and the employer.

A labor contract is distinguished from a contract for consultancy services in that a consultant is paid on the basis of work performed, need not comply with orders from the employer, is not subject to a specific work schedule, and does not need to be physically present at the employer’s place of business.

However, if the employer and the consultant are bound by a consulting agreement but the characteristics of the relationship are one of labor dependency, there is a serious risk that it may be considered by the courts to be a labor relationship with the attendant consequences.
Rules Governing Labor Relationships

Argentine law governs all labor activities in Argentina, regardless of where the employee was first hired or where the employment contract was entered into or signed.

The basic sources of labor law in order of priority are (a) laws governing labor contracts, (b) collective bargaining agreements (convenios colectivos de trabajo or CBAs), (c) agreements between the parties, and (d) customs in the workplace. A stipulation ranking below another may only modify a higher-ranking stipulation to the extent that it enhances the employee’s position.

The Labor Contract Law governs most labor relationships, while specific statutes govern rural workers and employees in the public sector and in domestic service. CBAs tailor the general provisions of the Labor Contract Law to a specific industry sector or employer. They are negotiated between the relevant union representatives and the management of different industry sectors or a specific company. They typically involve issues such as vacations, bonuses, wage scales, overtime pay, health and safety conditions in the workplace, and special paid leave.

The parties also may agree to specific individual conditions of employment by means of a written contract or a verbal agreement. Written contracts are frequent among key employees such as senior management, professionals, and chief executive officers. The customs and habits of a particular region or company may establish work practices which eventually become legally binding between the relevant parties.

Minors

Persons from 16 to 18 years of age are considered to be minors for the purposes of labor law. They may become employees with the consent of their parents. An employee who is a minor is entitled to the same remuneration as an adult for an equivalent workday with similar tasks.

However, all minors are restricted to a six-hour workday and a 36-hour workweek and may not work between eight o’clock in the evening and six o’clock in the morning. They also are entitled to a rest period of two hours in the middle of the day.

The employer should obtain a medical certificate stating that the minor is fit to perform the work demanded before hiring such minor. Otherwise, the employer will have strict liability in respect of accidental injury, regardless of whether the employee is negligent or not.

Persons under 16 years of age cannot be hired unless the business employs only members of the employer’s family or it obtains an express authorization from the Ministry of Labor. In such a case, only minors from ages 14 to 16 could work.
Female Employees

The law guarantees the female worker equal remuneration for equal work, and protection against discrimination in employment based on sex or marital status.

Female employees are entitled to a two-hour rest at midday, although this rule is generally not enforced and can be eliminated with the approval of the Ministry of Labor.

Foreign Employees

Foreigners who wish to work in Argentina should first obtain a transitory or temporary residency permit, depending on the amount of time they plan to spend in the country.

In any event, the request for any form of residence permit should be preceded by the issue of an entrance permit (permiso de ingreso) by the Board of Immigration (Dirección Nacional de Migraciones). The request for an entry permit may be filed directly by the foreigner or through a third party on behalf of the applicant.

A transitory residence permit is required for a person who wishes to stay in the country for less than a year. This permit is currently issued for an initial period of three months, but its length is frequently varied. A temporary residence permit is valid for a year and can be renewed on three occasions to last for up to three years. After three years, the employee can apply for a permanent residency permit.

A number of documents from the employer and the employee should be presented by the company and the applicant before the Board of Immigration and the consulate in the applicant’s country of origin. This includes the written contract between the applicant and the employer, who should be established in Argentina.

The applicant should ensure that all the required documentation is translated into Spanish by a public translator registered with the consulate and duly legalized. Any necessary notarizations also should be carried out by an authorized notary. In most cases, a temporary residency permit will take up to approximately two to three months to obtain.

There is a special program for foreign residents who are natives of the States of the Mercado Común del Sur (Mercosur) and its associated States. The program simplifies the proceedings to obtain temporary residence (patria grande), which can be requested in Argentina and is valid for two years.

Subcontracted Personnel or Outsourcing

Care should be taken when subcontracting personnel from other companies, since the recipient company may be held jointly liable with the supplying company for any labor and social security claims that may arise. However, the recipient company may avoid such liability if it verifies that the subcontractor
has the following documentation in good order in respect of the persons supplying the services:

- Sole Labor Identification Code number (Código Único de Identificación Laboral) for each worker rendering services;
- Evidence of relevant salary payments;
- Stamped copies of monthly social security payments to the relevant bank;
- Account number of the bank into which the money is deposited; and
- Certificate of insurance accrediting coverage for labor risks.

If any such documentation is unavailable, the recipient company should inform the subcontractor and request that the omission be corrected. If a recipient company does not do so within one month, it may be held jointly liable for any labor claim that may arise in respect of the employees rendering the services.

Transfers of Assets

When assets are sold by a company in the ordinary course of business or by means of a sale of fixed assets, labor relationships are generally not affected. If the assets sold can be considered to constitute a “business unit”, they may affect the contracts of employees in that business unit, and the following liabilities will arise as a result of transfer:

- The vendor will be jointly liable with the purchaser for any debts arising out of the labor relationships before the date of transfer, while the purchaser becomes solely liable for those after the transfer.
- The vendor and purchaser are jointly liable for labor obligations which arise during or as a result of the transfer of the business.1

The employee’s consent is not necessary in case of a transfer of a business unit, unless there is a material change in his conditions of employment. If the transfer is one solely of personnel, then the written consent of each employee should be obtained.

In view of the solidary liabilities that arise as a result of a transfer, it is common for the vendor and purchaser to agree as to who should bear these liabilities.

However, this agreement is only valid as between them and do not have any effect in respect of the employees concerned or the social security authorities.

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1 For example, both parties are liable for any dismissal which takes place because of the transfer or any indirect dismissal caused by any disadvantageous alteration of the employees’ work conditions resulting from the transfer. If an employee’s labor conditions are altered to his detriment, he may consider himself aggrieved and indirectly dismissed without just cause.
Terms and Conditions of Employment

Working Day

The basic working day is eight hours with a maximum of 48 hours per week. Any hour worked between nine o’clock in the evening to six o’clock in the morning is equal to one hour and eight minutes in order to calculate the number of hours to be included in a basic working day.

An employee who works between six to eight hours per day will be considered a normal full-time worker. If the work has been declared unhealthy by the Ministry of Labor, working hours may not exceed six hours per day and 36 hours per week. Timetables stating employee work schedules should be posted in a clearly visible manner for the information of all.

Overtime Pay

Hours of work in excess of the basic working day are payable at overtime rates equivalent to a 50 per cent surcharge on the normal wage. However, after one o’clock in the afternoon on Saturdays, Sundays, and holidays, the surcharge is 100 per cent. Night shift workers do not receive overtime pay for night work.

Part-time workers cannot work more than two-thirds of the normal working schedule and cannot work overtime hours.

Vacations and Leaves of Absence

The employer should grant to employees the appropriate amount of vacation days and special leaves of absence for illness and important personal events. The employee will receive normal pay from the employer during leaves of absence, except for maternity leave which entitles an employee to social security benefits equal to normal salary payments and will normally be paid by the employer.

However, the employee receives a slightly increased salary of more than 20 per cent while away on vacation. Holiday pay corresponding to the period of the vacation should be paid before the employee’s departure. Vacation pay is calculated by dividing the monthly salary by 25 and multiplying this amount by the number of days of vacation taken.

To qualify for the full vacation entitlement, an employee should have been employed with the employer for at least half a year. However, if the employee has worked less than half a year, he is entitled to one day of vacation for every 20 days worked. Any sick days or legal absences taken by the employee are considered days worked for the purpose of vacation entitlement.

The amount of vacation time to which an employee is entitled increases in accordance with his period of employment with the employer in the following manner:

- For six months’ to five years’ employment, 14 days of vacation time;
- For five to 10 years’ employment, 21 days of vacation time;

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• For 10 to 20 years’ employment, 28 days of vacation time; and
• For more than 20 years’ employment, 35 days of vacation time.

The calculation is made as of 31 December of each year. The employer fixes the
vacation period and should give each employee 45 days’ prior notice of the
dates assigned for vacations. In principle, employees are entitled to take their
vacations only during the summer months between October and April, although
this rule is generally not followed in practice. If the employer and employee
agree, up to one-third of any vacation entitlement may be carried forward to the
subsequent year.

**Special Leaves of Absence**

The law allows special leaves of absence for the birth of a child, maternity leave,
marriage, death of a relative, and high school or university examinations. The
employer will pay the employee his usual salary during such leaves of absence.
The annual vacation may be accumulated with such leaves of absence upon the
employee’s request.

A pregnant employee is entitled to ninety days’ maternity leave, divided into 45
days before birth and 45 days after birth. The employee may subtract up to 15
days from the time allowed before birth and add it to the leave permitted after
birth.

The employer is required to take such an employee back once she has finished
her maternity leave. While on leave, the employer should pay her social security
benefit, but he may reclaim such amounts from the social security authorities or
set it off from the monthly contributions made in respect of other employees.

All female employees are guaranteed job protection during gestation from the
moment they notify their employer of their pregnancy with proper medical
certification. If an employee hands in the legal certification and is dismissed
within 7.5 months before or after the birth of her child, she is presumed to have
been dismissed by reason of her pregnancy. The employer is then required to
pay her one year’s salary in addition to the usual severance package for
dismissal without just cause.

A mother is entitled to a half-hour break taken twice daily to breastfeed her child
for up to one year after her child’s birth. In practice, employees may come to
work an hour later or leave an hour earlier. CBAs often contain clauses making it
obligatory for the employer to establish a daycare center for employees’
children.

**Absence Due to Illness**

An employee who is absent from work due to an accident or extended illness not
related to work is entitled to collect normal salary while away. He may receive
normal salary for up to three months of illness if he has been working for the
same employer for less than five years, or up to six months of illness if he has been working for the same employer for more than five years.

If the employee has dependents, these periods are increased to six months and twelve months respectively. The employer may cease paying the employee his salary after these periods have elapsed.

However, if the illness continues beyond such periods, there is an additional period (reserve period) of one year within which the employee can return to his previous employment position. This right also is granted to employees elected as union officers or to certain public offices. After the lapse of the reserve period, either party may terminate the contract of employment but should pay indemnity.

If the employee returns to work during these periods but there is a permanent reduction in his capacity to carry out previous work functions, the employer should assign him to a post which he can fulfill but without a reduction in his salary.

If the employer cannot assign the employee to such a post, the contract will be extinguished and the employer will have to pay the employee 50 per cent of the normal seniority indemnity. If the employer can assign such a post to the employee but does not do so, the contract will be extinguished and the employer will have to pay the whole of the seniority indemnity to the employee.

**Salary Considerations**

*In General*

Although remuneration is usually paid in some monetary form, payments in kind also may qualify as a form of remuneration for up to 20 per cent of the salary.

Payments in kind are considered when calculating the relevant social security and union contributions. The employer also may offer vouchers for food and eating establishments.

*Minimum Wage*

The minimum wage as of August 2011 is ARS 2,300 for workers earning a monthly salary for a full-time day’s work and ARS 11.50 an hour for daily workers. Apprentices and part-time workers may be paid less than the minimum wage.

*Mandatory Semi-Annual Bonus*

The law requires an employee to be paid every semester (June and December) a bonus equal to 50 per cent of the highest monthly wage he received during the previous six-month period (“semi-annual bonus” or *aguinaldo*).

In medium-sized and small companies, the relevant CBA may provide that the *aguinaldo* be paid in three equal parts.

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Social Benefits

Social benefits are services provided to the employee at the employer’s expense to improve the employee’s and his family’s quality of life. These benefits are not considered a part of remuneration and cannot be substituted by monetary payments.

Social benefits are not subject to contributions or salary withholdings, nor are they taken into account in calculating the *aguinaldo* or the amount of any indemnity in case of a labor contract termination. The following benefits are considered to be social benefits:

- Provision of company restaurant facilities;
- Reimbursement of medical and dental expenses of the worker and his dependents against duly accredited receipts;
- Duly accredited reimbursement of the expenses of children’s nurseries utilized by the employee’s children up to the age of six, where the employer does not provide such facilities;
- Provision of school materials and smocks at the beginning of the school year for the employee’s children;
- Reimbursement of the cost of occupational training courses; and
- Reimbursement of duly accredited funeral expenses for the employee and his dependents.

Luncheon and food vouchers were previously considered as social benefits, but a mechanism has been established to progressively eliminate them as such, granting them remunerative nature in a staggered and progressive manner and subjecting them to social security withholdings and contributions.

Travel Expenses

The reimbursement of an employee’s duly accredited travel expenses with proper receipts is not considered as remuneration and will not be considered for purposes of calculating social security, healthcare, and union contributions.

Stock-Option Plans

Stock-option plans may be granted to key employees as an incentive form of remuneration. However, a stock option plan that can be exercised only once has different labor and social security consequences from one that can be exercised in different occasions or is a series of stock options.

Where the benefits under the plan are received habitually, such benefits will form part of the employee’s remuneration. They will be taken into account for purposes of social security withholdings and in calculating employee benefits such as *aguinaldo*, vacation pay, and indemnities payable upon dismissal.
Where the benefits under the plan are received only on one occasion or in an exceptional manner, they will be considered as an extraordinary gratification and not as normal remuneration. They will not be subject to social security withholdings or taken into account in calculating employee benefits. However, the benefits under stock-option plans will always be subject to tax in the normal way whether received on a habitual basis or upon a “one-off” basis.

Types of Labor Contracts

Contract for Indefinite Period

In general, all labor contracts are considered to be entered into for an indeterminate period, unless the parties agree to a fixed period because of special circumstances. All indefinite term labor contracts begin with a trial period which allows either party to terminate the relationship during that period without just cause, and without the employer having to make any severance payment.

A trial period lasts for three months, and the parties should provide a 14-day prior notice in case they decide to terminate the employment agreement during this period. If the labor relationship continues after completion of the trial period, such period will be computed as part of the contractual period for all purposes.

Contract for Fixed Period

A fixed-term contract should be in writing and should specify its duration (which may not exceed five years), the type of work, and the reasons justifying its use. If these requirements are not met, the contract will automatically be converted into a contract for an indefinite period.

In all cases, the employer should give prior notice to the employee of the expiration of the contractual period at least one month before but not more than two months after such expiration. Otherwise, the contract will be converted into one for an indeterminate period, unless the parties expressly agree to renew it for a further fixed period.

Contract for Extraordinary or Special Services

This type of contract is entered into where extraordinary or special services are to be provided by the employee for the realization of determined work outside the normal activity of the enterprise, to attend to a circumstantial increase of work corresponding to extraordinary and transitory needs of the employer, or to cover the temporary absence of normal employees.

The burden of proving that a contract of this nature exists is upon the employer. However, it is presumed to exist when the services of the employee commence and terminate with the service, work, or act.
In this case, an employer is not required to give prior notice or to indemnify the employee when the contractual relationship is extinguished as a result of the termination of the special work that gave rise to the contract.

**Seasonal Labor Contract**

An employer may hire a worker for activities performed seasonally. Their contract is considered as one for an indefinite period having intervals of activity and recess. The worker has the right to be taken on at the beginning of each season simply because he was employed for the previous season, but no obligations or rights exist between the parties during the recess period.

If the worker is dismissed without cause at the start of or during the season, he should be paid an indemnity equal to the salary which would have been payable up to the end of the season in question, in addition to any amounts corresponding to a dismissal without just cause.

**Contract of Apprenticeship**

Employers may hire persons between 14 to 28 years of age for work capacitating programs that may last up to one year. Contracts of apprenticeship should be in writing and should last from three months to one year. Employers may not employ more than ten per cent of their employees as apprentices.

The employer should give the apprentice 30 days’ notice prior to the expiration of the contract, otherwise he will have to pay the apprentice half a month’s salary. Upon the expiration of the contractual period, no indemnity is payable. However, if the contract is terminated before the contractual period expires, the employer will be required to pay seniority indemnity.

**Part-Time Contract**

An employee’s work hours should not exceed two-thirds of the full-time schedule for the same activity to be classified as a part-time employee. The remuneration paid by the employer to a part-time employee should not be less than the proportional salary of a full-time worker.

Overtime is not permitted in a part-time contract, except where the employee is providing services to avoid danger to other employees. If the part-time employee’s work hours exceed two-thirds of the full time, he should be paid the same remuneration as a full-time contract employee for that month.

Social security contributions should be made in proportion to the part-time employee’s salary, except for healthcare contributions which consider a part-time employee’s salary the same as that of a full-time worker.
Registration and Procedural Formalities

In General

The employer should comply with all the procedural or formal obligations arising from a labor relationship, otherwise he will be required to pay increased levels of compensation to the employee in the event of a dismissal and also may be subject to fines.

Registration in Labor Registry System

All employers and employees should be registered in the Labor Registry System (Sistema Único de Registro Laboral) of the Federal Administration of Public Income (Administración Federal de Ingresos Públicos or AFIP). The following should be submitted to the AFIP:

- Copy of the articles of incorporation of the employer registered with the Public Register of Commerce and certified by a notary; and
- Sole Tax Code of Identification (Clave Única de Identificación Tributaria or CUIT) of the person who is registering as an employer, and employees’ personal data such as copy of the National Identification Credential (Documento Nacional de Identidad or DNI), the employee’s healthcare organization, details of his pension fund, family allowance fund, and social welfare organization, the employment contract, and the employee’s CUIT.

Employers are required to record the entry and exit of every employee who is included in or discharged from the payroll. Students under trainee programs (pasantes) also should be included in the record. An employer may record employees’ data via the Internet at the tax authority’s official website or by submitting an affidavit that includes the relevant information to the tax authority’s office where the employer is registered.

Employee Registration Book

The employer should record employee data in a book which is stamped and numbered by the Ministry of Labor. The employee registration book should contain basic details of all employed personnel, such as names and civil status, dates of employment, and salaries. It should be available for judicial inspection if needed and also may be reviewed periodically by inspectors from the Ministry of Labor, although this does not occur very often in practice.

The employer should ensure that the records in the employee registration book are correct and complete, otherwise he may be fined. The seniority indemnity and the indemnity in lieu of notice also will be doubled if, at the time of the

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2 To have the employee registration book stamped, a form with the name of the company and its CUIT number and address should be filed with the Ministry of Labor. A company representative should sign the completed form before a notary public.
dismissal, the employee was not registered or his registration was deficient in some manner.

If an employee is not registered or incorrectly registered in the employee registration book, he may request that the employer correct the discrepancies. If this is not done within 30 days of such request or if the employer refuses, the employee may consider that he has been unfairly dismissed and will be entitled to double indemnity.

Such employee also will be entitled to a further indemnity equivalent to 25 per cent of the remuneration earned by him from the commencement of his employment. However, if he was registered some time after starting work, this indemnity will be 25 per cent of the remuneration earned from the date of his actual commencement of employment until the date that he was registered as having commenced employment. Where the registered remuneration is less than that actually paid to the employee, the extra indemnity will be 25 per cent of the non-registered part of the remuneration.

Payments to Employees

Payments to employees also should be correctly documented and accredited, with the purpose of the payment properly indicated and signed by the employer and the employee. In particular, the employer should list upon any receipt the following information:

- Name and address of the employer or company;
- Name and job title of the employee;
- Tax identification numbers of the employer and the employee;
- Details of any remuneration received and the gross total;
- If applicable, the number of hours worked or units completed;
- Amounts of withholdings and contributions;
- Place and date of payment; and
- Employee’s date of hiring and current grade.

Suspension of Employment

Employers may suspend employees for disciplinary reasons or for lack of work caused by economic reasons or force majeure. During the period of suspension, the employer is not required to pay the worker’s salary if the suspension is justified, is within the legally established time limits, and is notified to the employee in writing.

However, the employer will have to pay any salary foregone if the employee objects to the suspension within 30 days of notification, and such objection is upheld by the courts. The number of days an employee can be suspended in a year will vary depending on the reason for the suspension. If the suspension is for disciplinary reasons or lack of work due to economic reasons, it cannot
exceed 30 days. If the suspension is due to *force majeure*, it may last for 75 days. If any combination of suspensions exceeds ninety days in a year, an employee can choose to consider himself as indirectly dismissed without just cause.

**Non-Competition Agreements**

An employee has a duty of loyalty to the employer and is barred from engaging in competitive activities during his employment. Key employees are normally required by their contracts to work exclusively and on a full-time basis for their employers.

However, these obligations expire once the labor relationship is terminated. Contractual stipulations providing that the employee will not compete after the termination of the contract are of doubtful validity since they are considered to conflict with the Constitutional provision which provides that all persons have an unfettered right to work.

Thus, case law has considered that a reasonable time limitation should exist for non-competition agreements, i.e., three years. However, for the non-competition clause to be enforceable, certain compensation should be paid to the former employee to cover his inability to obtain another job in the industry where he worked for his former employer.

**Confidentiality**

The employee’s duty to keep company secrets continues during the period of employment and extends indefinitely beyond the end of that period. The employee will thus always be under an obligation not to reveal confidential information or company secrets.

**Discrimination**

**In General**

Section 16 of the Constitution sets forth the main principle on discrimination, i.e., all inhabitants of Argentina are equal before the law and admissible to employment without any condition other than that of aptitude. It also sets forth the principles of equal working conditions and equal remuneration in respect of work of equal value.

Section 17 of the Labor Contract Law expressly forbids any kind of discrimination between workers based on sex, race, nationality, religion, politics, trade union, or age. It also requires employers to give all workers the same treatment in similar conditions.
There is unequal treatment when arbitrary discriminations based on sex, religion, or race are made, but not when the different treatment is supported by greater efficiency, diligence, or dedication to tasks.3

The Trade Unions Law Number 23,551 (“Trade Unions Law”) provides that trade unions cannot establish differences for ideological, political, social, religious, national, racial, or sexual reasons, and should abstain from giving a discriminatory treatment to its affiliates.

It will be considered disloyal practice and contrary to the ethic of professional labor relationships if employers practice discriminatory treatment in any manner by reason of union rights.

Other non-labor laws regarding discrimination that could be applied to labor relationships include the Non-Discrimination Law Number 25,592 and the Fight against AIDS Law Number 23,798.

Under the Non-Discrimination Law, a person who arbitrarily impedes, obstructs, restricts, or in any manner deprives the plain exercise, on an equal basis, of the fundamental rights and guarantees recognized in the Constitution, will be compelled by request of the injured to remove the effect of the discriminatory act or to cease its realization and repair the moral and material damage produced.

The discriminatory acts or omissions for reasons of race, religion, nationality, ideology, political or trade union opinion, sex, economic position, social condition, or physical characteristics are considered, although there is no specific definition of discrimination in matters of sex, age, incapacity, and working conditions. The legal framework punishes the discriminatory act independent of the specific matter of discrimination.

Still, certain international treaties define discrimination in general,4 and racial5 and sex discrimination6 in particular. Most discrimination-related precedents in case law pertain to AIDS, violation of the principle of equal remuneration for the same work, maternity, marriage, and union reasons.

Discrimination in State organizations and private companies is treated similarly due to the fact that employees of these entities are equally considered by the Constitution and international treaties.

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3 Labor Contract Law, s 81. Nevertheless, authors consider that the enumeration provided by law is not restrictive, such that the law is interpreted to contemplate any kind of discrimination that nullifies or alters the equality of opportunities, or even provides an arbitrary treatment of an employee.

4 International Labor Organization Convention Number 111, s 1.

5 International Covenant on Civil and Political Rights, s 1.

6 Convention on the Elimination of all Forms of Discrimination against Women, s 1.
Asserting Violation of Discrimination Law

Competent Courts

If the discriminatory act has occurred in the exertion of or is motivated by a labor relationship, the claim will be resolved by a labor court. The competence of the National Labor Court cannot be waived.

However, if the victim of the discriminatory act decides to claim compensation for moral or material damages produced by the discriminatory act in a context other than that of a labor relationship, the claim will be settled by the civil courts.

Proof

Each party will have to submit proof fulfilling the requirements of the law(s) upon which they base their claim, defense, or exemption.

Remedies that are available to the employee include hiring, reinstatement, compensatory damages, and moral and financial remedies. As compensation and repair for discriminatory acts, the law provides (a) a return to the previous non-discriminatory situation, (b) the removal of the effects of the discriminatory act, (c) compensation for moral damages, and (d) compensation for injury.

Employees under union protection also cannot be dismissed, suspended, or have their working conditions modified, unless a judicial resolution excludes them from the union guarantee. A union representative who is dismissed could claim reinstatement or compensation equivalent to the sum that he would have been entitled to for the remaining period of his union protection plus the severance package for dismissal without justified cause.

It is generally presumed that the dismissal of a female worker within seven and a half months before or after childbirth is on account of her maternity or pregnancy, provided that she had notified and certified the fact of her pregnancy and childbirth. The erring employer should pay a compensation equivalent to one year of remuneration in addition to the severance payment for dismissal without justified cause.

A dismissal is presumed to be on account of marriage when it occurs three months before the marriage or six months after the marriage of the relevant employee. The erring employer should pay a compensation equivalent to one year of remuneration plus the severance payment for dismissal without justified cause.

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7 Law Number 18,345, s 20.
8 Law Number 18,345, s 19.
9 Law Number 22,434, s 375.
10 Trade Unions Law, s 52.
11 Labor Contract Law, s 178.
12 Labor Contract Law, s 182.

(Release 1 – 2012)
If a worker is dismissed during paid sick leave, he is entitled to collect the severance payment due to dismissal without cause plus the salaries corresponding to the remainder of the period of the paid sick leave.\textsuperscript{13}

In the labor sphere, the employer will be responsible for the damages produced by a discriminatory act committed against an employee. In the civil sphere, he who performs a discriminatory act will be ordered by the damaged party to leave the act without effect or to terminate the realization of the act and to repair the moral and material damage caused.

An employer may undertake several acts to protect himself against claims, although there is not much precedent regarding discrimination and most labor claims pertain to redundancy payments, justified cause for dismissals, and other general matters.

\textbf{Policies to Be Adopted}

The main claims for discriminatory treatment transpire due to the arbitrary treatment of an employee or a violation of the principle of equal remuneration for work of equal value.

Thus, it is advisable to use objective criteria to elect beneficiaries when an employer grants a bonus, increases remuneration, elects participants in stock option plans, or grants promotions. These could include achievement of objectives, amount of sales, new clients, launching of products, production of units, and revenues of the area or category within the corporate organizational chart, among others.

It is not customary to make written offers of employment to future employees, except only when contracting key employees. The hiring and screening processes are outside the scope of the Labor Contract Law, which governs an employment relationship once employment has commenced.

Nevertheless, the screening of prospective employees is customary and may be executed when it consists of background checks and certain mandatory medical exams. The written consent of the employee is not expressly required by law, but the employer should treat the information with the highest degree of caution and confidentiality. On the other hand, drug, criminal, and other sensitive checks should be treated with extreme caution and should always be performed with the employee’s consent.

\textbf{Collective Bargaining and Worker Participation in Management}

\textbf{Labor Unions and Collective Bargaining Agreements}

Employees have the right to organize and to join or not join labor unions. Collective bargaining negotiation is governed by Law Number 14,250, Decree

\textsuperscript{13} Labor Contract Law, s 213.
Number 199/88, and other applicable regulations, while the right to strike is provided for by Section 14bis of the Constitution.

The employer should be registered as such with the union that represents the employees, but each employee can choose whether to be affiliated to the union or not. The employee should inform the employer of his decision in writing.

Unionized employees require additional registrations and/or payments, including registration with the applicable worker’s union, payment of monthly fee to the said union, and any additional payments provided in the applicable CBA.

**Participation in Management**

Although Section 14bis of the Constitution grants workers the right to “collaborate in the management” of a company, this right has not yet been implemented through any law.

**Health and Safety Protection in Workplace**

**Work Risk Insurers**

Employers of workers included within the scope of Law Number 24,557 of 1995 (the “LRT”) should either self-insure against the obligations imposed by the LRT or should be insured by a Work Risk Insurer (Aseguradora de Riesgos del Trabajo or ART).

Very few companies provide self-insurance for their workers. When an ART provides coverage, it also should provide medical and pharmaceutical attention, prosthesis and orthopedics, rehabilitation, occupational reclassification, and funeral service benefits.

The Work Risk Insurer is financed by monthly payments made by the employers of insured persons. These payments are calculated by reference to the employer’s payroll and vary according to the statistical level of loss and damages which may result from the activities of that particular employer. The average amount paid for such insurance is approximately 1.5 per cent to three per cent of the payroll.

The LRT releases the employer from any liability derived from a work accident or professional illness. In principle, the only responsible party is the ART, which should provide medical assistance and pay certain compensations subjected to statutory caps. However, these provisions have been declared unconstitutional by the Supreme Court in 2004, which ordered the employer and not the ART to provide full damage compensation for a work accident.

Since such decision, several criteria have been created in relation to work accidents compensation, and different projects for a new work accident prevention and compensation system have been circulated.
Safety in Workplace

The LRT aims to prevent work accidents and illnesses by requiring that each insured employer develop a plan for the improvement of hygiene and security conditions at work. The Superintendent of Risks Insurance should approve any such plan prior to implementation by the employer.

The employer should perform pre-occupational medical examination to prospective employees. Pre-occupational exams determine the job applicant’s aptitude according to physical and psychological conditions for the performance of required activities, and also are useful to detect pre-existent pathologies. These exams cannot be used with discriminatory aims.

Other Mandatory Insurance

Employers also are required to contract life insurance policies for their employees. The cost of this insurance is immaterial for the employer and each employee should declare the beneficiaries of such insurance.

Dispute Resolution

Collective Disputes

In General

Collective disputes involve a company or group of companies, on one side, and a group of employees and union members, on the other.

The Labor Collective Conflicts Law Number 14,786 and Law Number 23,546 establish the procedures for collective conflicts. However, collective conflicts are strongly governed by practices and actions not statutorily regulated but which result from practices adopted over time.

Mandatory Settlement Stage

When there is a conflict that may not be solved on a friendly basis by the parties, any of them should inform the Labor Ministry before adopting any direct measure in order to initiate the mandatory settlement stage (instancia obligatoria de conciliación).

If any of the parties skips this legal procedure and unilaterally decides a direct measure (e.g., a strike decided by the trade union), the other party may report such situation to the Labor, Employment, and Social Security Ministry (“Labor Ministry”) and request the initiation of the mandatory settlement stage, as well as the declaration of the illegality of the measure.

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14 Law Number 14,786 expressly contemplates the “voluntary and premeditated reduction of production” as an example of a direct measure that cannot be taken without the prior implementation of the mandatory settlement stage.

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Once the Labor Ministry is notified of the conflict and until the conciliation is ended, it may declare that things return to the way they were before. Thus, the Labor Ministry may suspend a strike declared by a trade union. If the trade union remains in its position and the Labor Ministry declares the strike illegal, the employees that continue to support it might be subject to loss of salaries, may be notified of their obligation to resume work, and may be subject to disciplinary measures, including dismissal.

Notice for employees to return to work and refrain from participating in an illegal measure should be given through authentic and personal means, and the employer should provide them a reasonable term to respond, stating clearly and accurately the consequences of a negative response. After complying with these requirements, the employer is entitled to dismiss the worker with cause without paying severance.

If the strike is declared illegal, the trade union that initiated it also could be subject to sanctions by the Labor Ministry, which may consist of suspension of its legal representation of employees or even its cancellation.

The Labor Ministry also may summon and hold as many hearings as necessary to solve the dispute. These hearings may not take more than 14 days, but may be extended for five additional days. After completion of this stage, the conciliator may suggest that the parties submit the conflict to arbitration. If no conciliation is reached or if arbitration is not accepted, the parties would then be authorized to adopt direct measures.

**Voluntary Arbitration**

The arbitration stage is not mandatory and may thus be accepted or refused by the parties. If it is accepted, the parties will execute a document indicating their names, the topics to be decided by the arbitrator, and the evidence to be submitted.

The decision of the arbitrator, which should be rendered within an extendible period of 10 days, is not subject to any appeal except when the subject matter of the appeal is the nullity of the decision itself. This decision is valid and binding for all the parties involved and the employers and employees who are duly represented.

**Collective Bargaining Agreement**

Section 27 **bis** of CBA Number 396/2004 specifically determines the procedures required to solve collective conflicts in the activity of a company. The parties should inform the National Negotiation Commission (**Comisión Paritaria Nacional** or the “Commission”) prior to the adoption of any direct measure that implies the cessation of activities and/or the existence of a collective conflict situation that could not be solved by the parties. The Commission should initiate a five-day negotiation period that could be extended for a similar term.

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It could be argued that the Commission may only participate in conflicts related to the interpretation and application of the CBA itself.

However, the company could reasonably argue that any matter related to labor conditions regulated by the CBA would be inherent to the specific legal framework ruled by the CBA, and is thus subject to the scope of the Commission.

**Legal Alternatives**

A company would have the following legal alternatives in a collective conflict:

- To resort to the Commission and request the implementation of the negotiation procedure;
- To request the Labor Ministry to initiate the mandatory settlement stage and declare the illegality of any measure taken by the trade union, if applicable; and
- Upon offer of the Labor Ministry’s conciliator, to abide or not to have the matter decided by an arbitrator, at the company’s option.

The company also could decide to initiate a legal action requesting the unconstitutionality of the measure taken by the trade union.

However, the current political, social, and judicial environment renders immaterial the possibility of obtaining a favorable court decision or declaration of illegality from the Labor Ministry, and could eventually cause losses and complicate the relationship with the trade union.

The practical alternative is to find a reasonable negotiator within the trade union who could let the company know of future claims in advance, so that both parties may negotiate specific topics or claims prior to having the production stopped or interrupted.

**Practical Recommendations**

The current sociopolitical scenario requires a good relationship with trade unions, especially petroleum-related unions that are very aggressive and utilize extortion techniques that are beyond the scope of the legal tools available to employers.

It is vital to establish appropriate and clear communication channels and use expert negotiators that frequently handle these situations in light of future conflicts. It also would be useful to identify adequate negotiators on the trade union’s side and have a fluent relationship with them.

The trade union also should have an action plan in advance, contemplating the different steps and the parties involved in each of them. It may contemplate the permanent availability of lawyers and a notary public specially trained for these situations.
Individual Disputes

Law Number 24,635 provides a mandatory prejudicial settlement proceeding in Buenos Aires before parties are able to file a judicial complaint before the labor courts. This proceeding takes place before a mediator appointed by the Labor Ministry.

In case the parties reach a settlement, they should file the agreement for the Labor Ministry’s approval. The resolution issued by the Labor Ministry approving the agreement has *res judicata* effect. Where the parties fail to settle, the worker is entitled to file a judicial complaint before the labor courts.

Parties also may file agreements for the Labor Ministry’s approval without going through the mandatory prejudicial settlement proceeding. The approval issued by the Labor Ministry in such case also has *res judicata* effect. In the provinces, similar prejudicial proceedings are in force but they are not mandatory and are not required for the filing of a judicial complaint before the labor courts.

Litigation issues related to employment contracts and their conflicts are decided by the ordinary justice of each province and of the city of Buenos Aires. There are two main court structures in such litigation, one involving mainly oral arguments and the other involving mainly written documents.

The provinces have mainly adopted the oral procedure, and provincial tribunals usually consist of more than one judge (i.e., three members) and of a sole instance or stage. When the procedure is mainly written, it consists of two stages. The first occurs before an individual judge, while the second occurs before a three-member tribunal. In any case, the National Supreme Court of Justice has a very narrow scope of intervention related mostly to constitutionality issues.

Termination of Employment

In General

The key issues to consider when bringing a labor relationship to an end are the reasons for the termination, the appropriate prior notice, and the amount of compensation which may be due. The following are the various causes for termination:

- Mutual agreement;
- Termination by the employer with just cause;

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15 For example, in the province of Buenos Aires, the tribunals consist of three judges, and any appeal may only be filed before the Supreme Court of Justice of the province, but its scope of intervention is narrow.

16 For example, in the city of Buenos Aires, there are 80 first-instance labor courts. Any appeals against the decisions of these labor courts should be filed before the National Labor Court of Appeals, which is divided into chambers formed by three judges each.
• Termination by the employer without just cause and indirect dismissal;
• Dismissal due to *force majeure*;
• Dismissal due to economic events;
• Bankruptcy of the employer;
• Incapacity of the employee;
• Expiration of a fixed-term contract;
• Resignation;
• Abandonment of work;
• Retirement; or
• Death of the employer or employee.

If the contract is expiring or the employer is ending the relationship, the law provides that the employer should give the appropriate prior notice of termination (except where there is just cause for dismissal). The length of prior notice is dependent on the employee’s seniority. The employee also should, in principle, give notice to the employer when terminating the relationship.

In practice, it is very unusual for the employer to give the appropriate prior notice of termination, and he is normally required to compensate the employee for salary in lieu of such notice. Once the labor relationship has been ended appropriately, the employer also is required to pay the employee any compensation to which he may be entitled depending on the reason for the termination.

**Prior Notice**

Even if an employee is retiring or has a fixed-term contract which is about to expire, the employer should still give him a reminder of the approaching end date in the form of a prior notice.

However, no such notice is needed in case of termination with just cause, death, or by mutual agreement. If the employer does not give the appropriate prior notice where relevant, he will be required to pay the employee salary for the period for which no notice was given. Employers should give employees the following prior notice:

• 14 days during the trial period;
• One month’s notice, if the employee has worked for the employer for less than five years; and
• Two months’ notice, if the employee has been with the same employer for more than five years.

The periods of prior notice begin to run the day after the notice is given. The employee is required to give a 15-day prior notice of termination to the employer, but this is generally not enforced by the courts.
In case no prior notice is given by the employer and the dismissal takes place on a day that is not the last day of the month, the employee also will collect an amount equal to the salary corresponding to the remaining days of the month of dismissal.

**Compensation**

Compensation should be paid to the employee in one lump sum payment within four days of dismissal. However, the employer and the employee may agree regarding the time and manner of payment.

Amounts received pursuant to severance packages are generally taxable, except for compensation paid for seniority which does not exceed the legal limits. Any amount exceeding the legal limits will be taxable.

Special severance packages exist for certain situations, such as a dismissal on account of pregnancy, marriage, race, color, religion, sex, national origin, or handicap, or if the employee is a union representative or is in a public office.

**Termination by Mutual Agreement**

For a termination by mutual agreement to be legally binding, it should be contained in a public deed executed before a notary public or by an agreement signed by the employee and approved by a labor court judge or by the local labor authority having jurisdiction over the workplace.

There is no need for prior notice in a termination by mutual agreement, but the employer is required to pay the employee the appropriate amounts for any outstanding pay, vacation entitlement, and the relevant proportion of the *aguinaldo*.\(^{17}\)

**Termination with or without Just Cause**

If there is just cause for termination, the employer may dismiss the employee without need of prior notice and will only have to pay him outstanding pay, vacation entitlement, and any proportional entitlement to the *aguinaldo*. The law recognizes two areas which constitute justified reasons for dismissal:

- The employee’s violation of his work duties, such as unwarranted or excessive absences, lack of punctuality, abandonment of work, disobedience, participation in illegal strikes, and not reincorporating on time; and
- The employee’s violation of good conduct while carrying out his duties, such as loss of trust, illegal competition, and the commission of criminal acts.

Since the labor courts generally tend to be protective of employees, it is normally difficult for an employer to establish just cause before the courts. If the

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\(^{17}\) The semi-annual bonus is equal to one-half of the highest monthly salary earned by the employee during the previous semester.
dismissal is without just cause, the employer should pay the employee outstanding pay and vacation entitlement, including payment for any prior notice which may be due and an indemnity depending upon the employee’s seniority (antigüedad).

This amount will be increased if the employee also occupies a public office, is a union representative, is just about to marry or has just been married, or is pregnant. These indemnities also will be increased if the labor contract is not properly registered.

If the actions of the employer substantially modify the terms of employment to the detriment of the employee or the employer aggrieves the employee, the latter may consider himself effectively dismissed. This is known as an indirect dismissal, and may occur when the employee’s salary is reduced, if there is a substantial geographical move, or if the employer abuses the employee. In the case of an indirect dismissal, the employee will be entitled to the same compensation as for termination without just cause.

**Termination by Employer Due to Outside Events**

A termination by the employer due to outside events arises as a result of forces external to the employer’s or employee’s volition, making it impossible to continue with the labor contract. This type of termination includes bankruptcy, incapacity of the worker, force majeure, and lack of work not caused by the employer.

An employer may dismiss employees as a consequence of a force majeure that makes the provision of duties impossible. The force majeure acts outside the control of the employer and may not be avoided with reasonable care. It includes events such as destruction of a manufacturing plant by flood or fire caused by lightning, or acts of war and terrorism.

Prior notice is not required in a dismissal due to force majeure, but the employer should pay the employee outstanding pay, vacation entitlement, any proportional entitlement to the aguinaldo, and 50 per cent of the indemnity for seniority.

On the other hand, prior notice is required in a dismissal due to adverse economic events, although the employer also should pay the employee outstanding pay, vacation entitlement, any proportional entitlement to the aguinaldo, and 50 per cent of the indemnity for seniority.

In both instances, the employer should be able to show that the event will have a lasting effect and that it led to the employee’s dismissal. The employer should certify that he was not responsible for the job loss and should show that he took reasonable precautions to prevent the same.

Dismissals in these cases should take place in the order of least seniority. However, in respect of employees who started employment in the same semester, those having family responsibilities will be preferred for remaining in employment to those who have none.
The employer also may terminate labor relationships after a state of bankruptcy (quiebra) is declared by a judge of the bankruptcy court. In this case, prior notice is not required, but the employer should pay the employee outstanding pay, vacation entitlement, any proportional entitlement to the aguinaldo, and 50 per cent\(^\text{18}\) of the indemnity for seniority.

The employer also may dismiss an employee who becomes incapacitated, after prior notice and by paying outstanding pay, vacation entitlement, any proportional entitlement to the aguinaldo, and indemnity for seniority.\(^\text{19}\)

**Termination of Fixed-Term Contract**

A labor relationship under a fixed-term contract should not be terminated before the date specified in the contract. The appropriate prior notice of the contract’s expiration also should be given by the employer to the employee.

If the contract has duration of less than one year, it will terminate upon the expiration of such period and the employer will not be required to pay any indemnity to the employee. Upon the expiration of the contract with duration of more than one year, the employee will have the right to receive an indemnity equivalent to half of that which would have corresponded to him in the case of an unjustified dismissal in a contract for an indefinite period.

For an unjustified dismissal before the termination of the contractual period, the worker has the right to receive an indemnity for damages arising under common law in addition to the normal labor indemnities. This indemnity has generally been fixed by the courts as being equivalent to the salary that would have been subsequently paid had the contract been allowed to expire normally. Nevertheless, the parties may fix the amount of the indemnity to be paid in the event of a dismissal without just cause before the expiration of the contractual period.

**Termination by Employee**

The employee may terminate the labor relationship by resigning or abandoning his post. In both cases, he will only be entitled to collect his outstanding salary, vacation days, and his proportional entitlement to the aguinaldo.

If the employee wishes to resign, he should do so in writing with his signature certified by a notary or an official of the Labor Ministry.\(^\text{20}\) Where an employee

\(^{18}\) The reduced rate only applies to the extent that the bankruptcy or suspension of payments does not arise as a result of the fault of the employer, otherwise the seniority indemnity will be 100 per cent.

\(^{19}\) The seniority payment will be reduced by half if (a) the previously healthy employee is partially disabled and cannot be reassigned, or (b) a physically or mentally handicapped employee becomes unable to perform his special tasks due to a further supervening incapacitation.

\(^{20}\) A common method is for the employee to send in the resignation with the applicable prior notice by registered telegram through Correo Argentino (or any other postal
abandons his job position, the employer should send a registered telegram requiring him to return to work. If the employee does not respond to the notice within a reasonable period of time (i.e., two days), the employer can consider the contract terminated by the employee.

**Termination by Retirement or Death**

The retirement age for workers is 65 for men and 60 for women. However, the employer is required to maintain the labor relationship until the employee begins to receive pension benefits from his elected pension fund or after one year from the notification of retirement, whichever occurs earlier.

In practice, this notification is normally made by the employer as soon as the employee attains the age of retirement and has paid 30 years of contributions to the social security system. The employer’s death causes the termination of the labor contract only when it is impossible for the employment to continue in his absence, i.e., when the employee worked directly for the employer and there is no longer any need for the employee’s services. In the case of death of the employee, the appropriate severance package, including 50 per cent of the entitlement to seniority and any outstanding pay, should be paid by the employer to the employee’s heirs.

**Retirement and Pensions**

Once the employee retires, the retirement payments are made by a government agency and the former employer has no duties whatsoever.

Pension plans offered by companies are allowed. The conditions are provided by each plan. The official pension includes healthcare, although retired employees may retain a private healthcare provider at their own cost.

**Summary of Social Cost**

**Salary Withholdings and Contributions**

Employers and employees are required to make social security contributions for family allowances, medical services, pensions, and unemployment benefits. In addition, union dues of one per cent to 2.5 per cent of salaries may be withheld from the relevant employees’ salaries. The employer also is required to withhold amounts due in respect of income tax payable by the employee.

Withholdings and contributions are amounts, calculated as a percentage of the individual employee’s salary, which should be deposited in the relevant agency properly authorized in Argentina) to the employer. These rules are not strictly enforced by the courts, but the employer should ensure that the employee does in fact send a telegram of resignation; otherwise, the employee may later claim that he is still employed by the company.
accounts of the AFIP. Withholdings are normally paid by the employee but are retained from his remuneration by the employer. On the other hand, employers are required to directly pay contributions, which are calculated by reference to the employee’s salary.

**Withholding and Contribution Percentages**

The percentage amounts for withholdings and contributions are based on the employee’s gross remuneration in the following amounts:

- For the health provider (*Obra Social*), the employer contribution amounts to six per cent while the employee withholdings amount to three per cent; and
- For pension funds, family allowances, and unemployment funds, the employer contribution may be 17 per cent or 21 per cent, while the employee withholdings amount to 14 per cent.

Thus, the total percentage amount for employer contributions is 23 per cent or 27 per cent, while the total percentage amount for employee withholdings is 17 per cent. The percentage of contributions for employers whose main activity is the rendering of services, leasing, and commerce and who have annual invoices of more than ARS 48-million is 21 per cent. The contribution for other companies, unions, healthcare organizations, and small and medium-size companies is 17 per cent.

**Salary Caps for Withholdings and Contributions**

The mandatory social security withholdings and contributions are calculated as a percentage of the employee’s remuneration. The base for calculating employees’ contributions is a cap of ARS 19,070,55.

Employers’ contributions have no cap, and should thus be calculated over the whole employees’ remuneration.

**Conclusion**

Recent labor law discussions in Argentina center on the control from the Tax Authority over the employer’s compliance with its obligations as such and registration matters in general. Unions also have recently obtained several salary increases by means of CBAs, and such amounts are expected to increase. Litigation and collective negotiations also have continued to increase.

21 The employer should ensure that these amounts are deposited in a correct and timely fashion in the relevant bank accounts, otherwise interest and penalties may be due. Any debt that the employer may have with the AFIP is subject to a penal rate of interest between 1.5 per cent and three per cent per month, and also may be subject to fines which could increase the debt by 200 per cent. The limitation period for any claims by the AFIP for such withholdings or contributions is 10 years.
Although material changes in government policy are not expected for 2011, the short period in which the current government has been active reduces the chances of anticipation.
Australia

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Introduction

Federal Nature and Constitutional Issues

As in any federation, lawmaking powers in Australia are divided between the Commonwealth and state governments. The Australian Federation consists of six states (New South Wales, Victoria, Queensland, Tasmania, South Australia, and Western Australia) and two territories (the Northern Territory and the Australian Capital Territory).

The powers of the Commonwealth government are governed by the Constitution Act of 1900. The states have retained a plenary power that allows them to pass laws for the peace, order, and good government within their jurisdictions. The Commonwealth’s lawmaking powers are generally limited to specific areas set out in Section 51 of the Constitution.

The states also may legislate with respect to these issues unless the Commonwealth provisions express an intention to exclusively govern the area. Section 109 of the Constitution provides that to the extent that any inconsistency exists between the state and the Commonwealth law, the latter will prevail to the extent of the inconsistency.

Section 122 of the Constitution provides that the Commonwealth may make laws for the government of any territory surrendered by a state. Thus, the Northern Territory and the Australian Capital Territory are covered by federal legislation, and may only legislate on issues not already covered by federal legislation.

Development of Labor Law

Australian labor law was historically influenced by the British system, but Australia ultimately developed its own system of industrial relations by adopting a legislative approach that was better equipped to deal with lawmaking given the country’s colonial origins.

Trade unionism has developed since the mid-1820s, when workers and employers were subject to the master and servant legislation enacted by the
By the mid-1880s, there existed an organized union movement similar to that in Britain, but which was regarded as being generally more effective as it was able to secure more progressive terms and conditions of employment in many cases.

By the turn of the century, the union movement had developed a “quasi-corporate” status. Nevertheless, individual workers were still subject to prosecution under the relevant master and servant legislation.

The development of the conciliation and arbitration system was attributable to a series of industrial strikes and the severe defeat of the union movement in the maritime, mining, and pastoral disputes of the 1890s.

As the labor movement became more motivated towards political rather than industrial forms of action, the incentive to have a collective voice heard culminated in the foundation of the Australian Labor Party in 1891.

Western Australia was the first state to legislate for conciliation and arbitration with the enactment of the Industrial Conciliation and Arbitration Act of 1901 (WA), which was closely followed by the Conciliation and Arbitration Act (NSW). In addition to establishing permanent state bodies to deal with the settlement of disputes, the introduction of conciliation and arbitration also provided a mechanism for the registration and regulation of trade unions.

In 1904, the Conciliation and Arbitration Act (Cth) was introduced at the Commonwealth level to deal with the prevention and settlement of interstate industrial disputes. At present, the Australian Industrial Relations Commission (AIRC) is the major regulatory body at the Commonwealth level performing the functions of conciliation and arbitration under the Workplace Relations Act of 1996 (Cth) (“Workplace Relations Act”).

The states tended to adopt a combination of awards and workplace agreements as the primary means of regulating the employment relationship. While individual statutes exist to regulate specific areas (e.g., discrimination, leave entitlements, and occupational health and safety), the bulk of state industrial

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4 The Commonwealth Court of Conciliation and Arbitration was established to conduct the process, but was abolished in 1956 following the landmark decision of R vs. Kirby; ex parte Boilermakers Society of Australia. The court was subsequently reconstituted as the Commonwealth Conciliation and Arbitration Commission and the Commonwealth Industrial Court (which later became the Australian Industrial Court). Both of these bodies have since been abolished. The functions of the former Australian Industrial Court have now been subsumed under the Federal Court of Australia.
laws are contained in the dominant piece of industrial legislation within each state.5

Legal Relationship of Employer and Employee

Employment Relationship

In General

Under the current regime, the employment relationship can be governed by a number of sources, including: (a) a common law contract of employment; (b) a modern award; (c) an enterprise agreement made under the Fair Work Act of 2009 (“Fair Work Act”); (d) a state enterprise agreement entered into with a union or a collective of employees at a workplace; or (e) federal and state legislation pertaining to occupational health and safety, discrimination, and leave.

Depending on which of these options is pursued, regulation of the employment relationship may be on an individual or collective basis and may or may not involve unions.

Common Law Contract of Employment

The basis of every employment relationship is the contract of employment, which may be oral or written and its terms and conditions may be express or implied. An express term in a contract of employment is one that the employer and the employee have agreed upon in respect of a condition of employment. The term may be written or oral, although contracts of employment are preferred to be written for reasons of clarity.

If a term is not express, it may still be implied. Implied terms which affect contracts of employment may be classified as terms implied by fact, terms implied by law, and terms implied by custom and practice.

If a dispute arises as to the terms or conditions of a contract of employment, a court may evaluate the contract and imply a term if such is necessary for the reasonable or effective operation of the contract of employment.

Every employment contract has terms implied by law in the form of employer and employee duties. The duties of employers include the: (a) duty of care to ensure the health and safety of employees; (b) duty to indemnify an employee’s reasonable expenses; and (c) duty of mutual trust and confidence.

Employee duties include the: (a) duty to use due care, skill, and diligence; (b) duty to obey lawful and reasonable commands; and (c) duty of good faith and fidelity. For a term relating to custom or practice to be implied, the custom

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5 These include the Industrial Relations Act of 1996 (NSW), Industrial Relations Act of 1999 (Qld), Industrial Relations Act of 1979 (WA), Industrial and Employee Relations Act of 1994 (SA), and Industrial Relations Act of 1984 (Tas).
should be sufficiently notorious and should not be in direct conflict with an express term. An employee also may be bound by a particular custom despite the fact that he may not have had knowledge of such custom operating within the specific industry or field.

The common law contract of employment will regulate the employment relationship where employees are not covered by a federal or state award. Parties may expressly agree that an award be incorporated into the contract of employment. However, the breach of an award by an employer will not entitle an employee to common law remedies unless incorporated.6

Modern Award

The AIRC recently completed a historic process of “award modernization”, where it distilled approximately 6,000 current awards and Notional Agreements Preserving State Awards (NAPSAs) into a fewer number of simplified “modern awards”. Modern awards, together with the National Employment Standards contained in Part 2-2 of the Fair Work Act, constitute the new safety net against which future enterprise agreements will be tested.

Under the modern award system, the application of an award is determined on the basis of the type of work performed by the employee. Under Section 139 of the Fair Work Act, the following matters may be dealt with in a modern award:

- Minimum wages, including skill-based classifications and career structures, incentive-based payments, piece rates and bonuses, wage rates, and other arrangements for apprentices and trainees;
- Type of employment (i.e., full-time, casual, or regular part-time employment) and the facilitation of flexible working arrangements;
- Arrangements for when work is performed, including hours of work, rostering, notice periods, rest breaks, and variations to when work is performed;
- Overtime rates;
- Penalty rates for employees working irregular or unpredictable hours, on weekends or public holidays, and as shift workers;
- Annualized wage arrangements regarding patterns of work in an occupation, industry, or enterprise, as an alternative to the payment of penalty rates;
- Allowances, including reimbursement of expenses, responsibilities, or skills that are not considered in rates of pay, and disability-based payments;
- Leave, leave loadings, and arrangements for taking leave;

6 Byrne vs. Australian Airlines Ltd., 185 CLR 410 (1995). Nevertheless, employers should be aware of the danger of inadvertently creating rights for employees by referring to an award, or even to policy documents such as human resource manuals in the actual contract of employment, as seen in Riverwood International Australia Pty. Ltd. vs. McCormick (177 ALR 193 (200)).
• Superannuation; and
• Consultation, representation, and dispute settlement

Terms dealing with coverage, flexibility, and dispute resolution procedures also should be included in a modern award. An enterprise agreement will pass the “better off overall test” if Fair Work Australia is satisfied that each award-covered employee and prospective award-covered employee for the agreement would be better off overall if the agreement applied to the employee rather than if the relevant modern award applied to such employee.

Enterprise Agreement

Collective enterprise bargaining agreements are made between an employer and a group of employees or an employer and a union. Negotiations over certified agreements may only involve a union if: (a) the union has at least one member who will be subject to the agreement; and (b) the member has authorized the union to represent him. Fair Work Australia is tasked with approving proposed agreements. An enterprise agreement should be approved if the following requirements are fulfilled:

• The agreement has been genuinely agreed to by the covered employees;
• The terms of the agreement do not contravene the National Employment Standards;
• The agreement does not contain any unlawful terms; and
• The agreement passes the “better off overall test”.

Where an employee is covered by an enterprise agreement, the modern award that would otherwise apply to him no longer applies. Any term of an enterprise agreement that reduces the minimum entitlements of employees under the National Employment Standards will have no effect.

Individual Flexibility Agreement

Government reforms in 2007 led to the abolition of Australian Workplace Agreements. In their place, individual flexibility agreements (IFAs) provide a useful means by which employers and employees can tailor some modern award provisions to suit their needs.

The modern award is only varied in its operation as between the employer and the individual employee with whom the IFA is made. IFAs may only be made to vary the effect of the following modern award terms: (a) arrangements for when work is performed; (b) overtime rates; (c) penalty rates; (d) allowances; and (e) leave loading. An IFA can only be made after the employee has commenced employment and thus becomes entitled to the benefit of the relevant modern award.

7 Fair Work Act, s 57.
Categories of Workers

In General

There are three essential categories or types of workers, namely full-time employees, part-time and casual employees, and independent contractors.

In most instances, the categorization of employment relationships is relatively straightforward. However, categorization may be difficult in areas of employment that have witnessed increasing change over the past two decades due to the decline of the traditional standard of full-time work and the nature of work itself. Categorizing the nature of employment has legal and financial consequences for employers, employees, and independent contractors.

Independent Contractors

Employees are defined in common law as workers employed under a contract of service, while contractors are defined as workers hired under a contract for services. The traditional test used in common law was the nature and degree of control exerted by the master over the servant. The evolution of the employment relationship required a more flexible common law approach.

The High Court held in Stevens vs. Brodribb Sawmilling Co. Pty. Ltd.\(^8\) that it is not just the level of control which should be considered, but the “totality of the employment relationship” as well, considering factors such as the mode of remuneration, obligation to work, hours of work, provision of holidays, deduction of income tax, and delegation of work.

In the recent decision of Hollis vs. Vabu Pty. Ltd., the High Court also considered factors not of paramount concern under Stevens vs. Brodribb, i.e., whether a worker is a truly economically independent business unit. Thus, the door has been left ajar for courts to adopt a test similar to that of the “economic reality” test espoused in the United States Supreme Court decision of United States vs. Silk.\(^9\)

The impact of increasing levels of contracting on the formation of labor law policy has been significant because the laws that govern employees do not generally govern “self-employed” workers. This has implications in terms of shifting the burden of employment costs (e.g., payment of superannuation benefits, unfair dismissal, and paid leave) from the entity for which work is being performed to the individual worker.

The ill-defined legal status of independent contractors also has led to calls for legislative reform to better regulate their legal status. This has been achieved to some degree under the Industrial Relations Act of 1999 (Qld) and the Industrial Relations Act of 1996 (NSW).

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8 160 CLR 16 (Mason, J., 1986).
9 331 US 704 (1946).
In determining whether a person is an employee or contractor, a Full Bench of the New South Wales Industrial Relations Commission is now able to consider matters such as the relative bargaining power of the class of independent contractors concerned, economic dependency of the independent contractors concerned, and whether the contracts for services are designed to or do avoid the provisions of an industrial instrument.

Section 357 of the Fair Work Act provides that an employer who employs or proposes to employ an individual should not represent to the latter that his contract of employment is a contract for services under which he performs or would perform work as an independent contractor.

Casual and Part-Time Employees

Casual employees are usually employed as and when work is available, rather than on a permanent or continuing basis. A separate contract of employment is entered into for each period of work, which can be a weekly or shift-by-shift arrangement. As a result, casual employees are not usually entitled to employee benefits such as holiday pay, long service leave, or sick leave.

Traditionally, casual employees also have been excluded from accessing termination provisions under relevant legislation unless they have been engaged in continuous employment on a regular basis over a specific period (i.e., six or 12 months, depending on jurisdiction) and have an expectation of continuing employment.\(^\text{10}\)

However, recent developments represent a shift away from this traditional approach. To compensate for the absence of benefits, casual awards and workplace agreements usually provide for a loading of 15 per cent and 25 per cent of the regular wage rate to be paid to casuals.

Recent decades have seen an increase in the number of casuals entering the workforce, and the number of part-time positions made available. This shift has been reflected in the provisions and entitlements registered in awards and agreements for part-time workers.\(^\text{11}\)

Employment Relationship and Transfer of Business

The process of outsourcing has become a major business activity in recent decades. Outsourcing strategies will often result in a transmission of business or

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\(^{10}\) Fair Work Act (Cth), s 384; Industrial Relations Act of 1996 (NSW); Industrial Relations Act of 1999 (Qld); Industrial and Employee Relations Act of 1994 (SA); Industrial Relations Act of 1984 (Tas); Industrial Relations Act of 1979 (WA).

\(^{11}\) For example, subsection 5(2)(d) of the Industrial Relations Act of 1996 (NSW) provides for agreements to be made between employers and individual workers for the performance of work on a part-time basis, regardless of any award restriction but in compliance with minimum conditions established by the New South Wales Industrial Relations Commission.
part of a business. The Fair Work Act makes no reference to outsourcing, but it does contain provisions relating to transfer of business.\textsuperscript{12}

In recent years, courts have been called upon to consider the meaning of “transmission of business”, with businesses claiming there has been no transmission of business in outsourcing to avoid payment of existing employee entitlements. In the decision of \textit{PP Consultants Pty. Ltd. vs. Finance Sector Union},\textsuperscript{13} the High Court rejected the previously established “substantial identity” test which looked to whether there was a substantial identity between the activities that were previously carried out by the organization and the successive entity as well as to the extent of control exercised by the organization over the outsourcing entity. The court effectively created a new test that focuses on the similarity in character of the business or part of the business transmitted. Under the Fair Work Act, a business will be transferred when:

- Employees of the old employer are employed by the new employer within three months;
- The work they perform is the same or substantially the same as that performed for the old employer; and
- There is a relevant connection between the old and the new employer.

The necessary relevant connection will be proven when:

- There has been a transfer of assets between the two employers;
- The old employer outsources work to the new employer that is performed by transferring employees as employees of the new employer; or
- The new employer is an associated entity of the old employer.

\textbf{Terms and Conditions of Employment}

\textbf{Remuneration}

\textit{In General}

Remuneration has been typically expressed in hourly, weekly, or fortnightly increments, or as an annual salary. A standard working week has generally consisted of 40 hours, and many awards and enterprise agreements provide for “overtime” penalty rates where an employee works in excess of the standard working week or works during a weekend or at night.

\textsuperscript{12} Part 2.8 of the Fair Work Act deals with transfer of business. For example, Section 312 states that a modern award is a “transferable instrument”. Section 313 provides that if a transferable instrument covered the transferring employee before the termination of his employment with the old employer, the new employer will be bound by such instrument.

\textsuperscript{13} 176 ALR 205 (2000).
Remuneration also may include perquisites such as a company car, insurance, travel allowance, bonus superannuation contributions, or a combination thereof. Part 2-7 of the Fair Work Act provides that, where no other remedy is available, men and women who perform work of equal value receive equal remuneration.

**Performance-Related Remuneration**

The implementation of the Workplace Relations Act and the Fair Work Act has seen an increasing incidence of agreements containing provisions for performance-related pay. There are many types of performance pay with varying objectives. For instance, piece rates — where the quantum of remuneration is contingent on the level of output — and commission payments are geared toward increasing productivity. Gain-sharing (or profit-sharing) schemes offer a share of profits in return for an employee meeting an agreed productivity or financial objective.

They also may be designed to engender loyalty towards an employer and promote retention of employees. Employees may be offered valuable bonuses or shares in the company after completing a stipulated period of service.

The relevant period should be expressly identified and communicated, or an employer may be liable to pay a portion of the bonuses or share options even where an employee does not complete the intended period of employment.14

**Minimum Wage**

The concept of “minimum wage” has originally has two distinct notions: (a) as “living wage”, being the level of remuneration required to sustain an average person in a civilized society in a condition of frugal comfort; 15 and (b) as equitable comparability between different occupations and industries.

The Minimum Wage Panel of Fair Work Australia is responsible for setting the minimum wages for employees who fall under the national industrial relations system. It is required to conduct and complete an annual wage review every financial year, and consider the provisions and objectives in the Fair Work Act. Section 293 of the Act prohibits an employer from contravening a term of a national minimum wage order.

**Hours of Work**

What constitutes a standard working week will vary between and within occupations and industries, depending on the terms of the applicable modern award or enterprise agreement. Modern awards may stipulate the maximum and standard number of working hours, but an enterprise agreement will generally override the award.

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15 *Ex parte HV McKay*, 2 CAR 1 (1907).
Under Section 62 of the Fair Work Act, the maximum number of hours that an employer may require an employee to work is 38 hours, unless additional hours are reasonable. This standard cannot be overridden by a modern award or enterprise agreement. These weekly hours may be averaged if an award or enterprise agreement allows for such, but the maximum time over which the averaging may occur is 26 weeks.

Typical assumptions regarding working hours have been based on an eight-hour working day, five-day working week (typically Monday through Friday), 11-month working year, and a 45-year working life. Awards and enterprise agreements have recently adopted new and creative methods of measuring ordinary working hours that are purported to have had a significant impact on the culture of work.

**State Jurisdictions and Territories**

State legislation, awards, and agreements may govern the terms and conditions of employment of many employees, particularly state public sector employees.


In the Northern Territory, these statutes include the Annual Leave Act, Long Service Leave Act, Public Holidays Act, Work Health Act, and Anti-Discrimination Act.

**Discrimination**

**In General**

Anti-discrimination laws provide rights, obligations, and remedies for specified acts of discrimination. The Australian system at the state and federal levels is complaint-based, with the filing of a formal complaint and a subsequent confidential investigative and conciliatory process.

If the complaint is not resolved through such process, specific tribunals will hear the matter and determine whether there has been a breach of law. Discrimination law centers on statutorily defined acts of discrimination. Direct discrimination occurs where a person is treated less favorably than another in the same circumstances or circumstances not materially different.

Indirect discrimination occurs where a person with a particular characteristic is required to comply with an unreasonable requirement or condition which appears neutral on its face, but with which a substantially higher proportion of persons without that characteristic are able to comply.

**Federal Discrimination Laws**

**Sex Discrimination Act**

The Sex Discrimination Act of 1975 (Cth) (“Sex Discrimination Act”) prohibits direct and indirect discrimination on the grounds of sex, marital status, pregnancy, potential pregnancy, or family responsibilities.

Sexual harassment is included in the Sex Discrimination Act as a ground of complaint. It is defined as an unwelcome sexual advance, an unwelcome request for sexual favors, or any other unwelcome conduct of a sexual nature in

16 *De facto* relationships involving partners of the opposite sex are included within the definition of marital status, but homosexual *de facto* relationships are not recognized by the Sex Discrimination Act and discrimination based on this ground is thus excluded.

17 Potential pregnancy discrimination refers to situations where a woman is discriminated against because she is perceived to be pregnant or has expressed a desire to become pregnant.
circumstances in which a reasonable person would have anticipated that the person harassed would be offended, humiliated, or intimidated.\textsuperscript{18} However, it is not unlawful to discriminate against a person on the basis of sex if it is a genuine occupational qualification that the position requires a person of a particular sex.\textsuperscript{19}

Exemptions also apply in relation to services for members of one sex,\textsuperscript{20} accommodation provided for employees or students,\textsuperscript{21} charities,\textsuperscript{22} religious bodies,\textsuperscript{23} and educational institutions established for religious purposes.\textsuperscript{24}

\textbf{Racial Discrimination Act}

Discrimination on the basis of race under the Racial Discrimination Act of 1975 (Cth) ("Racial Discrimination Act") is defined as any distinction, exclusion, restriction, or preference based on race, color, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment, or exercise of human rights and fundamental freedoms in the political, economic, social, cultural, or any other field of public life.

Discrimination due to race, color, descent, or national or ethnic origin are prohibited under Sections 9(1) and 9(1A) of the Racial Discrimination Act, while racial hatred or vilification is prohibited under Section 18(c) thereof.

It is unlawful for an employer to refuse to employ a person or treat a person less favorably than others in the same circumstances because of such grounds. It also is unlawful to prevent or to seek to prevent another person from offering employment or from continuing in employment by reason of such grounds.\textsuperscript{25}

\textbf{Disability Discrimination Act}

The Disability Discrimination Act of 1992 (Cth) ("Disability Discrimination Act") makes direct and indirect discrimination on the basis of disability unlawful.\textsuperscript{26} Disability is broadly construed to include:

- Physical, intellectual, psychiatric, sensory, or neurological disabilities;
- Total or partial loss of a person’s bodily or mental functions;
- Total or partial loss of a body part;
- Presence in the body of organisms causing disease (such as HIV);

\textsuperscript{18} Sex Discrimination Act, s 28A.
\textsuperscript{19} Sex Discrimination Act, s 30.
\textsuperscript{20} Sex Discrimination Act, s 32.
\textsuperscript{21} Sex Discrimination Act, s 34.
\textsuperscript{22} Sex Discrimination Act, s 36.
\textsuperscript{23} Sex Discrimination Act, s 37.
\textsuperscript{24} Sex Discrimination Act, s 38.
\textsuperscript{25} Racial Discrimination Act, s 15.
\textsuperscript{26} Disability Discrimination Act, ss 5 and 6.
• Malfunction, malformation, or disfigurement of a body part; and
• Disorder, illness, or disease that affects a person’s thought processes, perception of reality, emotions, or judgment, or that results in disturbed behavior.

It also is unlawful to discriminate against a person because he uses a therapeutic device or auxiliary aid (e.g., hearing aid), or because he needs an interpreter, assistant, or carer. An employer may not discriminate on the ground of disability relating to arrangements made for determining who should be offered employment or in the terms or conditions on which employment is offered. An employer also may not discriminate on the ground of disability by denying the employee access or by limiting his access to opportunities for promotion, transfer, or training, or to any other benefit associated with employment, by dismissing the employee, or by subjecting him to any other detriment.

However, discrimination will not be unlawful where it relates to an employee’s inability to perform an inherent requirement of the position due to a disability, or where accommodating a person with a disability would impose an unjustifiable hardship on the employer in providing services or facilities that are not required by persons without the disability.27

It also is not unlawful to discriminate against a person on the ground of disability if such disability is an infectious disease and the discrimination is reasonably necessary to protect public health.28

**Fair Work Act**

The Fair Work Act provides for additional areas of discrimination, such as sexual preference, religion, and political opinions, which are not covered under the individual discrimination statutes.

The discrimination provisions under the Fair Work Act may only be accessed in the event of “adverse action”. A complaint based on discrimination in employment, in the absence of adverse action, should be made pursuant to one of the specific discrimination statutes.

**State Legislative Scheme**

Legislation has been enacted in all states and territories prohibiting discrimination on the grounds already specified under the various federal acts.

Most state legislation go beyond the federal provisions, providing for additional grounds of discrimination such as that based on homosexuality, age, HIV, carers’ responsibilities, and transgender grounds.

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27 Disability Discrimination Act, s 15.
28 Disability Discrimination Act, s 48.
Remedies

Each of the anti-discrimination laws set out a similar procedure for complaints that will be investigated by a relevant body. At the federal level, complaints are heard by the Federal Magistrates Court or the Federal Court. In New South Wales, complaints are heard by the Anti-Discrimination Board, while in the other states they are heard by the Commission of Equal Opportunity or its equivalent.

The parties should always attempt conciliation before a complaint is heard by the relevant body. If conciliation is unsuccessful, the matter will proceed to a formal inquiry, and if the complaint is proved, a remedy will be enforced.

The most common remedy for an employee who is found to have been discriminated against is the equitable remedy of compensation. Where an employee has left his employment as a result of the discrimination, the court also may order reinstatement. However, this remedy is rarely utilized because the nature and circumstances of discrimination actions and the hostility involved often render reinstatement inappropriate.

Anti-discrimination legislation has been fundamental in helping to eliminate discrimination, but it is insufficient for eradicating discrimination. In the employment context, education and implementation of comprehensive anti-discrimination policies also are essential in eliminating discrimination.

To avoid potential discrimination and harassment claims, businesses should formulate and implement comprehensive policies that should be effectively communicated to all employees, monitored, and reviewed as required. Employers may be held vicariously liable for the discriminatory acts of their employees unless they can prove that they have taken all reasonable steps to prevent discrimination and harassment.29

Collective Bargaining and Worker Participation in Management

In General

While a modified award system remains, industrial relations reform over recent decades has seen a shift away from the traditional centralized system of compulsory conciliation and arbitration to a decentralized bargaining system.

In seeking improved terms and conditions of employment, there is no general right to strike. However, parties negotiating enterprise agreements are given limited protection from legal action if they take industrial action, provided they comply with certain statutory provisions under the Fair Work Act. This is known as “protected industrial action” and allows protected strikes, bans, and slowdowns, but does not include secondary boycotts.

Enterprise Agreements

Under the Fair Work Act, an employer has a right to initiate bargaining for an enterprise agreement. If an employer does not want to bargain, an employee’s bargaining representative may apply to Fair Work Australia for a majority support determination. Thus, a majority of employees also are able to initiate bargaining if a majority support determination is obtained. Fair Work Australia should make a majority support determination if it is satisfied that:

- A majority of employees who will be covered by the agreement want to bargain;
- An employer who will be covered by the agreement has not agreed to bargain;
- If the agreement will not cover all of the employer’s employees, that the chosen group of employees was fairly chosen; and
- It is reasonable in all the circumstances to make the determination.

Once a majority support determination comes into force, an employer will have 14 days to provide employees with notice of their right to be represented by a bargaining representative. The Fair Work Act introduces the concept of good faith bargaining, and Section 228 thereof enumerates the following good faith bargaining obligations:

- Attending and participating in meetings at reasonable times;
- Disclosing relevant information (other than confidential or commercially sensitive information) in a timely manner;
- Responding to proposals of other bargaining representatives in a timely manner;
- Giving genuine consideration to the proposals of other bargaining representatives, and giving reasons for the bargaining representative’s responses to those proposals;
- Refraining from capricious or unfair conduct that undermines freedom of association or collective bargaining; and
- Recognizing and bargaining with other bargaining representatives for the agreement.

These obligations do not require bargaining representatives to make concessions or to agree on the terms that are to be included in the agreement.

Under Section 408 of the Fair Work Act, there are three types of protected industrial action, namely employee claim action, employee response action, and employer response action. For an industrial action to be “protected”, a protected action ballot should be held and written notice should be given at least three working days before the industrial action is scheduled to take place. The complex procedures for a protected action ballot include applying to Fair Work...
Australia for approval before the ballot is conducted and the vote of more than 50 per cent of the employees on the roll of voters for the ballot.

The right to take protected industrial action is a workplace right, thus an employer may not take adverse action against an employee who participates in protected industrial action. If an agreement is reached between the parties during the bargaining period, the employer should take reasonable steps to ensure that every employee who will be subject to the agreement has at least 14 days’ written notice of the intention to make the agreement, and an explanation of the terms of such agreement.

He also should be informed of his right to have a union representative meet and confer with the employer about the agreement. After successful negotiation between the parties, the agreement should be approved by Fair Work Australia. Requirements for approval include the following:

- Satisfaction of a better off overall test;
- Valid approval of the agreement by a valid majority of employees;
- Taking of reasonable steps to explain the agreement to employees prior to approval; and
- The agreement contains procedures for the resolution of disputes.

Employees should not engage in industrial action and an employer should not lock out employees for the duration of an enterprise agreement, otherwise such actions will not be protected.

**Worker Participation in Management**

There are no longer any provisions within the federal workplace relations legislation requiring the implementation of measures to facilitate employee participation in management.

Nevertheless, Part 2-4 of the Fair Work Act requires enterprise agreements under the law to be approved by a valid majority of employees. Employers should take reasonable steps to ensure that all parties have access to the written agreement (the terms of which are explained to them) at least 14 days prior to its approval.

Many agreements provide for consultative arrangements, particularly those agreements involving union participation. However, some argue that the implementation of genuine communication mechanisms is minimal, with evidence suggesting a very low rate of effective involvement.30 Most state occupational health and safety legislation also contain provisions requiring

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employers to consult with employees on matters affecting their health and safety at work.

**Health and Safety Protection in the Workplace**

**In General**

While the Occupational Health and Safety (Commonwealth Employment) Act of 1991 (Cth) governs occupational health and safety of employees of the Commonwealth or of a Commonwealth authority, occupational health and safety in Australia is primarily a matter for state regulation at present. A process of harmonization is currently taking place, which will result in a national occupational health and safety system of regulation.

The following statutes currently govern occupational health and safety in the states and territories: (a) Occupational Health and Safety Act of 1985 (Vic); (b) Occupational Health and Safety Act of 2000 (NSW); (c) Occupational Health, Safety and Welfare Act of 1986 (SA); (d) Occupational Safety and Health Act of 1984 (WA); (e) Workplace Health and Safety Act of 1995 (Tas); (f) Work Health Act of 1986 (NT); (g) Occupational Health and Safety Act of 1989 (ACT); and (h) Workplace Health and Safety Act of 1995 (Qld).

Occupational health and safety legislation in all jurisdictions requires employers to ensure the safety of employees and others (i.e., visitors and contractors) in their workplaces. They are generally required to provide and maintain safe plant, equipment, and systems of work and to provide information, instruction, training, and supervision to enable employees and contractors to perform their work safely.

The state has the right to pursue occupational health and safety breaches in criminal proceedings. A regulatory authority exists in each state to enforce the relevant occupational health and safety legislation by appointing workplace inspectors and investigating occupational health and safety complaints and accidents.

Employers also have occupational health and safety obligations under common law. These include a general duty of care, a duty to maintain safe premises, a duty to maintain a safe plant, and a duty to provide a safe system of work. Thus, employers who breach their duties may face civil proceedings brought by individual employees in addition to proceedings brought by the state.31

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31 In some states, the right of employees to take civil action is constrained by the operation of workers’ compensation legislation.
Statutory Occupational Health and Safety Duties

Duty of Employers

In all states and territories other than New South Wales and Queensland, employers are required to ensure, so far as is reasonably practicable, the health, safety, and welfare of their employees while they are at work.

In New South Wales and Queensland, this duty is expressed in absolute terms and is subject only to the defenses provided for by the relevant law.

An employer’s duty of care is very broad and requires him to ensure that the actions of independent contractors or their employees do not pose a risk to the health and safety of his employees. In addition, employers and self-employed persons (i.e., contractors) should ensure the health and safety of non-employees in the workplace. Employers should thus be aware of potential hazards to enable them to arrange safe work practices that minimize risk exposure.

Employers in New South Wales also have a duty to consult with employees on health and safety matters. This consultation is required when: (a) assessing and eliminating risks; (b) introducing or altering procedures for monitoring risks; (c) making changes in the systems or methods of work; and (d) making decisions relating to procedures for consultation.

The nature of the consultation requires the sharing of relevant information, an opportunity for employees to express their views and to contribute to the resolution of occupational health and safety issues, and the consideration of such views by the employer.

Through consultation, workers are directly exposed to occupational health and safety problems and are often the best source of solutions. By participating in such problem solving, employees also will most likely have a greater commitment to supporting change in the workplace.

Duty of Employees

Alongside their right to health and safety at work, employees have a corresponding duty to ensure the safety of others in the workplace.

Duty of Occupiers

Most state laws also impose a duty of care on “occupiers” of work premises, defined as those who have management or control of the work premises, such as persons who have an obligation under contract or lease to maintain or repair the premises.

Occupiers should ensure, as far as is reasonably practicable, that the premises and the means of access to and egress from such premises are safe and without risk to health.
Duty of Designers, Manufacturers, Suppliers, and Installers

Safe equipment and machinery are essential in ensuring health and safety in the workplace, as hazards may be introduced into the workplace with the introduction of new equipment, plant, and substances if such are not adequately designed, installed, or explained.

Thus, occupational health and safety legislation imposes a duty of care on a wide range of people outside of the actual workplace but directly connected with the work process. For instance, under the Occupational Health and Safety Regulations of 2001 (NSW), designers are required to:

- Ensure the use of appropriate guards at the plants to prevent or reduce access to a danger point or area;
- Ensure that operational controls are suitably identified and located in the plants to ensure maximum safety; and
- Ensure that warning devices are placed in appropriate positions and that emergency stop devices are prominent and accessible.

Manufacturers are required to identify hazardous substances and to prepare a material safety data sheet for a substance before it is supplied to another person for use at work. Suppliers should then supply the employer with this information and provide other relevant information that may assist in the safe use of the substance.

Health and Safety Representatives and Committees

While New South Wales is the only state that imposes a statutory duty on employers to consult with employees, legislation in the other states and territories provide that employees may elect occupational health and safety representatives and form occupational health and safety committees.

Occupational health and safety representatives are tasked with promoting employee participation in safety issues by communicating employees’ safety concerns to management. To carry out this role effectively, they are empowered with the right to learn about safety through training and access to information, the right to inspect the workplace, the right to participate in health and safety issues through consultation, and the right to demand the establishment of a health and safety committee.

Occupational health and safety committees are comprised of employees (generally occupational health and safety representatives) and managerial staff. They allow employee involvement in the making of decisions affecting their health and safety through joint consultation with management.

Occupational health and safety committees gather information on workplace hazards, assist in the formulation of a company’s occupational health and safety policy, and monitor managerial attempts to ensure the proper use and maintenance of plant, equipment, and dangerous substances.
They also make recommendations to management on issues pertaining to occupational health and safety, but they do not have the power to enforce these recommendations. The adoption of such recommendations remains solely at the discretion of management.

Dispute Resolution
In General
Industrial relations legislation encourages negotiation between disputing parties as the primary means of dispute resolution. Only where negotiation and compulsory conciliation fail will industrial tribunals arbitrate to settle a dispute.
This is consistent with the recent recognition throughout many jurisdictions of the benefits of alternative dispute resolution as a means of resolving grievances. Alternative dispute resolution can take various forms, including negotiation, mediation, and conciliation.

Dispute Resolution at the Federal Level
The Federal Parliament has the power to enact laws with respect to conciliation and arbitration to prevent and settle industrial disputes beyond the limits of a state. The importance of alternative forms of dispute resolution is recognized by the Fair Work Act and the Workplace Relations Act.
Although negotiation and agreement are the primary forms of resolution, arbitration provisions under the Workplace Relations Act will be utilized when they fail. Once the AIRC receives notice of a dispute, the conciliation and arbitration process becomes compulsory.
The AIRC can then order the parties to discuss ways of resolving the dispute through conciliation. Where conciliation fails, the AIRC may order a settlement that is legally binding on the parties via arbitration. A commissioner may not proceed to arbitrate a dispute without first seeking an amicable agreement between the parties via conciliation.

Dispute Resolution at the State Level
Legislation in most states also requires awards and agreements to contain dispute resolution provisions. However, most employees now come under the federal industrial relations system, with states maintaining control of their public sector employees.
The dispute resolution procedures in all states should include procedures for consultation at the workplace and the involvement of relevant unions. However, these procedures do not apply to small businesses of less than 20 employees unless the procedures in the award specifically apply to such an employer.
Termination of Employment

In General

Legal obligations surrounding termination of the employment relationship are derived from common law and the contract of employment, industrial instruments (i.e., modern awards and enterprise agreements), and statutes.

These sources create obligations for employers and employees, although they are primarily aimed at protecting the rights of employees, ensuring fair and lawful termination of employment, and providing remedies for unfair and unlawful termination.

Termination under Common Law

In General

Every employment relationship is governed by a written or oral contract of employment. The contract of employment may expressly contain provisions governing termination, with contracts often providing for unilateral termination upon notice.

If the contract is silent on the issue of termination, the terms and conditions of termination will be implied from common law.

Notice

An employer ordinarily should give the employee notice or payment in lieu of notice before terminating his contract of employment. Where the employment contract contains no express reference to notice upon termination, common law will imply a “reasonable” period of notice into the contract.

What constitutes a reasonable notice period will depend on the circumstances of each case. Factors to be considered by the court when making such determination include age, prospects of finding alternative employment, seniority, wage, length of service, and industry standards.

For lower-level employees, one month’s notice or less may be deemed reasonable, while this may be three months to one year\(^2\) and even longer in

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\(^2\) Stewart vs. Nickles (46 AILR (1999)), where a motorcycle instructor with 4.5 years of service received three months’ notice; Ross vs. GN Comtext (Australia) Pty. Ltd. (NSWIRC 6383 of 1998 (unreported, 31 August 2000)), where a manager with eight years’ service received six months’ notice; King vs. State Bank of New South Wales, (NSWLRC 1153 of 1996 (unreported, 6 December 2000)), where a manager with only one year of service was awarded six months’ notice because of unusual circumstances where he was headhunted for the position when the company’s operations were under review, left his former position, and was laid off shortly thereafter; Rankin vs. Marine Power International Pty. Ltd., (Supreme Court of Victoria 6972 of 1999 (unreported, 21 May 2001), where an executive manager with
exceptional cases\textsuperscript{33} for senior employees. Employees are entitled to a minimum amount of notice under the National Employment Standards. The minimum notice period varies according to an employee’s length of service, ranging from one week for an employer with less than one year of service up to four weeks for an employee with more than five years of service.

Summary dismissal is justified in the event of serious employee misconduct that results in a breach of contract. What constitutes serious misconduct will depend on the particular circumstances of the case, but may include the following:

- Obscene language directed at the employer, staff, or customers;
- Intoxication at the workplace;
- Dishonesty, including theft or fraud;
- Criminal conduct while at work;
- Criminal conduct outside of work where such activity is inconsistent with the employee’s contract of employment;
- Fighting at the workplace; and
- Refusal to carry out a lawful and reasonable instruction given by the employer.

Care should be taken when summarily terminating an employee as it is the most serious form of discipline an employer can impose. Summary dismissal may result in significant costs for an employer should litigation arise and the dismissal be found to be unreasonable.

Where an employer has engaged in conduct amounting to a fundamental breach of the employment contract, an employee may resign without serving the relevant notice period. Employees should serve notice at all other times, unless waived by the employer.

\textit{Constructive Dismissal}

Constructive dismissal occurs when an employer acts in a manner amounting to a fundamental breach of the employment contract and the employee resigns as a result of the employer’s unilateral decision.

An example of constructive dismissal is where an employer threatens an employee with dismissal, forcing him to choose between resigning and being dismissed. Thus, even where an employee appears to consent to the termination,
A court may find him to be constructively dismissed because his consent was not freely given.

A finding of constructive dismissal entitles the employee to benefits, such as notice that should have been received upon dismissal but foregone in the event of resignation. The employee also may have access to unfair dismissal protection under the Fair Work Act.

**Termination and Industrial Instruments**

Most employment relationships are covered by an award or agreement, although the terms of these industrial instruments are not automatically incorporated into the employment contract. Awards and agreements supplement statutory provisions and will generally specify the way in which an employee may be terminated, i.e., by the giving of notice or through the employer’s right to summarily dismiss for specified misconduct.

Monetary penalties are available for breach of an award or an agreement depending on the nature of the breach and the jurisdiction within which the breach is enforced. However, these penalties tend to be small and narrowly defined.

Common law damages are not available to employees who have been dismissed in a harsh, unjust, or unreasonable manner under an award, unless that award has expressly been given contractual force.

As reinstatement and compensation are not available solely because a dismissal is in breach of the award, pursuing a breach for an unfair dismissal under the award may not provide an adequate redress for the termination. The employee may need to pursue an action under the relevant federal or state legislation governing dismissals.

**Termination under Statute**

*In General*

The Fair Work Act provides an employee with remedies for unfair and unlawful dismissals, but he cannot seek relief for both. Under the provisions for unfair and unlawful dismissals, a remedy of reinstatement or compensation may be available.

Not all employees have access to unfair dismissal protection. An employee is protected from unfair dismissal if he has completed a minimum employment period of six months, or 12 months if the employer is a small business and one or more of the following applies: (a) a modern award covers the person; (b) an enterprise agreement applies to the person; or (c) the employee earns less than the high income threshold (currently at AU $108,000). The recent decision in

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35 Fair Work Act, s 382.
Ponce vs. DJT Staff Management Services Pty Ltd T/A Daly's Traffic (FWA 2078 (2010)) clarified the factors to be considered when determining if a casual employee’s employment was sufficiently “regular and systematic” to gain unfair dismissal protection.

Even if there is no clear pattern of days and hours worked, the employment could still be regular and systematic if:

- Work is offered and accepted in a sufficiently regular manner that it could no longer be regarded as simply occasional or irregular; and
- The employer regularly offers work when suitable work is available at times when he knows that the employee has generally made himself available.

Unfair Dismissals

Unfair dismissals constitute dismissals that are harsh, unjust, or unreasonable. While the Fair Work Act does not define the meaning of “harsh, unjust, or unreasonable” in determining this issue, Section 387 of the Fair Work Act requires Fair Work Australia to consider:

- Whether there was a valid reason for the termination related to the capacity or conduct of the employee or to the operational requirements of the employer’s undertaking, establishment, or service;
- Whether the employee was notified of such reason;
- Whether the employee was given an opportunity to respond to any reason related to his capacity or conduct;
- Any unreasonable refusal by the employer to allow the employee to be accompanied by someone who will assist him during any discussions relating to the dismissal;
- If the termination was related to unsatisfactory performance by the employee, whether he had been warned about such unsatisfactory performance before the termination;
- The degree to which the size of the employer’s enterprise would likely impact on the procedures followed in effecting the dismissal;
- The degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would likely impact on the procedures followed in effecting the dismissal; and
- Any other matter that Fair Work Australia considers relevant.

Adverse Action

Under the Fair Work Act, employers, potential employers, employees, independent contractors, persons who engage independent contractors, and industrial associations cannot take adverse action against another person because
the latter (a) has or exercises a workplace right\textsuperscript{36} or (b) engages in industrial activity.

However, it is not unlawful to terminate someone on this basis if the termination is based on the inherent requirements of the job, or if it is against a staff member of an institution run in accordance with religious principles and the termination is in good faith and to avoid injury to the religious susceptibilities of adherents to such religion or creed.

\textbf{Redundancy, Retrenchment, and Severance Pay}

Redundancy occurs when an employee is dismissed through no fault of his own, but because the employer no longer requires the particular job to be performed by anyone.\textsuperscript{37} Redundancies commonly occur after the introduction of new technology or organizational restructuring.

The standard redundancy entitlements for federal award employees are generally based on the following minimum standards established in the \textit{Termination Change and Redundancy Case}:

\begin{itemize}
\item For less than one year of service, no severance payment;
\item For more than one year but less than two years’ service, four weeks’ pay;
\item For more than two years but less than three years’ service, six weeks’ pay;
\item For more than three years but less than four years’ service, seven weeks’ pay; and
\item For more than four years’ service, eight weeks’ pay.\textsuperscript{38}
\end{itemize}

Section 119 of the Fair Work Act currently provides for a minimum statutory entitlement to redundancy pay. The amount varies depending on the length of the employee’s service. The minimum entitlement for an employee who was worked for an employer for one to two years is four weeks’ remuneration. Employees do not have a right to redundancy pay under common law unless the contract of employment expressly provides for it.

\textbf{Termination upon Transfer of Business}

A termination upon the transfer of a business will often give rise to redundancies, thus triggering employee entitlements to benefits such as notice and severance payments. However, many awards and agreements contain

\textsuperscript{36} This will be the case if the person: (a) is entitled to the benefit or has a role or responsibility under a workplace law, workplace instrument, or order made by an industrial body; or (b) is able to make a complaint or inquiry to a body capable of seeking compliance with a workplace law or workplace instrument (e.g., the Workplace Ombudsman).

\textsuperscript{37} \textit{R vs. Industrial Commission of South Australia; Ex parte AMSCOL}, 16 SASR 496 (1977).

\textsuperscript{38} 8 IR 34 (1984)
clauses that allow employers to avoid their obligation to make such payments if they can find the employees reasonable alternative employment. In transfer of business situations, reasonable alternative employment will often be found with the purchaser or transferee of the business.

While the traditional view has been that employees cannot be forced to accept alternative employment with another entity, a recent New South Wales decision suggested in obiter that an employee’s unreasonable refusal to accept reasonable alternative employment may result in the loss of his entitlement to severance pay. Employers should provide reasonable notice to employees and/or their unions. They should consult with employees and/or their unions on the impact of proposed changes, and explore genuine alternative options for employees that should be fairly offered to all affected employees. They also should provide reasonable redundancy benefits and ensure that employees nominated for redundancy are fairly selected. Where a business is transferred in whole or in part from one entity to another, awards and enterprise agreements are binding on the successor or transferee.

**Miscellaneous Employment Issues**

**Retirement Income System**

*In General*

The government introduced a compulsory superannuation scheme in 1992 that is designed to supplement the public aged pension by facilitating the accumulation of private savings for retirement.

In general, the retirement income system currently comprises of: (a) a means-tested public age pension scheme; (b) a compulsory employer-funded guaranteed superannuation scheme; and (c) voluntary additional employee superannuation contributions.

*Public Age Pension Scheme*

Under the Social Security Act of 1991 (Cth), an age pension becomes available to men at the age of 65 years. The availability age for women depends on their date of birth.

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39 Nokes vs. Doncaster Amalgamated Collieries, AC 1014 (1940), per Lord Atkin, at p. 1026.
40 Shop Distributive and Allied Employees’ Association of NSW vs. WD and HO Wills Holdings Ltd., NSWIRC 3363 of 1999 (unreported, 9 June 2000).
41 Social Security Act, s 23(5A).
Women born before 1 July 1935 become entitled to a pension at the age of 60 years, while the eligibility age slowly increases for those born after this date, reaching the age of 65 years for those born on 1 January 1949 or later.

To claim an age pension, the applicant should be an Australian resident and have lived in Australia long enough to satisfy the qualifying residence period, unless an exemption applies because of his status as a refugee.

The qualifying residence period is 10 years and is satisfied if the person has, at any time, been a resident for a continuous period of 10 years or has been a resident during more than one period, with one of those periods being five years or more and the aggregate of those periods exceeding 10 years. The age pension is subject to an income and assets test. The maximum pension rate per fortnight is indexed and is thus subject to change from time to time.

**Superannuation Scheme**

The Australian superannuation industry is regulated through various Acts and by a number of government authorities, agencies, and departments. There is approximately AU $520-billion invested in various superannuation funds.

Under the Superannuation Guarantee (Administration) Act of 1992 (Cth), employers are required to contribute superannuation payments into funds on behalf of full-time, part-time, and casual employees between 18 to 70 years of age and earning AU $450 per month or more (the “Superannuation Guarantee”). The rate of contribution currently stands at a minimum of nine per cent of the employee’s salary. Superannuation funds allocate these contributions into various investments at the domestic and international levels.

**Voluntary Contributions**

Employees also may make additional voluntary superannuation contributions from their own after-tax salary or may agree with their employer to make additional contributions on their behalf in lieu of salary (salary sacrificing). Employees also may contribute to personal superannuation funds that are separate from the compulsory workplace funds and offered at a retail level by various fund management companies.

Personal funds also are regulated, but they provide a better choice for individual investment strategy compared to workplace funds. Self-managed superannuation funds also are becoming increasingly popular with self-employed individuals who have high incomes, can act as trustees of their own funds, and can afford the associated costs.

42 Social Security Act, s 23(5C).
43 Social Security Act, s 23(5C)–(5D).
44 Social Security Act, s 7(6).
45 Social Security Act, s 7(5).
Taxation of Superannuation

Superannuation is taxed at the contribution stage, during accumulation, and when payment is made upon retirement. Australia appears to be one of the few countries that tax superannuation contributions at all three stages.

Taxing superannuation at all stages is complicated by the inclusion of a number of exemptions, thresholds, and the classification of components within the relevant legislation.

Health Care Coverage

The Medicare system was developed to provide for the healthcare of all Australians under a unified insurance system. A levy is imposed on all taxpayers and distributed to the states and territories to cover the costs of the scheme. The levy is normally calculated at a flat 1.5 per cent of an individual’s taxable income and included in his yearly tax assessment. Individuals classified as low-income earners, pensioners, and other specific persons are exempt from paying the levy or pay a reduced levy.

As the public system has become prohibitively expensive and inefficient to maintain, the federal government introduced a one per cent levy surcharge for all higher income earners who did not have private health insurance.

Since 1999, the federal government has attempted to attract more taxpayers to take up private health insurance by providing a 30 per cent rebate on the insurance premium. However, where the taxpayer does not join a private healthcare fund by the age of 30, a loading of two per cent for every year thereafter will apply to premiums until the 30 per cent reduction is completely diminished. The loading is frozen from the age of joining, provided that a minimum level of cover is maintained.

Vocational Education and Training

Vocational education and training was introduced in the 19th century to develop the skill of Australia’s working population in the manufacturing, mining, and agricultural industries. The Technical and Further Education (TAFE) system replaced the role of earlier educative bodies such as mechanics institutes, schools of mines, and technical and workingmen’s colleges.

The expansion of the services industry required a shift in focus of the TAFE system to other industries that sought vocational training. There are currently a number of private institutions working alongside the TAFE system that offer a wide range of courses in many vocational areas.

There has recently been significant development in the creation of “new apprenticeships”, establishment of the National Training Framework, introduction of vocational education and training in schools, and development of “training packages”. 
The traditional apprenticeship offered a mix of on-the-job training and off-the-
job study that operated over a set number of years, while the new
apprenticeships are “competency based”, allowing apprentices to complete their
training sooner if they have reached the skill level required.

The new apprenticeships are covered by formal agreements known as “training
agreements” or “contracts of training”, which set out the training and
supervision an employer should provide for an employee and an employee’s
obligations as a new apprentice. These agreements are subject to the relevant
statute, award, or agreement covering the employee.

There are a number of incentives and subsidies available for employers offering
these training schemes to offset the cost of the training. Although these
incentives and the structure of the “new apprenticeships” are a Commonwealth
government initiative, it is the states and territories that administer the training
agreements under the relevant statutes.

**Conclusion**

Given that the nature of Australian employment relations developed in the
context of a series of intense industrial disputes, it is hardly surprising that the
relationship was somewhat adversarial in character.

The union movement sought to protect and advance the interests of its members,
while the owners of the means of production sought to advance their interests in
the context of a typically capitalist society. Consequently, dispute rather than
compromise characterized the employment relationship at the time of its
inception in Australia.

Workplace regulation in the 21st century has become far more sophisticated,
especially in terms of the level of flexibility with which the employment
relationship is governed. In part, the trend towards flexible work practices
reflects the recognition that employers’ and employees’ interests do not have to
be mutually exclusive.

The most notable reform in recent times with respect to flexibility has been in
the area of employment protection for those with carers’ responsibilities. Courts
have recognized the importance of flexibility as a means of striking a balance
between the adoption of family-friendly work practices and the protection of
employers’ legitimate business interests.

The Fair Work Act now gives certain types of employees a right to request
flexible working arrangements. Legislative reform also has been implemented in
other jurisdictions. The incorporation of the Anti-Discrimination Amendment
(Carers’ Responsibilities) Act of 2000 (NSW) into the Anti-Discrimination Act
of 1977 (NSW) has gone a long way to balancing the interests of employers with
those of employees with family responsibilities.
Austria

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Introduction

Sources of Labor Law

Labor law in Austria is, in the absence of a complete codification, marked by the interaction of statutes from private and public law. The basis for the private autonomous shaping of legal relations in Austria is provided by the Civil Code, which constitutes the “common law” of employment.

The private law principles of labor law stem from the age of enlightened absolutism, while its public law principles developed only after the political unrest of 1848. The Constitution of 1867 and the age of neo-absolutism contributed to further development through the passage of the State Constitution Act (StGG). The STGG protects the following basic rights related to labor law: (a) equality before the law; and (b) the right to be free to pursue a livelihood and occupational education.

The granting of association and assembly rights, as well as the subsequent repeal of the prohibition against association through the Associations Act of 1870 (KoalitiG),1 enabled decisive progress in the development of labor law. Associations for the protection and support of workers were formed, and the union movement was able to organize legally and to advance its demands.

State intervention in labor matters was originally based on trade law. The Trade Code of 18592 contained provisions relating to labor law, which were significantly expanded through social law provisions in the second Trade Code Amendment of 1885.3

Of particular importance were the provisions concerning limitations on the hours of work in factories, child labor, protection of mothers in the weeks subsequent to birth, and Sunday rest and other guaranteed rest periods.

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1 Imperial Law Gazette (RGBI) Number 1870/43, as amended.
2 RGBI Number 1859/227.
3 RGBI Number 1885/22.
Historical Development

The years up to World War I and the end of the Habsburg monarchy were marked by a continued improvement in the working conditions of different occupational groups and the development of the precursors of institutions and instruments which presently have decisive influence on collective employment law.

The proclamation of the First Republic in 1918 triggered great social improvements. The law introducing the eight-hour day and the forty-eight-hour week (*Achtstundentagesetz*),\(^4\) the Workers’ Vacation Act,\(^5\) the Works Council Act of 1919,\(^6\) and the statutes establishing conciliation offices and dealing with collective agreements were passed.

Unemployment insurance and the prohibition of night work for women and minors also were introduced. The Salaried Employees’ Act\(^7\) likewise came into force during this time, and workers’ chambers were established as the counterpart to the chambers of commerce. However, this function was only fully developed after 1945, in the context of the typical Austrian system of economic and social partnership.

Economic and foreign policy problems and a worsening of the political climate not only halted the progress of social legislation, but also led to the authoritarian system of Austrofascism in 1934 and to the dissolution of the First Republic and the State of Austria through the *Anschluss* with Nazi Germany in 1938.

The development of labor law continued only after 1945 in the Second Republic. In particular, the idea of a codification of labor law was in part realized in the Labor Constitution Act of 1973 (*Arbeitsverfassungsgesetz*).\(^8\)

Compromise and understandings between employee and employer associations enabled the further development of labor and social law. In 1957, the social partnership was permanently established through the institution of the Joint Wage and Price Commission.

The participation of employer and employee associations in the labor courts also was responsible for the development of a general climate of social partnership, primarily marked by an attitude against social conflict. Compared with other countries, Austria has one of the lowest strike rates.

Effects of European Union Membership

Austria has been a member of the European Union (EU) since 1 January 1995, from which point on Community law took precedence over national law. Should

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\(^4\) *State Gazette* (StGBI) Number 1919/581.
\(^5\) StGBI Number 1919/395.
\(^6\) StGBI Number 1919/283.
\(^7\) BGBI Number 1921/292, as amended.
\(^8\) BGBI Number 1974/22, as amended.
Community law not be directly applicable (as in the case of Directives), the Member State official bodies are only bound to transform such Directives into national law.

Among the four basic freedoms of the EU, it is the freedom of movement for persons which has the greatest effect on labor law. It entitles workers to dependent gainful employment in a Member State other than their own.

Important amendments regarding the European juridical position were put into effect by the Act Concerning Adjustment of Employment Contracts (Arbeitsvertragsrechts-Anpassungsgesetz or AVRAG); Directive Number 98/59/EC on collective redundancies; Directive Number 2001/23/EC on employees’ rights in the event of transfers of undertakings, businesses, or parts thereof; and Directive Number 2006/54/EC on equal opportunities in matters of employment.

In addition, Directive Number 96/71/EC requires Member States to guarantee specific terms and conditions of work which apply to the same extent to foreign workers and citizens of the home country. Social insurance contributions paid by workers in other EU countries should be accredited for benefits in Austria.

Employment Agreement and Employment Relationships

In General

The employment agreement is a private law agreement by which someone (employee) undertakes to provide services to another (employer) for a period of time. The dependent position of the employee and some degree of duration identify the employment contract in the narrow sense.

The integration into the organization of the enterprise, as well as the personal subordination to and the duty to obey instructions of the employer, are characteristic. The employment agreement is distinguished from a contract for work and services, wherein someone undertakes to produce a particular work for remuneration and thus owes a particular result.\(^9\)

The possibility to regulate and change the course of the work at any time, as well as the absence of personal dependency and duty to obey instructions, especially distinguish a free contract for services from an employment contract. Labor protection laws are thus not applicable to the free contract for services. The employment relationship is commenced by the contract of employment. The conditions of work are subject to precise definition in the contract of employment.

\(^9\) Civil Code, s 1151.
Hierarchy of Labor Law Norms

In General

There is a hierarchy of sources of labor law, as follows: (a) statute; (b) collective agreement; (c) works agreement; and (d) individual agreement. However, the individual employment contract is the indispensable basis for the establishment of an employment relationship. It provides for main obligations, the type of service to be provided, and the amount of remuneration. Other matters such as the place and hours of work also may, in part, be freely determined by the contracting parties.

The employment contract also is central in the employment relationships of “managing employees”, which are not within the ambit and protection of the collective labor law. However, not all managerial employees are exempt from the application and protection of collective labor law. Only those exercising determining influence on management by being able to make decisions on their own responsibility in technical, commercial, and administrative matters and who thus have the direct means of influencing the employer’s sphere of interest are so exempt.

Mandatory Statutory Provisions

The statutory provisions of labor law occupy a primary position in the labor law hierarchy. They usually constitute mandatory law, and deviations are permitted only if the contractual agreement is more favorable to the employee.

Collective Agreement

A collective agreement is an agreement between incorporated associations of employers and employees with the capacity to conclude collective agreements.\(^{10}\) In principle, it has precedence over the individual employment agreement, but individual terms favoring the employee are permitted.

It essentially functions to fix the amount of the minimum remuneration, but almost all mutual rights and obligations of employers and employees arising from the employment relationship are subject to regulation by collective agreement (i.e., vacation, hours of work, and severance pay).

Works Agreements

Works agreements are written agreements between the owner of the enterprise and the works council concerning particular matters as specified by statute or collective agreement.\(^{11}\)

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10 Labor Constitution Act, s 2.  
11 Labor Constitution Act, s 29.
Non-Mandatory Statutory Law

Where a particular subject matter of the employment relationship is not provided for by agreement, non-mandatory statutory law is applied to fill the gap. Usage may be declared to be binding by non-mandatory statute, and thus may indirectly be given the status of a legal norm.

Contract of Employment

In General

An employment contract is concluded by the parties providing declarations of willingness to establish a continuing contractual relationship. The introductory declaration ("offer") contains a proposal to conclude a contract with certain content.

The declaration of the other party ("acceptance") corresponds with the contract proposed. Through the acceptance of the offer, its content is accorded the status of a contractual norm, i.e., it becomes an agreement binding in law.

According to Section 863 of the General Civil Code, the declaration may be accepted expressly or impliedly. It is not necessary to determine the amount of the remuneration since reasonable remuneration is deemed to have been agreed upon, unless the absence of remuneration was expressly provided.

Legal Age

The parties should have the requisite legal capacity to be able to conclude an employment contract. A person obtains full capacity to act in law (volle Geschäftsfähigkeit) upon attainment of the age of majority, i.e., 18 years old.

Individuals under the age of seven (children) are wholly unable to enter into legal transactions, while contracts with minors who are seven years old are void unless authorized by the legal guardian, insofar as they burden the minor with an obligation.

If the legal guardian does not authorize the contract within a reasonable period of time, or if he does not authorize the dealing at all, the contract is finally void. Persons who are 14 to 18 years of age enjoy a legally extended capacity to act in law. Thus, they may contractually commit to services and conclude work contracts, except contracts of apprenticeship or for other vocational training. The legal guardian may terminate the contract for cause prior to its agreed expiration date.\(^\text{12}\) Other collateral obligations also are dependent on the agreement of the legal guardian, insofar as financial provision for the necessities of the life of the minor is at risk.

\(^\text{12}\) Civil Code, s 152.
Formal Requirements

There are no formal requirements for concluding an employment contract, except as specifically required by law. The employment contract may thus be made by parol or in writing, the latter serving only evidentiary purposes. It also may arise by implication.

However, if the parties have agreed on certain formal requirements, then there is a presumption that they do not wish to be bound by the contract prior to satisfaction of the conditions as to form.13

Types of Employment Relationships

Part-Time Employment

Part-time employment is subject to generally applicable employment law. It is distinct in that the extent of the service to be provided is below the hours of work provided by law or collective agreement.

Contracts for Provision of Service to Third Party

It is a precondition to the contracting out of employees that the employee concerned is required to provide services to a third party or that he has agreed to do so in the particular instance concerned.

The extent of the rights of the third party as against the employee is to be determined exclusively from the content of the contract between the employer and the third party. The rules of general contract law govern the relationship between the employer and the third party.

Employment of Foreign Nationals

Section 3(1) of the Employment of Foreigners Act of 197514 requires an employment authorization from the Employment Office as a precondition to the employment of a foreign national. The authorization will be granted if allowed by the situation and development of the labor market, as well as by important public interests or interests concerning the economy as a whole. The authorization applies for a particular place of employment within one year, and may be revoked for “important reasons”15 at any time.

The foreign national should not be employed for wages and general employment conditions that are worse than those of the majority of comparable Austrian employees of the enterprise. However, in case of a decrease of staff or the threatened prospect of shortened hours of work, the employment relationships

13  Civil Code, s 884.
14  BGBI Number 1975/218, as amended.
15  Employment of Foreigners Act, s 9.
with foreign nationals will be terminated first to maintain the employment of Austrian nationals.16

An authorization is not required if the foreign national has been issued an Exemption Certificate (Befreiungsschein), which is valid for five years. Such Certificate may be obtained if the foreign national has been employed in Austria for at least five years in the past eight years. It also may be obtained by the foreign national’s marital partner and unmarried minor children who are legally settled in Austria for at least twelve months.

A foreigner employed without a valid employment authorization has, in relation to the employer for the duration of the employment, the same rights as in the case of a valid contract of employment. He would not be entitled to any pay in lieu of notice in the event of improper termination, but may otherwise be entitled to damages.

A foreigner may pursue an occupation in Austria only if he remains therein with permission. This normally requires a visa and the absence of a prohibition against the stay. The grant of an employment authorization does not depend on proof of the legality of the foreigner’s stay, but if the foreigner ceases to be in Austria legally, this will constitute a ground for the mandatory revocation of the employment authorization.

No authorization or dispensation is required for foreigners who are occupied in Austria exclusively in connection with short-term services (e.g., business conferences, visiting a fair, installation work and repairs in connection with the delivery of plants or machines). The rules on employment of foreign nationals are not applicable to citizens of EU Member States.

Seasonal Employment Relationships
Seasonal employment is subject to the general employment law, but no continuing social security benefits are provided.

Apprenticeships
On-the-job training usually takes place in the context of an employment contract. The trainee acquires certain knowledge and abilities according to a plan, in the context of this special employment relationship. The special characteristics of apprentice relationships are a result of the public interest in matters of vocational training and education, and the increased requirement for protection of the trainee.

After an apprentice has completed his training, the person providing training is required to keep him in the company for another three months in the same trade that the apprentice has learned. Apprentices also enjoy increased protection with respect to termination and social insurance.

16 Employment of Foreigners Act, s 8.
Transfer of Business

In General

The influence and effect of the transfer of an enterprise, a plant, or a part thereof to another owner on existing contracts of employment are determined by the AVRAG. In a business transfer, the new owner automatically succeeds to the position of employer with all the rights and obligations existing at the point of time of the transfer. In case of bankruptcy, the provisions on automatic succession do not apply.

The AVRAG applies to single and universal succession to the rights and obligations of the business transferred. There also are no restrictions with respect to the legal basis for the transfer (i.e., gift, sale, succession on death), so long as a change of ownership takes place. A mere change of shareholders does not constitute a transfer of business.

The AVRAG only applies to employment relationships existing at the time of the business transfer. Thus, if notice of termination has been given prior to the transfer, the employment relationship is still transferred to the new owner if the date of termination is subsequent to the business transfer.

Also covered are employment relationships where a notice of termination or of dismissal without notice has been successfully objected to, and which retroactively continue in force subsequent to the business transfer.

Effects of Automatic Succession

In principle, the employment relationship continues in force in case of a business transfer, based on the parties’ rights and obligations. Claims normally arising in the case of termination of the employment relationship (e.g., severance pay and pay for unused vacation entitlement) do not arise in a business transfer since the employment relationship is not terminated.

The course of the working year and the vacation year are not affected by the business transfer, but sick time consumed prior to the business transfer is taken into account in calculating the remaining sick time entitlement after the transfer.

Insofar as the law does not contain provisions more favorable to the employee, the transferor and the transferee are jointly liable for obligations arising out of an employment relationship with the transferor. However, the liability of the transferee is limited in two respects.

First, it is limited to obligations which the transferee knew or ought to have known of at the time of the transfer, with a reverse onus applying against the transferee if he is a close relative of the transferor. Second, the transferee is not liable to satisfy obligations of an aggregate amount exceeding the value of the business acquired. The transferor is only liable for severance pay claims to the extent to which such claims may amount at the time of the transfer. As regards
liability for pensions commencing subsequent to the transfer, the pension entitlements accrued up to that date are determinative.

With respect to obligations which have not passed to the transferee, he is only liable according to general provisions of the civil and merchant law, i.e., for unpaid severance pay, employer’s pension plan payments, or compensation for vacation.

Only in the case of single succession is the new owner entitled to refuse the assumption of an employer’s pension plan, by providing timely notice. The employee has a right to object to such refusal within the period provided by law, and such objection does not affect the unchanged continuation of employment.

If the employee does not object to the refusal of the employer, then no new pension benefits accrue after the business transfer. However, the employee is entitled to demand payment from the transferor for previously accrued pension benefits.

Subsequent to the business transfer, the purchaser should abide by the terms of a collective agreement for as long as it continues in force, particularly where the transfer is of part of a business and another collective agreement applies thereto, if by such transfer the part transferred becomes an independent entity or is integrated into another applicable agreement.

If the collective agreement previously applied contains provisions for the protection of the employees, and the new collective agreement does not contain such provisions, then the transferee may, insofar as the business is continued, refuse the acceptance of such provisions with respect to individual employment contracts.

However, the AVRAG also provides a right of objection to the employee in this case, such that his employment relationship with the vendor remains in force. If the business is terminated, then the protection provided by the collective agreement is automatically transformed into a provision of the individual employment agreement and thus remains available to the employee.

A change of collective agreement due to the transfer of the business may not lessen the remuneration provided by the collective agreement prior to the transfer for regular work during normal working hours. This relates only to wages set by reference to the minimum level provided by collective agreement, since remuneration in excess of the collective agreement level is to be continued in any event due to the automatic succession.

Termination in the Case of Business Transfer

The transfer of an enterprise does not constitute a ground for termination of employment. The employees generally have to accept the change of employer. Further, the business transfer does not constitute a “business requirement” making a continuation of employment impossible, and thus may not be raised against an otherwise sound challenge of termination.
The transferor should no longer terminate employees to be free from contractual obligations which he is no longer able to fulfill in consequence of the transfer. However, the AVRAG does not prohibit terminations motivated by the business transfer. As may be permissible otherwise, the transferor and the transferee may terminate employees for reasons not related to the transfer, such as a decrease of operations or to rationalize the business.

Work conditions under an individual work contract may not be suspended or restricted to an employee’s disadvantage within one year following the transfer of an enterprise.\(^{17}\)

If the conditions of employment in a collective agreement or works agreement applicable by reason of the transfer worsen materially\(^{18}\) in relation to the conditions previously applicable, then an employee may terminate his employment within one month after the time at which he knew or had to know of such fact, with due regard for the termination dates and periods provided by statute or collective agreement.

In such case, the employee retains the same rights as if terminated by the employer. The employer is required to advise the employees of any change in working conditions occurring by reason of a transfer of business.

### Terms and Conditions of Employment

#### Remuneration

**In General**

The most important obligation of the employer in the context of an employment agreement is the payment of remuneration. The mutuality of the obligations to work and to pay remuneration is clearly illustrated by the principle of “no pay without work”.

However, “work” in this sense means the availability of one's service. Thus, the employee’s right to be paid remains unaffected by his failure to work, if the work is not provided due to circumstances within the sphere of the employer and the employee was prepared to render the service.

The employee also has a claim to continued payment of remuneration for a limited period in the instances provided by statute, such as vacation, sickness, and other short periods during which the provision of work is prevented.

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\(^{17}\) AVRAG, s 4(1).

\(^{18}\) What constitutes a “material worsening” of the conditions of work can be determined by way of an administrative procedure. It means that the respective main obligations of the parties, i.e., the obligation to work, right to remuneration, extent of vacation, and continuation of payment of remuneration in case of sickness, should be affected.
Forms of Remuneration

Remuneration may be in the following forms: (a) money and payment in kind; (b) time pay and incentive (piecework) pay; (c) commission, profit sharing, and premium; or (d) bonus. The employee is to receive his pay in legal tender. Section 78 of the Trade Code requires that the wages of unskilled laborers be paid in cash, but the payment of wages by way of bank transfer does not constitute a violation of this obligation. Payment in kind is particularly important in relation to agricultural workers and is regulated by the applicable statute.

Time payment and incentive payment methods differ only in the manner of calculation. Time pay is calculated based on the duration of work without considering the result of the work, while the amount of incentive pay is a result not only of the duration of the work but primarily of the productivity of the employee. Incentive pay is distinguished from a (free) contract for work and services in that the employee is not entitled to organize the course of the work.

The introduction of piecework pay or other performance-based systems of pay may only take place by way of works agreement, if there are no provisions regarding this in a collective agreement. A commission is a participation (usually expressed as a percentage) in the value of those transactions of the employer which have been arranged or concluded through the activities of his employee. However, the commission also may consist of an amount fixed independently of the value of the transaction.

Commission pay depends on the agreement of the parties. In case of doubt, the employee is entitled to receive a commission with respect to such transactions involving customers falling within his area of responsibility and which were concluded on behalf of the employer during employment. A commission may not be decreased by reason of subsequent discounts granted to the customer with respect to the transaction arranged, without prior agreement.

In profit sharing, the amount of remuneration is determined as a percentage of the business profit. A premium is remuneration granted as recognition for especially successful work of an employee. An employee who works in excess of the normal working hours is entitled to be paid for overtime. A supplement of fifty per cent or more is payable for overtime, based on the basic hourly wage, otherwise overtime can be compensated by way of time in lieu. The employee cannot waive his right to be paid for overtime, and higher premiums may be payable for overtime in certain types of businesses or industries.

Employers frequently grant benefits by way of special payments on occasions such as Christmas, New Year, the end of the business year, business anniversaries, and long employment anniversaries. Such bonuses may be contractually or voluntarily provided by way of a lump sum payment or by periodic payments.
The employer may state that a bonus is provided voluntarily, thereby excluding the right of the employee to count on payment of the bonus in the future. The voluntary nature of the bonus payment and the right to terminate the same at any time should be expressly and clearly stated. The same applies to payment of a premium. If bonuses are paid repeatedly, a legal claim to the payment of the same may arise in accordance with Section 863 of the Civil Code or by reason of a “business practice”.

Amount of Remuneration

The amount of remuneration is generally determined by agreement. In the absence of individual agreement, it is set by applicable collective agreement or statutory minimum wage tariff. Minimum pay is provided for many occupational groups by collective agreement, and it is not permissible to pay remuneration less than such minimum.

If there is no minimum remuneration provided by collective agreement, then the employee should be paid reasonable remuneration. What is considered to be reasonable will be judged according to what is usual at the location and in the industry concerned.

Under the principle of equal treatment prevailing in employment law, employees may not be paid at different rates for the same type of work. Violation of this principle allows the disadvantaged employee to have the proper level of remuneration determined by the labor court.

Vacation

Each employee has a claim to an uninterrupted annual vacation with pay in the duration prescribed by law. In case of a period of service of less than 25 years, the extent of the vacation amounts to 30 working days, and increases to 36 working days for a period of service of 25 years or more.

In the first working year, the entitlement to vacation arises pro rata during the first six months, i.e., at the rate of two and a half days per month. Full vacation entitlement is earned on six months’ service, after which time the annual vacation may be consumed entirely. In the subsequent years of employment, the entire vacation entitlement arises on the commencement of the working year.

Instead of the working year, the calendar year or a different period of time may be fixed by collective agreement or works agreement as vacation year. All immediately preceding periods of employment with the same employer are counted for the qualifying period for vacation, the amount of vacation, and the vacation year.

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19 “Working days” means Monday to Saturday, thus the annual vacation effectively amounts to five weeks.
20 “Working year” means that period which is to be calculated from the date of entry of the employee.
In principle, the vacation should be consumed during the vacation year in which the entitlement has arisen, but unused vacation entitlement continues beyond the end of the vacation year for two years, calculated from the end of the vacation year during which it arose.

The commencement of the vacation is to be agreed upon between the employer and the employee with due consideration for the requirements of the business and the recreational opportunities of the employee.

An employee of a seasonal business cannot take his vacation during high season, while an employee who has children cannot be confined to periods during which the recreational value of his vacation is low. Still, an employee may commence a vacation without the employer’s consent in exceptional circumstances and with the intervention of the works council.

An employee does not have a claim to a continued vacation to the extent of the entire annual entitlement. The employer may demand that he consume the vacation in two parts, each part amounting to at least six working days, to protect the employee from the employer dividing the annual vacation into small portions and depriving him of the vacation’s intended purpose of rest and recreation.

The employer should keep records showing the extent of the vacation consumed. If an employee is sick or meets an accident during vacation through no fault of his own, then the days during which he would have otherwise had to be on duty are not counted for calculating the vacation consumed if the sickness or disability lasts for more than three calendar days.

The employee should notify the employer of the sickness or disability and should provide a medical certificate upon request. However, if the sickness or accident is due to an activity which is contrary to the recreational purpose of a vacation, then the vacation is not interrupted by such sickness or disability.

During vacation, the employee’s claim to remuneration continues. Vacation pay should be paid in advance, at the commencement of the vacation, for the entire duration thereof. The employee is entitled to the remuneration to which he would have been entitled if he had not commenced vacation. Overtime, lump sum payments for overtime, and reimbursement for expenses should be taken into account in calculating vacation pay.

Agreements between the employer and the employee providing for payment of money or other valuable consideration in exchange for the non-use of the vacation entitlement are void. Vacation compensation and settlement are part of remuneration which only become payable upon termination of the employment relationship if the employee still has unused vacation entitlement.

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Hours of Work

The determination of the daily, weekly, or monthly hours of work by the contract of employment is subject to narrow limitations by statute and collective agreement.

Under the Hours of Work Act (Arbeitszeitgesetz), the hours of work generally may not exceed eight hours daily or forty hours per week. The weekly hours of work have been reduced in certain industries and enterprises by collective agreement to 38.5 or 35 hours. However, the regulation of the normal hours of work may be increased to ten hours per day, with the weekly limit remaining at forty hours.

If a significant portion of the working hours is taken up by on-call duty, the weekly hours of work may be increased to 60 hours by collective agreement. The daily hours of work in such a case may not exceed twelve hours. Overtime work may only be requested by the employer if important interests of the employee do not militate against the same and if the employee has agreed to work overtime in advance.

In the case of increased work requirements, the hours of work can only be increased by five hours of overtime per week (which could be increased to ten hours with official permission), up to a maximum of 60 hours of overtime in a year.

The daily hours of work may not exceed ten hours. For advance preparation and finishing work, the hours of work may be exceeded by an additional half hour per day if the maximum daily hours of work of ten hours are not exceeded.

Unless otherwise provided by collective agreement, a premium of fifty per cent of the normal remuneration for one hour is to be paid for overtime. Overtime also may be paid by way of a lump sum arrangement. However, if the overtime pay otherwise calculated exceeds the lump sum payments, then the employee is entitled to be paid such excess.

The period during which the employee is available to work (where he is to remain at a place determined by the employer), as well as the period when he is required to be on call while he is able to pursue other activities but should be within reach of the employer, are considered working time. If the daily hours of work exceed six hours, then the employee is entitled to a period of rest of at least one-half hour.

An employee is entitled to an uninterrupted period of rest of at least eleven hours after his daily work, subject to collective agreement. The weekend period of rest should be at least 36 hours, including the period from one o’clock in the afternoon of Saturday to Sunday midnight, although there are numerous exceptions for specific occupations, businesses, and activities.

22 BGBl Number 1969/461, as amended.
Discrimination

Equal Treatment

The principle of equality of treatment not to arbitrarily, or for factually unjustified reasons, treat one employee worse than other employees is the result of case law developments and arises from the employer’s duty of care.

The principle applies to all working conditions. The employer’s treatment of all employees is examined for the purpose of comparing factual and legal issues forming a subject area. The question whether a violation of the principle has occurred can only be answered upon determining that there is no factual basis for the demonstrated differentiation. An employee alleging a violation of the principle should prove that he is being treated worse than comparable employees, and should provide evidence tending to show the lack of a factual basis for such treatment.

Pursuant to the Equal Treatment Act (Gleichbehandlungsgesetz), no one should be discriminated against in relation to hiring, the level of pay, the grant of voluntary social benefits, measures relating to continuation of training in the business, promotion, other conditions of work, and termination of employment by reason of sex. Discrimination means any disadvantageous differentiation carried out without factual justification.

The employer also may not invite applications for job vacancies only from men or only from women, unless this is justified as an essential requirement for the work. Violations of the requirement of equal treatment may be fought by an employee by way of a suit for declaratory relief, application to the Equal Treatment Committee, or information to the Equal Treatment Attorneyship.

Male and female employees also are legally protected against sexual harassment at the workplace. They have a right of damages against the offending party if they have been discriminated against by reason of sexual harassment in the course of employment.

Women

In General

The Federal Government and state and community governments, as employers, are required to work toward the removal of the existing underrepresentation of women. Women are considered to be underrepresented if they number less than forty-five per cent of the total number of employees in the area of responsibility of the authority concerned.

Thus, female applicants who are no less qualified for a position than the best qualified co-applicant are to be preferred until the proportion of females has reached at least the required rate.

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23 BGBl Number 2004/66, as amended.
Night Work

The EU Nighttime Work Harmonization Act (EU-Nachtarbeitsanpassungsgesetz) entered into force on 1 August 2002. As of that date, women are no longer prohibited from working at night, but there are gender-neutral night work regulations equally applicable to men and women.

Night work limits set out in other laws, such as the Act on Nighttime Heavy Labor (Nacht schwerarbeitsgesetz), the Mother Protection Act (Mutterschutzgesetz), and the Children and Juvenile Employment Act (Kinder- und Jugendlichenbeschäftigungs gesetz), remain unchanged.

The EU Nighttime Work Harmonization Act contains protective provisions for night workers, that is, employees who work regularly or at least forty-eight nights in a year for at least three hours during the night. Nighttime is deemed to be the time between ten o’clock in the evening and five o’clock in the morning.

Maternity

Pregnant women may not be made to work during the last eight weeks prior to the expected birth, as shown by a medical certificate. A pregnant woman should notify her employer as soon as she is aware of her pregnancy, while the employer is required to advise the pertinent Labor Inspection Office of this circumstance as soon as he learns of the pregnancy.

After the notification, the woman concerned may not be assigned heavy physical labor or activities which may adversely affect her health or that of her unborn child. Expectant or weaning mothers also should not work overtime, and their weekly hours of work may not exceed forty hours. Night work and work on Sundays and holidays are only permitted in the instances enumerated by statute.

The employer cannot legally dismiss the employee during pregnancy and until four months after the birth. If the employee has used her entitlement for parental leave, she is entitled to special protection from dismissal for four weeks after the termination of such leave. A dismissal can only be effected on one of the grounds set out in the statute. A consensual termination of employment of a pregnant woman should be in writing.

Childcare

Parents who receive family allowance are entitled to claim childcare benefits in any of five calculation models. One model is dependent on the last month’s income of the parent prior to the parental leave, while the other four models provide for an invariable amount of money per month for different time periods.

The longer the duration of entitlement to childcare benefits, the lower is the monthly amount of money. The time periods vary between twelve months and 36 months, and the monthly amounts of money vary between EUR 1,000 and EUR 436.
Fathers also are entitled to parental leave. It lies within the discretion of the parents as to who uses the parental leave. It also is possible to divide the two-year parental leave between the parents. Apart from one month in the course of the first change of parental leave usage, both parents may not use parental leave at the same time.

**Children and Adolescents**

*Children*

Children under 15 years of age generally may not be employed. The state governor may authorize the employment of children in the case of musical, theater, or other performances, as well as for the production of a motion picture, but the authorization may only be granted for a particular artistic, scientific, or educational purpose.

At the age of 12 years, children may be given light and occasional duties in the family business, and small deliveries. However, their hours of work may not exceed two hours daily. Work on Sundays and holidays as well as night work during the hours of eight o’clock in the evening to eight o’clock in the morning is prohibited. Public authorities strictly supervise and enforce the prohibition of child labor.

*Adolescents*

Adolescents are individuals older than 15 years but less than 18 years of age, or less than 19 years of age for the purpose of an apprenticeship or similar relationship. The working hours of an adolescent may not exceed eight hours daily, or 40 hours per week. An increase of the daily hours of work to nine hours may only be done by way of collective agreement. Legally required attendance at a trade school should be considered as time worked.

There should be a rest period of at least one-half hour after a period of work of 4.5 hours. The daily period of rest after work should amount to at least 12 hours, and the nightly rest should be from eight o’clock in the evening to six o’clock in the morning. The weekend should be at least 43 hours in duration and should include the Sunday.

However, exceptions from these rules are found in collective agreements and are subject to the consent of the Youth Office concerned. Violations of these rules are subject to administrative penalties by way of fine or imprisonment, and repeat offenders may be prohibited from employing adolescents.

Adolescents below 16 years of age or those in an apprenticeship or similar relationship may not perform work remunerated by incentive pay. Work which is connected with special risks to the adolescent’s health or morality may not be assigned. At the commencement of employment, adolescents should be especially reminded of the risk of accidents and instructed accordingly. An adolescent who is in an apprenticeship or similar relationship should be paid an
apprentice’s remuneration. The amount of such remuneration is determined by agreement in the apprenticeship contract, in the absence of the same being set by collective agreement.

The apprenticeship is based on a contract made for a specific term. Its unilateral termination by the person entitled to provide the instructions is required to be in writing and is valid only if one of the statutory grounds for termination provided by law24 applies.

The apprentice also may terminate the apprenticeship by reason of one of the statutory grounds. The termination (as well as the guardian’s consent if the apprentice is less than 18 years of age) should be in writing to be valid.

**Disabled Persons**

All employers with 25 or more employees within Austria are required to employ, for each 25 employees, at least one special-status disabled person. This refers to an Austrian citizen whose earning capacity is reduced by at least fifty per cent by reason of injury to his health.

The employer should pay special consideration to the state of health of the disabled person and may be required to provide special installations in relation to such employment. If the employer fails to employ the required number of disabled persons, he is required to pay an equalization payment in an amount determined by the state Disabled Persons Office.25 Currently, the compensation rate (Ausgleichstaxe) is EUR 223.

Handicapped persons enjoy special protection against termination if their work relationship has lasted for more than six months. Their dismissal is legally ineffective if not permitted by the Handicapped Persons Board (Behindertenausschuss) after a hearing of the staff committee.

At least four weeks’ advance notice of termination should be given, but the minimum cancellation period will be longer if the law or a collective agreement so provides, which happens frequently. In exceptional cases, the Handicapped Persons Board also may give consent *ex post facto* to the extent that the case involves special circumstances approximating grounds for cancellation.

Consent may be granted after the notice of termination has been provided if there are special circumstances, such as lack of knowledge on the part of the employer regarding the fact of the disability.

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24 These grounds include the commission of a criminal offense, physical or substantial verbal attack against the instructor, repeated delinquency with respect to the duties of the apprentice despite warning, violating business secrets, leaving the place of instruction, or inability to learn the trade concerned.

25 Disabled Employees’ Act (BGBl Number 1970/22, as amended), s 9.
A dismissal without notice may only take place for cause. In the absence of a substantial reason, the notice of dismissal is not effective in law. Such a dismissal does not require the consent of the Handicapped Persons Board.

**Older Employees**

The law pays special consideration, through provisions regarding anticipated layoffs, to the special difficulties of older employees regarding reintegration into working life.

**Collective Bargaining and Workers' Participation in Management**

**Collective Bargaining**

*In General*

Individual employment law regulates the legal relationships between individual employees and employers, while collective labor law consists of norms regulating the legal position of associations (e.g., chambers, unions, employer organizations, works councils) in the employment law context, their legal relationships between each other, and their specific entitlements in the area of employment.

**Collective Agreement**

Collective agreements are concluded between the representatives of employers and employees and secure for the employees certain minimum wages and minimum conditions of work without State interference. The provisions of a collective agreement provide social protection to employees and cannot be avoided by individual agreement. The legal capacity to conclude collective agreements is granted to associations, including unions, either by the Federal Conciliation Office or by statute.

The subject matter dealt with by collective agreement is decided by the parties, if a minimum content is not prescribed by law. The collective agreement should be in writing in order to be valid. All collective agreements should be deposited with the Federal Ministry of Labor, Social Affairs, and Consumer Protection. The Federal Minister should publish the fact of the conclusion of a collective agreement in the *Official Gazette*. The provisions of a collective agreement may be divided into the contractual part and the normative part.

The contractual part regulates the legal relationship between the parties and gives rise to their rights and obligations. The parties undertake to actually carry out the provisions agreed upon (duty of execution) and to work toward achieving compliance with the collective agreement on the part of their members (duty to influence).

During the term of the collective agreement, the parties are not allowed to engage in or support a labor dispute directed at the amendment of the agreement.
(duty to maintain labor peace). The following subject matters of the collective agreement are determined by statute to have a normative character and thus compulsory effect:

Content norms, which relate to rights and obligations of the employer and the employee that typically arise out of the employment relationship (such as provisions on remuneration, working hours, vacation, and termination);

• Social norms, which prevent or mitigate disadvantages to the employees in case of layoffs or shutdown of the business;

• Labor constitution norms, which are not usual since labor constitution matters have been exhaustively regulated by statute in principle;

• Norms regarding common institutions, such as funds for maintenance or vacation and associations for continuing education; and

• Other norms which the parties are statutorily entitled to create.

Restrictions and Sphere of Operation of Collective Agreements

The parties’ freedom to contract is restricted by mandatory statutory provisions and by basic rights guaranteed by the Constitution. Collective agreement provisions contrary to law and good morals are always void.

The normative application of the collective agreement exists only within a jurisdiction determined by reference to time, geographic area, and a defined group of persons and occupations. It includes the parties pertaining to the collective agreement, i.e., employers and employees who are association members of one of the parties to the collective agreement.

However, employees who are not members of the employees’ association which is party to the collective agreement also are bound thereby, so long as they are employed by an employer subject to the collective agreement.

Within its jurisdiction, the collective agreement applies in the same manner as a statutory provision in the substantive sense. Its application does not require an agreement of the parties and its normative effect commences automatically with its effective date.

However, except as otherwise provided by the collective agreement, all provisions of an employment contract or a works agreement which are more favorable to the employees have preference over the collective agreement (preferential treatment principle).

The parties are authorized by statute\(^\text{26}\) to exclude the possibility of special agreements, i.e., to provide their norms with absolute binding effect for the uniformity of working conditions. Thus, the preferential treatment principle may be displaced.

\(^{26}\) Labor Constitution Act, s 3(1).
**Termination of Collective Agreement**

Collective agreements may be terminated effective the last day of any calendar month upon three months’ notice in writing, but at the earliest after the collective agreement has been in force for one year. However, the parties may agree on different termination conditions or on a specific term so long as the notice is in writing.

If an association loses the capacity to conclude collective agreements, then an agreement concluded by it terminates upon the publication of the loss of capacity in the *Official Gazette*. Collective agreements also may be terminated by agreement and for cause to be determined with reference to economic considerations.

A collective agreement still has legal effect after its expiration or termination. However, its provisions are only non-mandatory in nature. The application of an expired collective agreement extends only to employment relationships covered immediately prior to its expiration.

Thus, the termination of a collective agreement does not become immediately effective as regards the employment relationships then within its jurisdiction. The after-effect can only be avoided by new individual agreements, but the employer cannot worsen conditions of employment by such means.

If a collective agreement expires and another applies to the same enterprise, the latter agreement’s outsider effect commences to apply, thereby excluding the after-effect of the expired agreement. If the employer and the employee are no longer within the jurisdiction of a collective agreement, then no after-effect applies.

**Subsidiary Forms of Collective Agreements**

The legal effect of a collective agreement may be extended by Charter Declaration (*Satzung*) to employment relationships in branches not covered by collective agreement. The Charter Declaration is issued by the Federal Conciliation Office (*Bundeseinigungsamt*) at the application of a party to the relevant collective agreement.

Charter Declarations may only issue with respect to collective agreements that: (a) are in force; (b) are of significant effect, that is, they should apply to a large number of employment relationships; and (c) include employment relationships which are substantially equal to those of the occupational or business branch to which the Charter Declaration is to extend.

The provisions of Charter Declarations which have been duly published are of direct binding effect, unless a more favorable individual agreement has been made with an employee. However, they also may be absolutely mandatory if the collective agreement to which they relate so provides.

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27 Labor Constitution Act, s 17(1).
In principle, a collective agreement terminates the effect of a Charter Declaration within the former’s jurisdiction. The Charter Declaration itself does not have any after-effect. Its effect is only to extend the application of an existing collective agreement to other branches of the economy. Thus, it does not change the content of the collective agreement and it expires with the collective agreement on which it is based.

The Federal Conciliation Office should fix, upon application of an employees’ association having capacity to conclude collective agreements, the minimum wages and minimum amounts for compensation of expenses, if these are not provided for by collective agreement or Charter Declaration.

The minimum wage tariff is directly binding, and also is capable of having an after-effect, which is terminated by individual agreement or upon the conclusion of a collective agreement or a new Charter Declaration, without regard to the preferential treatment principle.

**Workers’ Participation in Management**

*In General*

The existence of a works council is a precondition to participation in management according to labor constitution law. It is the task of the works council to further employees’ interests in economic, social, cultural, and health matters within the enterprise, while it is the purpose of labor constitution law to achieve a reconciliation of interests for the benefit of employees and the enterprise.28

The employees’ representatives are called on to participate in the making of certain decisions concerning the enterprise or plant. Except for internal matters, the staff representatives are not entitled to interfere with the management or course of the enterprise by giving independent instructions or otherwise.

*Forms of Co-Management*

Under the law, co-management may be of two forms. Compulsory co-determination without legal recourse allows the works council to massively interfere with the management authority of the enterprise owner. Here, the owner requires the consent of the works council to be legally entitled to implement certain measures (e.g., introduction of disciplinary rules, personnel questionnaires, controlling measures affecting human dignity, incentive pay, and disciplinary measures).

The owner does not have any legal recourse to court or the Arbitration Board (Schlichtungsstelle) against the refusal of consent to implement these measures. In enforceable co-determination, such as the introduction of a personnel information system or transfer of employees, it is possible to replace the consent

28 Labor Constitution Act, s 39.
refused by the works council with an order from the Arbitration Board or the court.

The co-determination of the works council may consist of rights of information, supervision, and consultation, but also may take the form of co-management as well as rights of objection and consent.

**General Co-Determination Rights**

The works council is called upon to ensure that the legal provisions regarding the employees of the enterprise are observed. The owner of the enterprise is required to hear the works council upon demand in all matters affecting the employees, and to provide information to the works council regarding all matters affecting the economic, social, cultural, or health interests of the employees.

The owner is required to jointly consult with the works council at least quarterly, and monthly upon demand of the works council, on current affairs, general management issues, and the shaping of employment relationships. He also should inform the works council about important matters. The works council should be supplied with records necessary for the consultation.

**Personnel Matters**

Individual decisions as to personnel and general personnel matters include the hiring of employees, transfer of employees, promotions, and termination of the employment relationship.

Moreover, the works council has co-determination rights concerning the fixing of incentive pay in individual cases, and regarding disciplinary matters. The staff representatives also have information and consultation rights in case of the appointment of a manager of the technical safety service, as well as in relation to the awarding of apartments to employees.

29 Labor Constitution Act, ss 98 and 99. For example, information rights regarding future personnel needs, plant personnel matters such as hiring, and the right to make proposals concerning the posting of a vacant position.

30 Labor Constitution Act, s 101. In particular, information and consulting rights in case of a permanent transfer of an employee to another position. If the transfer is connected with lower pay or less favorable working conditions, then the consent of the works council is required.

31 Labor Constitution Act, s 104. In particular, the right of information and consultation.

32 Labor Constitution Act, ss 105–107. In particular, information rights and a right of objection in the case of termination and dismissal.

33 Labor Constitution Act, s 100. If no agreement is reached between the owner and the employee concerning the amount of the incentive pay, then the determination thereof requires the consent of the works council to be legally effective. This co-determination right is mandatory, without legal recourse.

34 Labor Constitution Act, s 102. In particular, right of consent of the works council, which is a mandatory co-determination right without legal recourse.
Social Matters

The works council has co-determination rights in social matters concerning vocational training and courses of instruction offered in the enterprise. Specifically, these rights include:

- Rights of information and consultation concerning the planning of such measures.
- A joint non-mandatory co-determination right concerning the planning, establishment, organization, and termination of these facilities.
- A joint enforceable co-determination right concerning the administration and a right of objection against the intended dissolution of the facility, if such is not in accordance with the grounds of dissolution provided by the works agreement or if a reconciliation of interests would favor the continuation of the vocational training or course of instruction in the enterprise.

The works council has similar co-determination rights in matters relating to welfare facilities maintained by the business. It also has co-determination rights in the setting of general rules of conduct affecting the behavior of the employees in the enterprise, and certain matters relating to working hours.

The works council also has co-determination rights in matters relating to the modalities for the accounting for wages and payment thereof, the determination of provisions on the use of facilities and equipment, the creation of a list of measures regarding the consequences of a restriction of operations or shutdown of the enterprise or part thereof, and the implementation of measures for the protection of night shift workers. If an agreement between the enterprise owner and the works council cannot be achieved with respect to these matters, the Arbitration Board decides upon application of one of the parties.

Economic Co-Determination

The most important form of co-determination in economic matters is the employees’ participation in supervisory boards of corporations and a right of objection, without sanction, on the part of the staff representatives against management measures. The law further provides rights of information, consultation, and intervention collateral thereto.

Participation on the supervisory board is contemplated in the case of stock corporations, limited-liability corporations, mutual insurance associations, savings banks, and cooperatives. Special provisions exist for limited partnerships consisting of a limited-liability corporation and partners, and for the parent corporation of a corporate group.

The right to participation can only be invoked if a supervisory board exists or has to be established according to the legal provisions that apply to the respective organization. The nature of such participation consists of the staff representatives providing one-third of the members of the supervisory board,
thus allowing them to participate in matters concerning rights of supervision and control in relation to the legality and commercial results of management.

The staff representatives also participate in decisions which are within the sole competency of the supervisory board, such as the appointment of managing directors, or which require its consent by virtue of statute, corporate bylaws, or resolution.

The staff representatives have the same rights and obligations as other supervisory board members appointed by the shareholders, but they fulfill their duties without remuneration. The appointment or removal of a managing director or the election of a supervisory board chairman or his first deputy requires the majority of the entire supervisory board and the majority of the directors appointed by the shareholders to be valid.

If supervisory board powers are delegated to executive committees, then the staff representatives also should be represented in these committees and entitled to vote. However, this does not apply to committees dealing with the relationship between the corporation and the managing directors, such as negotiation of executive contracts. The functions of a staff representative on the supervisory board terminate upon his resignation, and automatically in the case of loss of the works council mandate.

The works council of enterprises permanently employing more than 200 employees is entitled to object against changes to the enterprise and other economic measures resulting in material disadvantages to the employees, within three days of being informed thereof. Objections to the intended shutdown of the enterprise suspend the operation of such measure for four weeks following notice.

If no agreement is reached between the enterprise owner and the works council within one week following the objection, then any of the parties may apply for conciliation proceedings. An award can only be made with the parties’ prior written consent. In enterprises with more than 400 permanent employees, the works council is entitled to call on the state economic commission at the third stage of the proceeding.

As a further economic co-determination right, the works council has a general right of information concerning economic issues such as financial situation, planned investments, and status of orders. The right to receive financial statements is limited to banks, insurance corporations, and other enterprises with more than 70 employees. Further, the works council should be advised of intended mass layoffs and changes to the enterprise.

35 Labor Constitution Act, s 109(1). These include restriction or shutdown of operations or parts thereof, mergers, change of the legal form or the distribution of ownership of the enterprise, introduction of new methods of work, and measures for the rationalization or automation of material significance.
To ensure the unimpeded realization of certain protected goals of an enterprise or business, the extent of co-determination rights is limited. Such protection is accorded to certain enterprises with direct political, scientific, educational, or charitable goals.

_Works Agreement in General_

The works agreement is considered to be the most important instrument of co-determination. It is an agreement between the enterprise owner and a staff representative body with the capacity to conclude a works agreement (i.e., works council, works committee, or corporate group works council). It should be in written form to be binding, and may cover the subjects provided by statute or collective agreement.\(^{36}\)

Works agreements may be necessary, enforceable, or facultative. The introduction of operational disciplinary regulations and/or personnel questionnaires, arrangements for inspection, and piecework wages should be carried out in the form of a necessary works agreement. These measures cannot apply at all to the proprietor of a business without the accord of the works council. Such works agreements may be terminated at any time by any of the parties without observing a notice period.

In accordance with the Labor Constitution Act, certain measures require the accord of the works council. A decision rendered by an Arbitration Board may be substituted for such accord. Termination is not possible, and dissolution can only be effected by mutual accord or by the Arbitration Board.

Enforceable works agreements are regulated by pertinent provisions of the Labor Constitution Act, covering administrative rules on worker comportment, working hours, manner of settling accounts, and employee council participation in advanced training and welfare plans.

The proprietor of the business orders the measures, to which the employee council may object. In case of non-agreement, the Arbitration Board resolves the matter. Enforceability only comes into effect if the collective bargaining agreement or the articles of association contains no applicable regulations.

Facultative or voluntary works agreements are concluded exclusively by mutual accord between the two parties, and cover the allocation of factory-owned flats, accident prevention, profit-sharing, or company pension benefits. The publication of a works agreement is essential to its normative application. The owner or the works council should post the works agreement or make it otherwise available within the enterprise. Its contractual provisions become effective on the date as determined by the parties.

\(^{36}\) Labor Constitution Act, s 29.
Contents of Works Agreements

Matters that may be regulated by a works agreement are set by statute or collective agreement. If a subject matter is eliminated due to an amendment of the statute or collective agreement, then the works agreement dependent thereon expires without after-effect. The same applies if the enterprise ceases to be within the sphere of operation of a collective agreement. Matters that may be regulated by works agreement include the following:

- Employee safety;
- Sickness and accident, particularly the amount of remuneration and the duration of the claim to continued payment of remuneration;
- Pensions and retirement allowances;
- Issues relating to remuneration;
- Working hours; and
- Vacation.

Sphere of Operation of Works Agreements

The jurisdiction of the works agreement results from the statutorily defined jurisdiction of the works council concerned, and the provisions of the agreement. Managerial employees are not within its jurisdiction. The provisions of the normative part of a works agreement are directly binding.

On the other hand, the contractual part of a works agreement only has legal effect between its parties. Works agreements cannot be terminated nor limited by individual agreements. Provisions in individual agreements are only valid insofar as the works agreement does not regulate the respective subject matter or the provisions of the individual agreement are more favorable to the employee.

Works agreements violating mandatory statutory provisions are absolutely void. Terms of a works agreement cannot succeed in the face of provisions of a collective agreement which are absolutely binding.

Termination and After-Effect of Works Agreements

Works agreements may be terminated by agreement. Either party may terminate the agreement for cause if continuation thereof would be unreasonable, and no notice period is necessary in such case. However, the notice of termination should be in writing. If the subject matter of the works agreement ceases to exist, such as in case of the shutdown of the enterprise, then the agreement expires.

The termination of the works agreement causes the expiration of all contractual obligations, as well as its normative part. Voluntary works agreements that have been regularly terminated involve a so-called after-effect, while mandatory works agreements do not entail any after-effect only in case of regular termination. Enforceable works agreements have no after-effect. New
employees are not covered by the after-effect, and the after-effect is terminated
by a subsequent works agreement or individual agreement.

**Health and Safety Protection in the Workplace**

**Employee Safety**

*In General*

Employee safety law contains a body of protective rules providing measures for the protection of the life and health of employees in connection with their occupational activities, and to ensure protection of morality as may be required by reason of age and/or sex of an employee.

It includes the establishment of ergonomical work processes and working conditions in accordance with general technical and medical standards and requirements of industrial hygiene and work physiology.

**Employer’s Duties**

Each employer is required to provide, at his expense, notice of risks in connection with the work and to ensure that the corresponding safety precautions are observed by his employees. The employees are equally under obligation to use the required safety precautions and to conduct themselves in a manner so as not to endanger their co-employees.

The Employee Safety Act (*ArbeitnehmerInnenschutzgesetz*)\(^{37}\) contains norms for the safety standards of buildings, rooms, furnishings, equipment, and conditions of work. For workplaces where the employer is not present, a suitable employee should be appointed to ensure the execution and maintenance of measures necessary for the protection of employees (safety delegate).

In an undertaking with more than fifty employees, special safety representatives should be appointed, while a technical safety service with specially trained personnel under the direction of a safety technician, and medical supervision under the direction of a medical doctor, may have to be instituted.

**Labor Inspection Offices**

Special administrative authorities called Labor Inspection Offices are responsible for the supervision and maintenance of employee safety legislation. These are supervised by the Central Labor Inspection Office of the Federal Ministry for Labor, Social Affairs, and Consumer Protection.

In fulfillment of their duties, labor inspectors have a right of entry, inspection, investigation, information, examination, and review of records. If the Labor Inspection Office determines that there is a violation of an employee safety

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\(^{37}\) BGBI Number 1994/450, as amended.
provision, it may ensure compliance through consultation with employees and the employer, or it may proceed with enforcement action.

If the violation is a threat to the life or health of employees, then the labor inspector may issue immediate official orders. Non-observance of employee safety provisions also may be punished by an administrative fine of up to EUR 7,260, and the second violation with a fine of up to EUR 14,530.

**Health Insurance**

*Coverage*

The Austrian system of health insurance provides for the eventuality that an employee is, by reason of a social risk such as illness, unable to fulfill his obligations arising from the employment contract. Health insurance delivers or finances the necessary healthcare and replaces loss of income due to illness, as well as the cost of continued payment of remuneration on the part of the employer. The reasons for the illness are not relevant with respect to the insurer’s liability, and the amount of the insurance benefits does not depend on the duration of the insurance coverage.

Health insurance coverage arises by operation of law. The employee has the benefit of coverage upon commencement of employment, regardless of whether or not the employer has carried out the obligation of reporting the same. The health insurance system does make allowances for various conditions of work and the risks inherent in different types of work, but is based on a set of uniform principles.

*Benefits*

The social insurance carrier provides the insured with lump sum or continued payments or makes available to him services or benefits in kind, such as healthcare treatment. The most important benefits include medical treatment (such as medical doctor, drugs, and healing aids) and institutional and home care.

Another benefit is sick pay, which provides partial compensation for the loss of income caused by the inability to work and is paid for a maximum of 26 weeks per event. Sickness insurance further provides numerous measures and financial benefits for the maintenance of health and prevention of disease.

**Accident Insurance**

*In General*

Accident insurance provides no-fault benefits to rehabilitate injured employees medically, occupationally, and socially with the aid of a multiple-layered benefit system financed by employers’ contributions.
It is not only the state of health of the injured person, but also whether his return to work after the accident or illness can reasonably be expected. Inability to work is where the injured person is unable to do the work carried out by him immediately prior to becoming disabled or sick, or if he can only do so at the risk of worsening the state of his health in the foreseeable future. The questions of necessary retraining or the reasonableness of a potential loss of income are the main issues regarding the goal of comprehensive rehabilitation.

Special regard should be given to the age and flexibility that may be reasonably expected with respect to retraining and re-adaptation. The degree of disability also is a key factor. Accident insurance covers the insured person in the role of wage-earner, school or university student, and those who suffer an accident in the course of voluntarily coming to the aid of an accident victim. The spare time of the insured person is outside the ambit of accident insurance.

**Insured Risks**

Accident insurance insures against work-related accidents and occupational diseases. In contrast to sickness insurance, accident insurance only provides coverage in specifically defined circumstances. It is a precondition to being entitled to benefits that an accident, i.e., an event limited in duration causing a bodily injury, occurs. The accident should have occurred in connection with risks to which the insured is exposed in connection with his work or occupation.

The insured is primarily protected with respect to his immediate work activities, but he also enjoys insurance coverage in areas only indirectly related to work where provided by statute, such as travel to and from work, participation in courses and seminars, and business travel abroad.

An occupational disease may be one of those diseases exhaustively listed by statute for specific occupational groups which is caused by an activity carried out in the context of employment. It also may be shown to exist on the basis of certain scientific knowledge that the disease concerned has been caused exclusively or primarily through emissions or radiation in the course of an insured activity.

**Benefits**

Benefits provided by accident insurance include benefits in kind, and monetary benefits such as family and daily allowance, special support, transitional payments, disability payments, disability pension, benefits to dependents, contribution to funeral expenses, widow’s and widower’s pension, orphan’s pension, pension for parents and siblings, and widow’s and widower’s assistance. Benefits in kind include healthcare treatment relating to accidents, healing aids, and rehabilitation measures with respect to medical and occupational (retraining) needs, as well financial aid for the adaptation of a residence suitable for the needs of a disabled person.
The base for calculating monetary benefits is the contribution base for the purpose of social insurance, which in turn is defined by statute, with reference to taxable income. Family and daily allowance benefits are identical to those provided under sickness insurance. In case of serious and long-term injuries, accident insurance provides voluntary financial support in an amount not fixed by law, for the duration of the treatment of the accidental injuries.

For the duration of training in the context of rehabilitation, the victim is granted a periodic allowance. Disability payments are to compensate for loss of income for the duration of accident-related inability to work. The disability pension fulfills the same purpose as disability payments, but can only be claimed if the extent of the disability amounts to at least 20 per cent, and fifty per cent in case of occupational disease, if it lasts for at least three months. If the duration and degree of disability by reason of the accident cannot be predicted in advance, an interim pension is granted, which may become a permanent pension after two years.

In order to provide immediate financial support without the usual bureaucratic delay, the interim pension also may be made available by way of a lump sum payment or disability payments. Accident insurance also provides further benefits if preconditions are met, such as subsidies for children, personal care, and in case of destitution.

Benefits to dependents are only granted if the accident caused death, even if death is not immediate, while the funeral expense benefit is available to the person who paid the costs of the funeral.

Widows and widowers are entitled to a pension. Benefits also can be paid to former spouses, i.e., persons whose marriage to the insured has been declared void or was dissolved by divorce, if the deceased insured was at the time of death required to pay spousal support by reason of a judicial settlement, judgment, or an agreement made prior to dissolution of the marriage.

No pension is payable if the marriage was only concluded after occurrence of the event insured against and death occurred within the first year of marriage. In case of remarriage, the entitlement of the former spouse to a pension terminates, but a lump sum payment is due in such event. Dependent children, parents, grandparents, and siblings of the insured are entitled to a pension if the insured primarily provided for their maintenance, while assistance is granted to widows and widowers whose spouses suffered serious disability but whose death was not the consequence of a work-related accident.

**Dispute Settlement**

It is not necessary to differentiate between union members and non-union member employees in employment law or proceedings before the Labor Court. In Austria, there is no mandatory union membership.
Outside of the courts, there exist only a few dispute resolution mechanisms and their significance for the entire area of employment law is small.

Termination of Employment

In General

Both the employer and the employee may terminate the employment relationship, but with different preconditions.

The means of termination primarily depend on acts of the parties (i.e., termination with notice, dismissal for cause, consensual termination). However, certain events not tied to such acts also may cause termination, such as death of the employee or the expiration of time.

Manner of Termination

In General

Whether the employment relationship was entered into for a definite or an indefinite term is of prime importance. The following grounds of termination apply to both types of employment relationships: (a) termination by consent; (b) death of the employee; (c) termination in the case of the employer’s insolvency; and (d) early termination for cause (substantial grounds) by the employer or the employee.

If the employment relationship was entered into for a definite term, it ends with the expiration of the period agreed upon. A prior termination without cause is only available where the term exceeds five years. If circumstances occur which make the continuation of employment unreasonable, then it may be terminated for cause on the part of the employer or the employee.

Employment for an indefinite term usually ends through a regular notice of termination. A declaration to terminate an employment relationship should be made in such manner that it can be clearly determined if the party terminating intends to do so with immediate effect, or only after the expiration of a period of notice.

Termination by Agreement

It also is permissible to terminate by agreement of both parties. Termination by agreement is considered a contract. This manner of termination is not specially provided for by law, thus the general provisions for termination of contracts provided by the Civil Code are applicable. In principle, termination by agreement is permissible at any time.

38 Civil Code, s 1158(3).
If the employee has, prior to dissolution of the contract, demanded consultation with the works council, then a termination by agreement cannot be agreed upon in the next two working days.\textsuperscript{39} Written notice within one week is required to rely on the invalidity of such an agreement. Legal action relating to the termination should be commenced within three months. Even in the case of termination by consent, the employee is entitled to certain rights arising from the termination, such as severance pay and compensation for unused vacation time.

As a general rule, there are no form requirements for termination by consent. Only in the case of persons enjoying special protection, such as minors, pregnant employees, apprentices, or employees on military leave, is the employee’s or guardian’s consent required in writing. A certificate from court or the Workers’ Chamber also may be required, showing that the employee concerned had been advised of his rights regarding the termination.

\textit{Death}

The death of the employee always terminates the employment relationship, but the employer’s death causes a termination only where the employer also was required to personally fulfill duties (i.e., apprenticeship), and where the employee was required to provide personal services to the employer (i.e., care services).

Generally, the employment relationship is not terminated by the death of the employer, since his heir steps into his position by way of universal succession.

\textit{Insolvency}

The bankruptcy of a party to the employment relationship does not terminate the same automatically, but the Bankruptcy Rules\textsuperscript{40} provide additional possibilities for terminating employment. If the employer becomes bankrupt and the employment has already commenced, then it may be terminated by the employee without notice within one month from commencement of bankruptcy proceedings. The commencement of bankruptcy proceedings is deemed to constitute cause.

However, the trustee in bankruptcy may only terminate in accordance with the notice provisions under the law, collective agreement or, in case of lawfully agreed shorter notice periods, individual agreement. The commencement of debt recomposition proceedings does not constitute a substantial ground for resignation. However, circumstances connected with the debt recomposition proceedings, such as non-payment or delayed payment of wages, may make the continuation of employment unreasonable and thus constitute cause.

The employer may terminate with the consent of the recomposition court. This consent may only be granted if the continuation of employment endangers the

\textsuperscript{39} Labor Constitution Act, s 104(a).
\textsuperscript{40} Bankruptcy Code (RGBI Number 1914/337, as amended), s 25.
agreement for debt recomposition, the successful completion of such agreement, or the continuation of the enterprise, and if the employee does not suffer any unreasonable harm thereby.

**Regular Termination with Notice**

*In General*

Termination with notice (without cause) is a unilateral declaration intended to terminate a contract of indefinite duration at a defined point in time, which should be received by the opposite party. The right to terminate is considered to be part of the freedom of contract, but is restricted by numerous provisions based on statute, collective agreement, works agreement, rules of service, or contract.

There exists a measure of general protection from termination under Section 105 of the Labor Constitution Act, but this is applicable only to employees in shops with five or more employees. Special protection from termination exists for shop stewards, mothers, persons performing compulsory military service and substitute military service, apprentices, janitors, contractual government employees, disabled persons, and war victims.

The notice of termination should clearly express the intention to terminate the employment relationship to be effective. Formal requirements with respect to termination notices only exist in special cases and are relatively rare. The termination notice is effective only upon receipt. The period of notice of termination is the period from the receipt of the notice and the end of employment. The date of termination is the point of time at which the employment is to end.

The Salaried Employees’ Act provides that the employer may terminate employment as of the end of each calendar quarter, in the absence of a different contractual provision more favorable to the employee. Thus, the dates for termination of salaried employees are 31 March, 30 June, 30 September, and 31 December. However, the respective 15 and last day of a month may be agreed as termination date.

The period of notice of termination should be six weeks, which increases with seniority of service up to five months. Section 1159(c) of the Civil Code provides that the period of termination should be equally long for the employee and the employer. However, if the parties have agreed on unequal periods of notice, the longer one applies.

The provisions of the Salaried Employees’ Act are different since employees are entitled to terminate as of the last day of every month by giving one months’ notice. However, it is valid to agree in advance on a longer notice period for the

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41 Salaried Employees’ Act (BGBI Number 1921/292, as amended), s 2(2).
employee up to six months, provided that the notice period for the employer is not shorter.

If employment was terminated with an insufficient period of notice or at an early effective date, then the employee continues to be entitled to claim his remuneration until the date at which the employment relationship would have ended if the proper period of notice for a proper termination date had been provided according to law.

Employment expenses which the employee did not have to expend during such period, and earnings which he realized therein or which he intentionally failed to realize, are deducted from such claim to the extent that pay in lieu of notice exceeds three months' remuneration.

**General Protection**

Protection against termination with notice is regulated by collective employment law, thus employees who are not employed in shops with at least five permanent employees entitled to vote in the election of shop stewards, and managerial employees, do not enjoy any protection against termination with notice. However, these employees may still be protected by way of collective or individual employment agreement, or by public policy consideration.

Prior to each termination of an employee, the employer should notify the works council, which may adopt a position with respect thereto within five working days. Within this period, the works council may require the employer to consult in respect of the intended termination, and may adopt one of the following positions:

- The works council expressly consents to the dismissal whereby a further objection, even on the part of the employee, is excluded. However, the employee may challenge the termination before the court if the employer’s motive contravened good morals.
- The works council expressly objects to the termination, allowing the possibility of challenging the termination upon demand of the affected employee within one week after the notice of termination. If it does not challenge the termination to which it objected, or withdraws its challenge without the consent of the person terminated despite his demand, then such person may challenge it himself.
- The works council does not take a position. In such case, its right of challenge ends, and only the terminated employee may, within one week upon receipt of the notice of termination, commence a challenge.

A notice of termination given prior to expiration of the five-day period is ineffective. Where an employee of a business which ought to but does not have a works council has been terminated, such employee is entitled to challenge the termination within one week. The grounds for challenging the termination include the following:
Motives for termination impugned by law, such as termination by reason of union or shop steward activities; and

A termination not “socially justified” and the individual concerned has been employed in the enterprise for at least six months. \(^{42}\)

**Special Protection**

The following classes of individuals have the benefit of special protection against termination: (a) members of the works council and other shop stewards; (b) pregnant women and mothers; (c) persons completing compulsory military service or civil alternative service; (d) apprentices; (e) janitors; (f) contractual government employees; and (g) handicapped persons and war victims.

The possibilities of terminating these persons are restricted to a few statutory grounds, and the effectiveness of such termination is dependent on the consent of the Labor Court. Members of the works council and their deputies are subject to special protection from termination from the acceptance of their mandate until three months after its expiration.

The effectiveness of their termination depends on the consent of the Labor Court, which is granted only in case of: (a) layoffs or shutdown, if no other work is available for them; (b) their inability to perform the work duties; (c) continued insubordination; and (d) special grounds, where continuation of employment cannot be reasonably expected of the employer due to serious disciplinary matters. Pregnant employees and mothers during the first four months after birth, and within four weeks after termination of parental leave if used, can only be effectively terminated in two cases:

- If the employer has terminated the employee without knowledge of her pregnancy, then such termination is only effective if the employee does not advise the employer of such fact within five days after the notice of termination; and
- In case of availability of one of the grounds exhaustively enumerated by statute, with the consent of the Labor Court.

Persons completing compulsory military service or alternative non-military service are subject to special protection against termination from the publication

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\(^{42}\) A termination is socially unjustified if it impedes the material interests of the employee, unless the owner of the enterprise demonstrates that the termination is justified by circumstances relating to the person of the employee which detrimentally affect employer interests. If a termination takes place due to economic grounds, the employer should first carry out a social comparison. Accordingly, a termination would be socially unjustified if a comparison showed that a termination will cause greater social hardship to the individual concerned than for other employees of the same enterprise and of the same occupational group, whose work the individual affected is able and willing to perform. Special regard should be given to older employees and the difficulties to be expected in relation to their reintegration into the working process.
of the general draft or service of notice of a special draft order, until one month
after the end of compulsory military or alternative service, if the employer is
advised of the service of the draft order within three working days.

A termination may only take place on statutory grounds and with the consent of
the Labor Court. A termination by reason of an impending draft to do military or
alternative service may be challenged according to Section 105(3) of the Labor
Constitution Act.

A contract of apprenticeship may only be terminated by agreement or by reason
of one of the statutory grounds for regular termination with notice or dismissal,
and otherwise only during the first three months of the apprenticeship.

A termination other than for cause is thus generally excluded, which also
generally applies to the three-month period after the end of the apprenticeship,
during which the employer is to keep the graduated apprentice. The termination
of disabled persons and war victims requires the consent of the Disabled Persons
Committee, which decides after hearing the works council.

**Early Warning System**

The Federal Minister for Labor, Social Affairs, and Consumer Protection may
require employers to provide written notice of a planned substantial decrease in
the level of employment to the applicable Employment Office.

If the employer disregards this duty, the termination is ineffective. The employer
should notify the Employment Office if employees are to be laid off within 30
days in any of the following circumstances:

- At least five employees in the case of shops with 21 to 99 regular employees;
- At least five per cent of employees in the case of shops with 100 to 600
  regular employees;
- At least 30 employees in the case of a shop with more than 600 regular
  employees; or
- At least five employees older than 50 years.

The notice of the intended termination should be provided at least 30 days
before the first notice of termination is given.

**Constructive Dismissal**

*In General*

An employment relationship concluded for a definite term may be terminated by
either party for cause (substantial grounds) prior to its expiration and otherwise
without providing any notice period.  

43 Salaried Employees’ Act, s 25.
A termination without notice that is initiated by the employer is called a “dismissal”, and “resignation” when initiated by the employee. There are no specific form requirements respecting dismissal and termination, but notice of dismissal or resignation should be given to the other party. Upon receipt of notice, the employment relationship is immediately terminated.

**Grounds**

Resignation may be for the following grounds: (a) the impossibility of continuing work without damage to health; (b) non-payment of wages or violation of other important contractual provisions; and (c) criminal acts.

On the other hand, the following are statutory grounds for dismissal: (a) inability to work; (b) breach of trust and loss of confidence; (c) failure to provide service and insubordination; (d) criminal activities, threats, physical assaults, and insults; (e) consistent breach of duty; (f) betrayal of business secrets; (g) competing activities; and (h) fraud in relation to obtaining employment.

Many specific employment statutes provide for further grounds for termination relating to specific professions and types of businesses. Individual or collective agreement provisions adding grounds for dismissal or resignation to those provided by statute are not valid, but it is possible to define the statutory grounds with greater precision or to limit them in part.

However, an agreement that dismissal or resignation or both are not permitted at all would be contrary to the policy of the law. A ground for dismissal or resignation should be acted upon after a short period of consideration. Without the consent of the employee, a dismissal, once pronounced, cannot be reversed.

**General Protection against Dismissal**

The employer should notify the works council of any dismissal and should consult with the works council within three working days after notification. Although the consent of the works council is not a precondition for the validity of the dismissal, the question of a challenge of a dismissal is dependent on the position of the works council.

If the works council expressly consents within three working days, then a challenge is not possible. If the works council does not take a position, the employee can challenge the dismissal within one week at the Labor Court.

If the works council objects to the dismissal, then it may, on demand of the person dismissed, challenge the same within one week after dismissal. If it fails to challenge despite objecting, the right to challenge passes to the person dismissed. In shops which should but do not have a works council, the employee affected may challenge the termination. The challenge of the dismissal is
successful only if: (a) cause for dismissal does not exist; and (b) the preconditions for a challenge to dismissal are available.\footnote{Labor Constitution Act, s 105(4)–(6).}

**Special Protection against Dismissal**

Members of the works council and other shop stewards can only be dismissed with the consent of the Labor Court. The consent may only be granted in especially serious grounds. Consent to dismissal should be obtained in advance, and may be granted after the fact only in certain rare cases.

Women during pregnancy and four months after the birth can only be dismissed on the grounds enumerated by statute, such as being absent without leave, intoxication despite repeated caution, acts of violence, and consistent neglect of duty. A dismissal on grounds other than those enumerated by statute is ineffective. The consent of the Labor Court is a precondition to the validity of the dismissal.

Apprentices also may only be terminated on the grounds enumerated by statute, such as inability to learn the respective trade and being absent without leave. Similar provisions apply to persons completing compulsory military or alternative service, and the consent of the Labor Court also is a precondition to the validity of their dismissal.

Disabled persons and war victims are specially protected against dismissal by rendering ineffective in law a dismissal without sufficient cause. The intervention of the Handicapped Persons Board is not contemplated in the case of dismissal.

**Remuneration Claims upon Termination**

*In General*

If the dismissal is justified, the employee is entitled to remuneration, inclusive of pro rata special payments and compensation for the prorated vacation entitlement up to the time of the dismissal. The employee has a claim for pay in lieu of notice in case of an unjustified dismissal (termination compensation).

If the termination compensation exceeds three months’ salary, earnings from another employment relationship are applied to the excess in mitigation. In case of unjustified dismissal, vacation compensation for any vacation not yet used and the pro rata portion of special payments and any severance pay are to be paid.

**Compensation for Termination**

Compensation for termination consists of the remuneration which the employer should pay up to the end of the statutory period of notice of termination,
regardless of whether the employee continues to work until the date of termination or is put on leave by the employer.

It is calculated with reference to the prior remuneration obtained from the employer, including any lump sum payment for overtime, premiums, pro rata special payments, Christmas bonuses, and vacation premiums.

Termination compensation also is due in cases where the employee is dismissed without sufficient cause or where the employee prematurely resigns with cause. The same applies to vacation compensation and severance pay. In case of termination without the statutory period of notice, the termination compensation should be paid as damages for a period until the next statutorily provided date for termination.

Substitute Vacation Benefit

Should a work relationship cease before an employee has taken his vacation, he will be entitled to substitute vacation benefit (Urlaubsersatzleistung). Employees are not entitled to such benefit if they resign prematurely without good reason or if they give improper notice of termination in contravention of stipulated time limits.

Vacation entitlements from previous years which have not yet statutorily lapsed also should be dealt with by way of substitute vacation benefits, and without considering the method and manner by which the work relationship was terminated.

Severance Pay

As of 1 January 2003, the Employee Contingency Act (Mitarbeitervorsorgegesetz) is applicable to work relationships based on a contract under private law to adapt the old severance payment law to the requirements of the labor market. The severance payment law was altered from a benefit-oriented system to a contribution-oriented one.

The severance payment obligation has been outsourced to legally independent business contingency commissions (BCCs or Betriebliche Vorsorgekassen). The health insurance carrier collects the contributions and forwards them to the BCCs. Employee claims are thus directed to the BCCs.

Employers pay contributions for their employees as of the commencement of the work relationship, the first month being exempt from contributions. Apprenticeship periods are similarly taken into account and become effective in terms of severance payments. The contribution rate is 1.53 per cent of monthly gross salary.

45 BGBl Number 2002/100, as amended.
Employers should pay contributions during periods of compulsory military service, training service, civil alternative service by conscientious objectors, and periods during which employees receive post-natal or sickness benefits (Wochen- oder Krankengeld) in accordance with the General Social Insurance Act.

Contributions for the duration of a sabbatical, training leave of absence (Bildungskarenz), or family distress leave and payment of childcare benefits are borne by the Family Compensation Fund.

Each company is free to internally determine the BCC to which contributions are to be paid. In companies with a works council, the BCC is chosen through an enforceable works agreement (Betriebsvereinbarung).

If there is no works council, the employer makes the selection, but the employees may exercise influence over the decision and enforce it through the Arbitration Board. The employer, the works council or, in companies without a works council, one-third of all employees may demand a change of BCC.

Entitlement to severance payment applies to every type of termination of a work relationship. However, claims for payment exist only in cases of: (a) employer termination; (b) redundancy; (c) justified withdrawal; (d) consensual termination; (e) expiration of term; (f) employee termination (part-time employment); (g) withdrawal due to motherhood; and (h) termination and simultaneously claiming a pension under a statutory pension policy, where contributions have been paid for three years.

Nevertheless, payment can always be claimed if: (a) the initial year of eligibility for a premature old age pension under a statutory pension policy is reached upon termination of the work relationship; or (b) the employee has not been in a work relationship entailing contributions for at least five years. The amount of the severance payment claim is calculated from the total of accumulated capital minus administrative costs. Capital guarantees and investment revenues also are to be taken into account.

In case of an employee’s death, his heirs who are entitled to maintenance have a direct claim against the BCC for the entire sum saved. As a rule, severance payments are due two months after the assertion of a claim, where employees who are entitled to payments have the option of:

- Payment of the capital sum;
- Further investment until retirement;
- Assigning the severance payment sum to a new employer’s BCC;
- Transferring the sum as a one-time premium for a pension policy;
- Acquiring pension investment fund shares; or
- Transferring to a pension commission.
For work relationships which existed prior to 1 January 2003, arrangements can be made to change over to the new severance payment system, whereby:

- The severance payment entitlements acquired to date are transferred to the ECC, such that the work periods accumulated up to the time of the agreement are considered when calculating the three years of payment contributions; or
- The severance payment claim acquired is frozen, that is, the amount of monthly compensation payable is based on the entitlement at the time of transfer. The claim continues to be against the employer, but as of the time of the agreed transfer, contributions are paid to the BCC.

More favorable severance payment claims under a collective bargaining agreement or individual contract continue to exist and may similarly be transferred.

Security for Wages in Insolvency

Persons entitled to claim wages or salaries from an insolvent employer should apply for insolvency loss compensation (Insolvenz-Ausfallgeld) in writing within six months following the instigation of bankruptcy proceedings to the business office of the Insolvency Loss Compensation Fund Service GmbH (Geschäftsstelle der Insolvenz-Ausfallgeld-Fonds-Service GmbH).

Eligible persons include employees, their survivors, and their heirs. In general, claims for current emoluments may only be asserted if they have become due six months prior to the commencement of bankruptcy proceedings.

As a rule, emoluments following the commencement of bankruptcy proceedings are guaranteed up to the legal termination of the work relationship. Exceptions apply if a petition for instigating bankruptcy proceedings is refused or rejected.

Social Insurance

In General

The Austrian system of social insurance does not provide comprehensive protection covering all social risks. Coverage is provided only in sickness insurance, accident insurance, and pension insurance.

The insurance system is organized according to occupational groups (i.e., wage earners, salaried employees, self-employed, and civil servants), but generally provides a uniform level of benefits.

Pension Insurance

Pension insurance seeks to provide long-term benefits for old age retirement, in case of reduction of working capacity, and to grant financial support to dependents.
Generally, entitlement to pension benefits arises for men at 65 years of age and for women at 60 years of age. However, individuals with a long period of contributions are entitled to an early pension. In this case, the initial age for pension eligibility is 61.5 for men and 56.5 for women. The law allowing this kind of an early pension expires on 1 October 2017.

**Dependents’ Pensions**

A widow’s or widower’s pension is granted to the spouse or former spouse of the insured until remarriage or death. The actual income of survivors is accredited to pension benefits. The pension amounts to 60 per cent of that actually received by the deceased or, if the deceased had not yet received a pension, of an arbitrarily determined pension amount.

The children of the deceased insured are entitled to a pension of forty per cent of the widow’s and widower’s pension in the case of a half orphan, and 60 per cent for a full orphan. Pension insurance provides various allowances to cover additional needs of certain beneficiaries, such as minimum pension, children’s allowance, and destitution allowance. Insofar as a pension insurance beneficiary is not entitled to coverage from a health insurance carrier, pension insurance also provides health insurance coverage. Pension insurance also provides voluntary benefits such as care during recovery, convalescence homes, and health resort visits.

In the event of the insured risk of disability to work, pension insurance provides medical, occupational, and social measures for rehabilitation. If pension income and earned income coincide, the entitlement to part of the pension income is suspended while earned income is being received.

**Unemployment Insurance Benefits**

Almost all employees are insured in case of unemployment. Employees classified below the limit, i.e., on wages totaling EUR 366.33 and less per month, and public servants are exempt from compulsory insurance.

The administration of unemployment insurance is organizationally and financially integrated with the State Labor Market Administration. It is financed with contributions paid in equal shares by employers and employees.

A person who is not independently or dependently employed after termination of an insured employment relationship, and who is willing and capable of work, is considered unemployed. In the case of a first claim for unemployment insurance benefits, the law requires at least fifty-two insured weeks of employment during the past two years as a further precondition to payment.

Should a person apply for unemployment benefit prior to his 25th birthday, it is sufficient if he has been employed for 26 weeks within twelve months to qualify. Periods of employment in other European Economic Community (EEC)
countries are to be accredited. For each subsequent claim, 28 insured weeks during the last year are sufficient.

Unemployment benefits are composed of a base amount and a family premium. A family premium is payable if the insured has maintenance obligations to close family members. The base amount together with family premium may not amount to more than 80 per cent of the insured income. Unemployment insurance benefits are allowed for a maximum period of 20 weeks, which may be increased in case of long prior insured employment.46

Emergency Aid

Emergency aid is available to an unemployed person after expiration of unemployment insurance benefits if he is unable to provide for the necessities of life. The amount of emergency aid is between 75 and 100 per cent of unemployment insurance benefits and is allowed for the duration of the emergency.

Territorial Application

In general, all branches of social insurance operate within the territory of Austria. Coverage is not tied to citizenship but to employment within Austria, or, in the case of self-employment, to an Austrian-registered office of the undertaking.

However, coverage is provided in certain circumstances to individuals working abroad due to a strong inland connection relating to their work. On the other hand, coverage is sometimes not provided in cases of employment within Austria, if the relationship to another country is sufficiently strong.

To avoid the export of benefits, social insurance benefits are generally only made available during an individual’s presence in Austria, but numerous exceptions exist. If employees sent from another country are normally resident or domiciled inland, they are covered by the social insurance system. In case of non-independent workers, all social insurance contributions within the EU are taken into account for the acquisition and maintenance of benefit claims.

Bilateral agreements also exist with Canada, the United States, and Yugoslavia’s successor states which accord mutual recognition of periods of insurance coverage, the social insurance protection to dependents of traveling workers who remain in their home country, the protection afforded to traveling workers upon return to their home countries, and numerous other harmonizing rules aimed at unifying all periods of coverage earned.

46 Unemployed Insurance Act (Arbeitslosenversicherungsgesetz, BGBl Number 1977/609, as amended), ss 18 and 19.
Wages and Collateral Costs

Collateral Wage Expenses

The following are all the associated outlays\(^\text{47}\) payable by the employer for workers, expressed as percentages of regular earnings.

- 100 per cent as compensation for operational attendance time;
- 21.91 per cent as compensation for nonattendance time;
- 20.31 per cent as special payments;
- 43.60 per cent as social insurance contributions;
- 6.88 per cent as other costs; and
- 94.24 per cent as total ancillary costs.

The following shows all ancillary salary costs which are payable by employers for salaried employees, expressed as percentages of regular earnings:

- 100 per cent as compensation for operational attendance time;
- 21.91 per cent as compensation for nonattendance time: 21.91\%;
- 20.31 per cent as special payments;
- 43.88 per cent as social insurance contributions;
- 6.88 per cent as other costs; and
- 94.52 per cent as total ancillary costs.

Social Insurance Contributions

Health insurance, unemployment insurance, and pension insurance are financed with contributions from employers and employees. Only accident insurance is financed entirely by employer contributions. The following are the social insurance contributions as percentage of the general contribution base:

- For health insurance, 3.95 per cent is contributed by the worker and 3.70 per cent by his employer, or 3.82 per cent by the salaried employee and 3.83 by his employer;
- For accident insurance, 1.40 per cent is contributed by the employer;
- For pension insurance, 10.25 per cent is contributed by the worker or salaried employee and 12.55 per cent by his employer; and
- For unemployment insurance, the worker or salaried employee and his employer each contribute three per cent.

\(^{47}\) The following calculations were performed assisted by the calculator for ancillary wage costs at https://www.bmf.gv.at/service/Anwend/Steuerberech/Nebenkosten/Lohnnebenkostenberechnung.htm.
The employee receives gross pay from which income tax and the appropriate social security contributions are deducted. Associated employer outlays increased continuously from the beginning of the Second Republic in 1945 to 1990, from just over fifty per cent to 100 per cent, due to increasing social security benefits and the payment of “13th-and 14th-month” salaries, a phenomenon unique to Austria. The reason is a tax bonus for the thirteenth and fourteenth annual salary.

From 1990 to 2010, associated employer outlays stagnated at about 100 per cent. Economy experts do not anticipate any increase in such outlays in the future. Austria lies in the middle of the scale in terms of international comparison of associated employer outlays.

**Conclusion**

Future development of Austrian labor law will be increasingly influenced and determined by economic and social tendencies in Europe, and particularly in the countries of the EU. In the days of high economic growth in Austria (1960s and 1970s), labor law achieved a high standard of employees’ protection by international comparison.

The European integration, the opening of markets, the competitive pressures connected therewith, and socioeconomic changes in the countries of the former eastern bloc and Austria’s participation in the EU also are leading the labor sector to an adjustment toward a uniform European standard.

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48 In accordance with almost all collective agreements, employees receive salaries equal to double the normal amount as vacation pay on 1 July and as a Christmas bonus on 1 December.
Bulgaria

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Bulgaria

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Government Attitude toward Regulation of Employment

Bulgarian legislation is based on the civil law system. Employment relationships between individuals and employers are predominantly regulated by the Constitution, the international treaties to which the Republic of Bulgaria is a signatory and which have been ratified by the Parliament, domestic legislation, including the Labor Code as amended in March 2012, and various special laws and regulations, collective labor agreements, and internal rules, policies, and orders of employers.

The Labor Code sets the minimum standards for the employment relationship. The majority of its provisions (ie, on working hours, breaks, leave, labor discipline, information and consultation, duration, and termination of employment) are mandatory and may not be waived even with the consent of the employee. Any mutual understanding to that effect could result in a violation of the Labor Code and in the imposition of sanctions for the employer.

Legal Relationship between Employer and Employee

Employee

In General

The law does not define an “employee”, but the concept covers any individual who has entered into an employment contract with an employer.

The employment contract is a contract by virtue of which an individual provides his physical or mental exertion, professional expertise, and skills to perform a certain type of work defined in the job description in return for remuneration. This type of contract is governed by the Labor Code and a large number of regulations.

The Labor Code expressly stipulates that all relations between parties in connection with the giving of an individual’s labor should be regulated solely as employment relationships. On the other hand, a civil contract covers the provision of various services (ie, technical, advisory, or consultancy), fulfillment
of certain assignments, or accomplishment of certain tasks, and the remuneration received is tied up with the delivery of a certain result.

However, apart from the delivery of such result, the contractor is free to determine the remaining parameters himself (i.e., how to work, when to work, and what materials to use). These contracts are governed by the Contracts and Obligations Act, defining them as agreements between two or more persons aiming to create, settle, or terminate a legal relation between them. As a rule, the parties are free to negotiate the contents of such contracts. Individuals working under civil contracts are not subject to employment legislation.

The Labor Code explicitly requires an employment contract to be executed where the relationship between the parties features the characteristics of an employment relationship. The Executive Agency General Labor Inspection is empowered to exercise control over the observance of employment legislation in Bulgaria, and it can declare the existence of an employment relationship between the parties, even when they have entered into a civil contract.

**Managers and Key Employees**

The Commerce Act expressly allows commercial companies to enter into management contracts with their statutory managers (i.e., persons appointed to manage and represent the company and entered in the commercial registry as such).

Statutory managers working under management contracts are not employees and do not enjoy the general protection provided by the Labor Code. Companies also are free to conclude employment contracts, instead of management contracts, with such persons, although this is not recommended.

The Labor Code and the Commerce Act do not expressly regulate the status of other key or management employees, apart from statutory managers, and thus they are subject to the general rules. These individuals should enter into employment contracts with the same contents as for other employees.

The Labor Code does not differentiate between the types of severance payments, bonuses, or leaves, depending on the seniority of the employee. The minimum standards are set by the Labor Code, and employers may deviate from them only if this will result in providing more beneficial conditions to the employees.

Normally, the seniority of the position is recognized by the employer, who may be willing to offer increased severance payments, bonuses, or leaves at the conclusion of the employment contract or upon termination of the employment relationship.

**Part-Time Employees**

The Labor Code allows parties to enter into an employment contract for part of the statutory working hours, establishing the duration and allocation of these
working hours. There is no minimum number of hours in such cases, but the monthly working hours of part-time employees should be lower than other employees of the enterprise working full-time in identical or similar positions. Where there are no full-time employees, the comparison should be made between part-time employees and all remaining employees of the enterprise.

Part-time employees enjoy the same rights and obligations as full-time employees. Part-time employees may not be placed in a less favorable position solely because of their part-time employment compared to full-time employees of the enterprise in identical or similar positions, unless the law has made certain rights dependent on the duration of hours of actual work, length of service, or qualifications, among others.

An employer also could unilaterally establish part-time work for the entire enterprise or a part thereof in the case of reduction in the volume of work, for a period of up to three months during one calendar year, after advance coordination with the trade union organizations’ representatives and with the employees’ representatives. In such cases, the duration of the working time may not be less than half of the statutory period.

To create a possibility for transfer from full-time to part-time work or vice versa, the employer should:

- Consider employees’ requests for transfer from full-time to part-time work, regardless of whether said requests are for the same or another job, where such a possibility exists at the enterprise;
- Consider employees’ requests for transfer from part-time to full-time work or for an increase in the duration of the part-time work, should such a possibility present itself;
- Make available to employees, trade union organizations’ representatives, and employees’ representatives information regarding vacant full-time and part-time jobs and positions; and
- Take measures to facilitate access to part-time work at all levels of the enterprise, including skilled and managerial positions and, where possible, to facilitate the access of part-time employees to vocational training for enhancing career growth opportunities and occupational mobility.

Young Workers

Under the Labor Code, young workers are employees under the age of 18. The minimum age for employment under the Labor Code is 16 years.

Although the employment of younger persons is forbidden, persons aged 15 to 16 years may be employed in work which is light and not hazardous or harmful to their health and to their proper physical, mental, and moral development, and whose execution would not be detrimental to their regular attendance at school or to their participation in vocational guidance or training programs.
Girls of 14 years and boys of 13 years may be appointed to apprentice positions at circuses, and persons who have not attained the age of 15 years may be recruited for participation in the shooting of films, in the preparation and performance of theatrical and other productions under relaxed conditions, and in conformity with the requirements for their proper physical, mental, and moral development. The working conditions in such cases are determined by the Council of Ministers.

The Labor Code sets forth mandatory increased requirements regarding the conditions of employment of young workers, namely:

- Maximum duration of working hours under a main and additional employment contract;
- Reduced working hours;
- Restrictions regarding overtime and night work;
- Restrictions regarding the specific types of work that young workers may perform (i.e., they may not be engaged in work which is beyond their physical or psychological capacity or involving hazards which chronically affect human health in any other way whatsoever or involving exposure to radiation);
- Compulsory medical examination prior to the conclusion of the employment contract (employment of young workers should be expressly permitted by the Agency of Employment in advance) and regular medical examinations during the employment relationship; and
- Special requirements for breaks, longer paid annual leave, provision of information by the employer to young workers and their parents or curators on the potential risks at work and the measures taken to ensure health and safety at work, and increased protection in terms of health and safety at work, among others.

**Employer**

The Labor Code defines an employer as any individual, legal entity or a division thereof, or any other organizationally and economically self-contained entity, who independently hires employees under an employment relationship, including for work at home and remote work, and for commissioning to work at a user enterprise.

**Employment Contracts**

*In General*

Employment contracts should be concluded in writing and should specify as a statutory minimum:

- The identities of the parties, including a detailed description of the employer through corporate or other data, address, representatives, or unified identity code, among others;

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• The place where the work will be performed, which is usually the employer’s registered seat unless specifically agreed upon;
• The position and nature of the work to be performed;
• The date on which the employment contract is concluded and the date of commencement of employment;
• The duration of the contract;
• The paid holiday (basic and additional) to which the employee is entitled;
• The notice periods that parties should observe in case of termination of the employment contract;
• The base and additional salary, and the periodic basis for their payment; and
• The duration of the daily or weekly working hours.

The notice period for the termination of an employment contract of indefinite duration is 30 days, provided that the parties have not agreed on a longer period, but no longer than 3 months. The notice period for termination of a fixed-term employment contract is 3 months, but no longer than the remaining period of the contract.

The parties may agree to requirements other than the mandatory ones, but such requirements should be more beneficial to the employee and should not violate the minimum mandatory standards of the Labor Code.

The law does not require an employment contract to be executed in the Bulgarian language, but if there is litigation held in Bulgaria based on the contract, it should be translated into Bulgarian by a chartered interpreter.

Duration of Employment Contract

Employment contracts may be concluded for an indefinite duration or for a fixed term. An employment contract is deemed to be concluded for an indefinite duration, unless expressly agreed otherwise. An employment contract concluded for an indefinite duration may not be transformed into one for a fixed term, except where explicitly desired by the employee and stated so in writing.

Fixed-term contracts may only be concluded exceptionally in the following cases:

• For a certain period which may not be longer than three years, and which is for temporary, seasonal, or short-term work or activity, or with new employees entering companies that have been declared bankrupt or in the process of liquidation;
• For the completion of a certain work assignment;
• For the replacement of an absent employee (the contract should be concluded for the period of the employee’s absence);
• For work in a position which should be occupied after election (the contract should be concluded for the period until such election takes place);

• For a certain term of office, where such term is established for the respective body (the contract should be concluded for a period equal to the term of office); and

• By exception for work which is not temporary, seasonal, or short-term (the contract should be concluded for at least one year but for no more than three years). These exceptions include specific economic, technological, financial, market, and other objective reasons existing at the signing of the employment contract, necessitating its conclusion for a fixed term. These reasons should be specified in the contract.

Employment contracts for a period shorter than one year are allowed only upon written request of the employee, in which case contracts with the same employee and for the same work may be concluded only one more time provided that it is for a period of at least one year.

Fixed-term employment contracts that have been concluded in breach of the requirements of law are deemed to be employment contracts for an indefinite duration.

Employees working under a fixed-term employment contract enjoy the same rights and obligations as those working under contracts for an indefinite duration, unless the law has made certain rights dependent on the qualifications and acquired skills of the employees.

As far as possible, the employer should take measures to facilitate access by fixed-term employees to vocational training for enhancement of their skills, career development, and occupational mobility.

Temporary Agency Workers

Hiring of employees through enterprises or agencies providing temporary work is legally admissible only for the completion of a certain work assignment or for the replacement of an absent employee. The employment contract with such enterprise or agency should stipulate that the employee is to be commissioned for temporary work at a user undertaking, under its guidance and control.

The number of employees commissioned by an enterprise or agency providing temporary work at a user undertaking may not exceed 30 per cent of the total number of employees employed by such user undertaking.

The enterprise or agency providing temporary work may not require from the employee any fee for the assistance to start a job at the user undertaking or any fee upon the conclusion of an employment contract or the formation of an employment relationship with a user undertaking, either before, during, or after the assignment for which such worker is commissioned.
Enterprises or agencies providing temporary work should be registered with the Agency of Employment under terms and according to a procedure stipulated in the Encouragement of Employment Act.

**Expatriates**

According to the Law on the Entering into, Stay, and Exit from the Republic of Bulgaria of the Citizens of the European Union (EU) and the Members of Their Family, which entered into force on 1 January 2007, EU citizens may enter, stay in Bulgaria for up to three months, and then exit using only an identification card or passport. As of 1 January 2007, EU citizens are entitled to work in Bulgaria without having to obtain work permits.

In order to work and reside in Bulgaria, all other expatriates need to obtain (a) a work permit, (b) a type D visa, and (c) a residence permit issued by the Bulgarian authorities.

Citizens of certain countries (such as Australia, New Zealand, Canada, the United States, EU, Brazil, Mexico, and Argentina) may enter and reside in the country without a visa for a maximum period of 90 days within each 6-month period calculated from the date of the first entry. However, if it is likely that their stay will exceed this period, steps should be taken to obtain long-term residence permits.

The procedure for the issuance of work permits should be initiated by the employer prior to the expatriate’s entry into the territory of Bulgaria. The entire procedure takes at least a month, but may take longer if expatriates will not be occupying senior managerial positions.

The Encouragement of Employment Act provides that work permits are issued in the event that (a) the status of, development of, and public interest on the national labor market, in the opinion of the Agency of Employment, allow this, and (b) the overall number of expatriates working for the employer does not exceed 10 per cent of the average number of citizens, expatriates with the right to asylum, and expatriates with refugee status employed within the preceding 12 months. Since Bulgaria joined the EU, (b) is not applicable to expatriates who are citizens of EU and European Community countries.

The Agency of Employment may refuse the issuance of work permits on grounds explicitly provided by law, particularly:

- If the expatriate applying for a work permit has been sanctioned for unauthorized work in Bulgaria within a five-year period preceding the filing of the current application, or according to the documents attached to the current application, he has worked illegally in Bulgaria during a previous visit or at the moment of filing of the application;
- If the employer filing the documents for the issuance of a work permit has been sanctioned within the preceding two-year period for the employment of expatriates without work permits; or
• The employer has unilaterally dismissed Bulgarian nationals, expatriates with permanent residence permits, or expatriates with the right to asylum or with refugee status who are qualified to occupy vacant positions during the last three months.

For the issuance of each work permit, the employer should pay a fee amounting to BGN 600. Work permits are granted for a period not exceeding 12 months but may be renewed if the conditions for the grant of the work permit remain unchanged.

**Transfer of Undertakings**

The Labor Code complies with the European Acquired Rights Directive regarding the transfer of employees in case of reorganization of the employer. Under Article 123 of the Labor Code, the employment relationship will not be terminated in case of change of the employer due to:

• Merger of enterprises by way of incorporation;
• Merger of enterprises by way of acquisition;
• Distribution of the operations of one enterprise between several enterprises;
• Transfer of an autonomous part of one enterprise to another;
• Reorganization of the legal form of the enterprise;
• Change of the owner of the enterprise or of an autonomous part thereof;
• Delivery or transfer of the operations of the enterprise to another, including transfer of tangible assets; and
• Delivery of the enterprise or an autonomous part thereof for rent, on lease, or under concession.

Prior to effecting the change, the transferring and acquiring enterprises should inform the respective trade union representative and employee representatives of the change and the scheduled date of the transfer, the reasons for the change, the possible legal, economic, and social consequences of the change for the employees, and the measures to be undertaken with respect to the employees, including the performance of the obligations arising from employment relationships existing as of the date of the transfer.

The transferring enterprise should submit this information in writing at least two months prior to effecting the change. The acquiring enterprise should submit this information in due course, but no later than at least 2 months before its employees are directly affected by the change in employment conditions.

If any of the employers has planned changes with respect to the employees, timely discussions should be held and efforts made to reach an agreement with the trade union representatives and employee representatives regarding these
measures. If there are no trade unions in the enterprise, the information should be submitted to the respective employees.

In the transfer of a business, the rights and obligations of the transferring enterprise arising from employment relationships existing as of the date of the transfer are transferred to the acquiring enterprise. The acquiring enterprise is bound to take on the employee obligations which have originated before the change in the case of a merger or joining of enterprises and a change of the legal form of the enterprise. In other cases, the acquiring enterprise and the transferring enterprise are jointly liable for obligations to employees.

In case of the employer’s non-performance of the information and consultation procedure, the trade union or employee representatives may inform the Chief Labor Inspection Executive Agency of such violation. The employer is punishable through sanctions ranging from BGN 1,500 to BGN 5,000, while guilty officials of the employer are punishable through fines ranging from BGN 250 to BGN 1,000.

Legislation and case law are silent on the situation where the new employer is situated in another country and will not perform the transferred activities in Bulgaria (cross-border transfer of activities). The scope of effect of the Labor Code is confined to the territory of Bulgaria and to Bulgarian employees sent to work abroad by Bulgarian companies.

However, the Acquired Rights Directive applies to any transfer of business within the territorial scope of the Treaty. If the new employer will continue to carry on the transferred activities from a territory of a Member State which has implemented the Acquired Rights Directive, the Acquired Rights Directive may be applicable in such transfer of activities.

**Terms and Conditions of Employment**

**Remuneration**

The minimum wage levels are set by the Council of Ministers by a decree. As of 1 May 2012, the minimum monthly salary in Bulgaria is BGN 290 for normal working hours. Men and women have the right to equal pay when performing the same work or work to which equal value is attributed.

The Labor Code guarantees payment of a monthly salary of up to 60 per cent of an employee’s gross salary under the employment contract, but not less than the national minimum monthly salary, in case of *bona fide* performance of his obligations.

The difference between the guaranteed monthly salary and the salary actually agreed upon in the employment contract remains due and should be paid by the employer with the legal interest equal to the basic interest rate as established by the Bulgarian National Bank plus 10 points.
Employees also are entitled to the following additional salaries:

- For length of service and professional experience (mandatory), at least 0.6 per cent over the basic salary agreed upon in the employment contract for each year of service and professional experience. The right to receive this additional salary vests when the employee has worked for at least a year.

- For night work (if such work is performed), at least BGN 0.25 for each hour of night work (ie, work between 10 o’clock in the evening and 6 o’clock in the morning) or part thereof.

- For being at the disposal of the employer outside of the enterprise, at least BGN 0.10 for each such hour or part thereof.

- For overtime work.

The minimum pay levels are the same for employees working under fixed-term employment contracts and employment contracts for an indefinite duration.

The employer may, independently or jointly with other authorities and enterprises, provide to the employees:

- Organized feeding conforming to the rational standards and specific conditions of work;

- Transportation between the place of residence and the workplace;

- Facilities for short-term and long-term recreation, physical culture, sports, and tourism; and

- Facilities for cultural pursuits, clubs, and libraries, among others.

The employer should provide work clothes and uniforms for employees under terms and according to a procedure established by the Council of Ministers or in the collective agreement. The employee should be required to wear the work clothes or uniforms during working time and to keep them as property of the employer.

Employers are free to provide their employees with other benefits, such as employees’ stock option plans or profits participation, among others.

**Working Hours**

*Regular Working Hours*

The Labor Code establishes a regular working week of 5 workdays of up to 40 working hours per week (8 hours per day), which may be extended only in exceptional specified cases.

Some categories of employees enjoy reduced working hours without reduction of their salaries or affecting their other employment rights, particularly (a) employees working under harmful or specific conditions subject to a decision of
the Council of Ministers, provided that they spend at least half of the working hours in such conditions, and (b) employees under 18 years of age.

**Allocation of Working Hours**

The allocation of working hours should be established by the internal rules of the enterprise. The employer may establish flexible working hours in enterprises where allowed for by the organization of work.

The time during which the employee should be at work and the manner of its reporting should be specified by the employer. Outside the time of his compulsory presence, the employee may determine the beginning of his working hours himself.

The employer may establish open-ended working hours for some employees due to the special nature of their work, after consultations with the employee and the trade union representatives. Employees on open-ended working hours should, if necessary, perform their duties even after the expiry of the regular working hours, but the aggregate duration of the working time may not interfere with the minimum uninterrupted daily and weekly rests established by the Labor Code.

Work performed after the regular working hours on working days should be compensated by additional annual paid leave, and on public holidays and weekends by increased payment for overtime work.

The employer may require some employees, due to the special nature of their work, to be on duty or stand-by during specified hours in a 24-hour period.

**Work in Shifts**

When necessitated by the nature of the production process, work in an enterprise may be organized in two or more shifts which may be combined. The succession of the shifts should be established in the internal rules of the enterprise, as the assignment of duties to an employee for two consecutive shifts is not allowed.

**Breaks**

The working day should be interrupted by one or several breaks, which are not included in the working hours. The employer should provide the employee with a lunch break which may not be shorter than 30 minutes. In continuous production processes or in enterprises where the work is uninterrupted, the employer should provide the employee with time for a meal which is included in the working hours.

The employee is entitled to an uninterrupted rest between working days of not less than 12 hours. In a five-day working week, the employee is entitled to a weekly rest of two consecutive days, one of which is principally Sunday. In such cases, the employee should be ensured at least 48 hours of weekly rest in one stretch.
Overtime

Work performed by an employee beyond his agreed working hours at the order of or with the knowledge of and with no objection from the employer or superior is considered overtime work. Overtime work is generally prohibited, except in specific cases.

The duration of overtime work performed by an employee in a calendar year may not exceed 150 hours. It may not exceed (a) 30 hours’ day work or 20 hours’ night work in a calendar month, (b) six hours’ day work or four hours’ night work in a calendar week, and (c) three hours’ day work or two hours’ night work for two consecutive working days.

Overtime work may not be assigned to special categories of employees such as young workers and pregnant women, and women in advanced stage of in-vitro treatment.

The increased payments for overtime work performed should be agreed upon by the employee and employer, but should not be less than 50 per cent for work on working days, 75 per cent for work on weekends, 100 per cent for work on official holidays, and 50 per cent for work with an accumulated calculation of the working time.

If the employer and employee have not expressly agreed on the increase of the rate for overtime work, it will be calculated on the basis of the remuneration set out in the employment contract. No additional remuneration will be paid for overtime work during regular workdays to employees working under open-ended working hours. Overtime work performed by these employees on weekends and official holidays will be paid with the respective percentages for overtime work on such days.

Night Work

Night work is work occurring between 10 o’clock in the evening and 6 o’clock in the morning; for employees who have not reached 18 years of age, between 8 o’clock in the evening and 6 o’clock in the morning.

The normal duration of working hours at night for a 5-day working week is up to 35 hours or up to 7 hours per night. The employer should provide hot food, refreshments, and other facilities to employees for the effectiveness of the night work. Night work is prohibited for some categories of employees.

Vacation

Any employee with at least 8 months’ length of service, irrespective of whether the length of service is with the current or a former employer, is entitled to basic annual paid leave of not less than 20 working days.

During this period, the employer should pay a salary calculated on the basis of the average daily salary received by the employee in the latest calendar month.
during which he worked at least 10 days prior to the month in which the leave is taken.

Employees who carry out work in specific conditions and life and health hazards which cannot be eliminated, restricted, or reduced regardless of the measures taken, and work under open-ended working hours are entitled to paid annual leave of at least 5 working days in addition to the basic annual paid leave.

The employer is required to prepare by the end of the year a schedule for use of paid annual leave for the next year in a manner which entitles each employee to use his annual leave for the year. The employee has to use his annual paid leave in the year for which it is due.

The right for the annual paid leave expires two years after the year for which the leave was due or in which the reasons for the non-use languish. For example, if the employee has not used 15 days of his leave for 2010, on 1 January 2013 his rights to use such leave will expire.

Monetary compensation for paid leave is permissible only in case of termination of employment. In such case, only the unused paid leave for the year and the paid leave which use has been postponed according to the requirements of the law, the right for which has not expired, are subject to compensation.

**Sick Leave**

“Sick leave” is defined as leave in the event of a temporary working disability. Employees are entitled to sick leave in case of a temporary disability resulting from a general or occupational disease, occupational injury, convalescence, urgent medical examinations and tests, quarantine, suspension from work prescribed by the medical authorities, taking care of a sick or quarantined member of the family, urgent need to accompany a sick member of the family to a medical check-up, test, or treatment, and taking care of a healthy child dismissed from a childcare facility because of a quarantine imposed on that facility or on the child.

Sick leave should be approved by the medical authorities and not by the employer, and a medical certificate is required. Under the Social Security Code (SSC), employees are entitled to cash compensation instead of their salary for the time they are on sick leave (if they have been secured for this social risk) at an amount established in the SSC.

Compensation for the first day of the sick leave will be paid at the expense of the employer and for the remaining period directly by the National Social Security Institute. For the period until 31 December 2012, the compensation for the first, second, and third day of the sick leave will be paid at the expense of the employer at 70 per cent of the average daily gross salary for the month during which the disability occurred, but no less than 70 per cent of the average daily agreed salary.
Health Care Coverage

All employers should ensure free labor medicine service to their employees as well as periodic medical examinations. These are part of the general statutory obligation of employers to ensure healthy and safe conditions of work.

All individuals also should have access to the public health system, provided that they make regular medical security contributions.

Discrimination

Areas of Protection

Under the Protection Against Discrimination Act, any direct or indirect discrimination on grounds of gender, race, nationality, ethnicity, human genome, citizenship, origin, religion or belief, education, conviction, political affiliation, personal or social status, disability, age, sexual orientation, marital status, property status, or any other grounds established by law or an international treaty to which Bulgaria is a party, is forbidden.

Direct discrimination means any less favorable treatment of a person on the above grounds than the treatment which another is receiving, received, or would receive in comparable similar circumstances.

Indirect discrimination means placing a person on the above grounds in a less favorable position compared to other persons through an apparently neutral provision, criterion, or practice, unless the provision, criterion, or practice is objectively justified by a legal aim and the means of achieving this aim are appropriate and necessary.

Harassment on the above grounds, sexual harassment, incitement to discrimination, persecution, and racial segregation, as well as the building and maintenance of an architectural environment hampering the access to public places of people with disabilities, also are considered discrimination.

Affirmative Action

The Protection against Discrimination Act expressly provides that the some actions will not constitute discrimination. These include:

- Treating persons differently on the basis of their citizenship or absence thereof where this is provided for by law or an international treaty to which Bulgaria is a party;
- Treating persons differently on the basis of a characteristic relating to race, nationality, or ethnicity, among others, when such characteristic, by the nature of the particular occupation or activity or of the conditions in which it is performed, constitutes a genuine and determining occupational
requirement, the aim is legal, and the requirement does not exceed what is necessary for its achievement;

• Treating persons differently on the basis of religion, belief, or gender in relation to an occupation performed in religious institutions or organizations when, by reason of the nature of the occupation or the conditions in which it is performed, the religion, belief, or gender constitutes a genuine and determining occupational requirement in view of the character of the institution or organization, where the aim is legal, and the requirement does not exceed what is necessary for its achievement;

• Setting requirements for minimum age, work experience, or length of service in employment or in granting certain job-related privileges, provided that this is objectively justified for attaining a legal aim and the means for attaining it do not exceed what is necessary;

• Treating differently persons with disabilities in conducting training and acquiring education for satisfying specific educational needs aimed at equalizing opportunities;

• Undertaking special measures for individuals or groups of persons in disadvantaged positions aimed at equalizing their opportunities, in so far as and while these measures are necessary; and

• Providing special protection to children without parents, juveniles, single parents, and persons with disabilities established by law.

Sanctions and Remedies

In case of discrimination or breach of rights and duties in an employment relationship, the employee or the candidate for work has the right to file a claim before a special Commission on the Protection against Discrimination, requesting for the termination of the breach, the remedy for its consequences, and compensation for any moral or cash damages incurred.

On the basis of such claim, the officials of the Commission on the Protection against Discrimination initiate the proceedings and collect evidence with the assistance of the Ministry of Interior.

Employers violating their obligations under the Protection against Discrimination Act also can be imposed sanctions ranging from BGN 250 to BGN 2,500, while the managers of the employer who have allowed the commitment of the violation will be punished by a fine ranging from BGN 200 to BGN 2,000, unless they are liable for more severe punishment.

Collective Bargaining and Worker Participation in Management

Collective labor agreements (CLAs) are concluded between trade unions and employers to regulate labor and social security matters of employees which are
not governed by law. CLAs can be concluded at the individual company level, branches of industry level, or at the field and municipality level.

A CLA should not contain terms less beneficial for employees than those provided for in the Labor Code. Lower level CLAs may not contain provisions less beneficial for employees than those provided for in higher level CLAs (i.e., the CLA of a company may not be less favorable to the employees than the branch CLA covering these employees).

Branch CLAs are concluded between the representative employee organizations and the representative employer organizations. A branch CLA is applicable to employers only if the specific employer is represented by the employer organization party to the branch CLA, while it is applicable to employees only if they are members of the trade union party to the branch CLA or they have joined independently.

Where a branch CLA has been concluded between all representative employee organizations and all representative employer organizations in the branch, the Minister of Labor and Social Policy may, upon their joint request, extend the application of the branch CLA or of its individual clauses to all companies of that branch.

The Labor Code requires an employer to conduct negotiations only with the trade unions for the conclusion of a CLA if there is such initiative by the trade unions. The first draft of the CLA should be prepared by the trade union at the enterprise and submitted to the employer prior to the start of the negotiations. There is no obligation for employers to initiate the formation of trade unions in their enterprise or initiate negotiations or reach an agreement on the CLA.

Employment relationships are regulated by CLAs and internal rules, policies, and orders of the employers. Employers should at least issue the following internal rules:

- Internal Work Rules, which define the rights and obligations of the parties in the employment relation and regulate the work organization at the enterprise according to the specific nature of the activities performed, and which are issued after holding advance consultations with the trade unions and employee representatives;
- Health and Safety at Work Rules, which have to be appropriately displayed at the workplace;
- Internal Rules on the Organization and Structure of the Salary; and
- Internal Rules on the Protection of Personal Data, including but not limited to personal data regarding employees.

Employers should invite the trade unions at the enterprise to participate in the drafting of all internal rules and regulations which pertain to industrial relations.
Health and Safety Protection in the Workplace

Employers should ensure healthy and safe conditions of work. Whenever the employees or expatriates of an employer are working on sites administered by another company, the employer has an obligation by means of a written agreement with such company to ensure that the conditions of health and safety at work also are ensured on these sites.

The principal regulations on health and safety at work are the Labor Code and the Healthy and Safe Conditions at Work Act. There also are more than 20 regulations relevant to the safety obligations of employers and employees.

The Ministry of Labor and Social Policy also has approved Rule Books which contain detailed norms concerning health and safety in various sectors. Rule Books are supposed to be binding on all enterprises, but their binding power is questionable from a legal point of view as they have not been published in the State Gazette, which is a prerequisite under the Constitution for the binding nature of any normative act. The principal areas and obligations of the employer in ensuring safety and health at work are the following:

- Constituting internal bodies dealing with healthy and safe conditions at work and their continuous training;
- Performance of risk assessment and determining measures and restrictions for health and safety at work;
- Emergency planning;
- Preparing Internal Rules for Safety and Health at Work and their notification to employees;
- Compliance with regulatory provisions for certain risks;
- Ensuring a physiological regime of work and rest;
- Establishing a work medicine service department for employees and ensuring periodical medical examinations;
- Ensuring the use of personal protection devices, clothing, and equipment; and
- Initial and periodic instructions to employees on health and safety, among others.

Employees may refuse or cease to discharge their duties if there is a serious and immediate danger to their lives and health. The immediate superior should be notified without delay and should investigate the danger and give instructions concerning the continuation of work.

According to the Healthy and Safe Conditions at Work Act, some of the measures that should be taken to provide occupational safety and health are:

- Prevention of risk to life and health;
- Assessment of unpreventable risk;
• Adaptation of the working conditions to the individual to reduce and eliminate their harmful effect;
• Introduction of technical improvements to technological processes, machinery, and equipment;
• Substitution of dangerous products, work equipment, tools, substances, and materials with safe or less dangerous ones; and
• Use of collective means of protection with priority to personal protective equipment, among others.

The Labor Code provides for increased protection of female and pregnant employees in some areas. If the employer has 20 or more female employees, he is required to provide personal hygiene facilities for women and rooms where pregnant employees may rest.

Where a pregnant employee or a nursing mother is performing a job that is unsuitable for her condition, at the mandatory instruction of the health authorities the employer should implement measures required for temporarily adapting workplace conditions, working hours, or both to eliminate the safety and health risk to the pregnant employee or nursing mother or (if not possible) to reassign her to another appropriate position.

Together with the health authorities, the employer is obliged to annually designate positions and jobs suitable for pregnant employees and nursing mothers. The employer may not send pregnant employees and mothers of children under 3 years of age on business trips without their written consent.

However, all of these rights of pregnant employees and nursing mothers may be enjoyed only if the employer has been notified of their status through documents duly issued by the competent health authorities. In the event of termination of the pregnancy, the female employee should notify the employer within seven days. The employer and his officers are under a duty to keep in confidence such circumstances.

**Workers’ Compensation and Survivors’ Benefits**

**Liability for Damages from Labor Accident or Occupational Disease**

The employer bears financial liability for damages resulting from labor accident or occupational disease which have caused temporary disability, permanently reduced working capacity of or above 50 per cent, or death of the employee, regardless of whether this is caused by an agent of the employer or by another employee.

The employer also will be liable if the labor accident has been caused by *force majeure* on or in connection with the execution of the assigned work, or of any other work performed even without orders but in the employer’s interest, as well as during a rest break spent within the enterprise.

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The employer will not be liable if the injured employee intentionally caused the damage. The liability of the employer may be reduced if the injured employee has contributed to the injury by committing gross negligence.

In such cases, the employer owes compensation amounting to the difference between the caused damage (whether personal or property), including lost profit, and the social security benefit and/or pension to which the employee may become entitled.

However, such compensation will be reduced by the amount received under contracts concluded for insurance of the employee. In case of the employee’s death, the compensation will be given to his survivors.

**Mandatory Insurance against Labor Accident**

Employers also have the obligation to insure against labor accident risk employees who perform work that could be hazardous to their life and health. All employees who perform work in the main or ancillary activity of enterprises which belong to economic sectors with levels of labor accidents equal or higher than the average for the country are subject to mandatory insurance. All costs for the insurance should be borne by the employer.

**Occupational Rehabilitation**

An employee who, by reason of a disease or labor accident, is unable to perform the work assigned to him, but who may perform another suitable work or the same work under relaxed conditions without hazard to his health, should be reassigned and transferred to such by prescription of the health authorities.

The occupational rehabilitation prescription issued by the health authorities requires the employee not to perform the work from which he is transferring, and the employer not to admit the employee to such work. The employer will be required to transfer the employee to a suitable work according to the prescription of the health authorities within 7 days after receipt of the prescription. Failure to fulfill the prescription of the health authorities makes the employer liable to the employee for compensation.

All employers with more than 50 employees are obliged to annually designate workplaces suitable for occupational rehabilitation. Such workplaces should be in the range of 4 per cent to 10 per cent of the total number of employees with that employer. The exact percentage depends on the economic activity that the employer operates in and is determined by the Minister of Labor and Social Policy and the Minister of Health.

The government ministers, heads of other central government departments, and municipal councils are required to establish specialized State-owned (municipal) enterprises, and employers with more than 300 employees are required to establish workshops and other units designed for persons with permanently reduced working capacity.
The activities of these specialized enterprises, workshops, and units have to be planned and accounted for separately. They should have specific rules for work targets, accounting, and payment for work, established according to a procedure established by the Council of Ministers.

Employees with permanently reduced working capacity of 50 per cent and above are entitled to basic paid annual leave in an amount of not less than 26 working days.

Employees with permanently reduced working capacity of less than 50 per cent and who are occupational rehabilitees for a fixed period and receive a lower labor remuneration for the new work are entitled to a cash compensation for the difference between the labor remunerations.

**Dispute Resolution**

Labor disputes are defined by the Labor Code as disputes between an employee and an employer regarding the formation, existence, implementation, and termination of employment relationships, as well as disputes over the performance of collective agreements and the ascertainment of the length of employment service.

Disputes between the elected employees’ representatives and the employer on violation of the rights of such representatives, as well as disputes between employees commissioned by an enterprise or agency providing temporary work and the user undertaking in case their rights are violated, also are considered labor disputes.

Labor disputes are settled by the regional court where the registered seat of the employer is located. Employees are exempt from the payment of any State fees for the filing of their claims. In most of the cases, such claims are examined by the courts under summary proceedings. Only in rare cases where there are grounds for cassational appeal of the second instance ruling are they brought before the Supreme Court of Cassation.

The employer and the employee may try to amicably settle any claims under an employment relationship at any time, but conciliation proceedings are not mandatory. Cases when employees and employers try to settle their disputes amicably through conciliation commissions are rare in practice. Claims for labor disputes may be filed within the following prescriptive periods:

- One month for disputes over limited financial liability of an employee, for revocation of reprimand, and for disputes between the elected employees’ representatives and the employer on violation of the rights of such representatives;
- Two months for disputes on revocation of a warning of dismissal, change in the place and nature of work, and termination of the employment relationship; and
- Three years for all other labor disputes.

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Termination of Employment

In General

The procedure and grounds for termination of an employment contract are not freely negotiable between the parties. Termination grounds are listed exhaustively in the Labor Code and are categorized thus:

- Termination of the employment contract upon the initiative of either party without notice;
- Termination of the employment contract upon the initiative of the employer with offer of compensation to the employee;
- Termination with notice; and
- Termination without notice.

Termination upon Initiative of Either Party without Notice

Termination of the employment contract upon the initiative of either party without notice may be done on the following grounds:

- By mutual written consent of the parties;
- When the dismissal of an employee is found unlawful or he is reinstated to his previous job by a ruling of the court, but he does not report to work within the stipulated term;
- Upon expiry of the contractual term, until the completion of some specified work or upon return of the substituted employee to work (these grounds apply to fixed-term employment contracts);
- When a position is listed to be occupied by a pregnant employee or an occupational rehabilitee, and a candidate entitled to that position appears;
- Upon the appointment of an employee who has been elected or has passed a competitive examination for the position;
- In case of inability of the employee to perform the assigned job because of illness resulting in permanent disability or because of health contraindications established by an expert medical commission (the employment contract will not be terminated if the employer can provide another job which is suited to the employee’s health status and the employee agrees to perform the job);
- Upon the death of the person with whom the employee has concluded an \textit{intuitu personae} employment contract;
- Upon the death of the employee; and
- When a position is listed to be occupied by a State employee.
Termination upon Initiative of Employer with Offer of Compensation

Termination of the employment contract upon the initiative of the employer with offer of compensation to the employee is a form of termination by mutual consent of the parties, but the initiative is provided solely to the employer.

The amount offered by the employer should not be less than 4 times the amount of the employee’s latest monthly gross salary, unless the parties have agreed on a larger amount. If the compensation has not been paid within one month from the termination of the employment contract, the grounds for such termination are considered revoked.

Termination with Notice

The employer may unilaterally terminate an employment contract by written notice only on the following grounds:

- Closure of the entire enterprise;
- Partial closure of the enterprise or staff cuts;
- Reduction of the volume of work;
- Work stoppage for more than 15 days;
- When the employee lacks the qualities for efficient work performance;
- When the employee does not have the necessary education or vocational training for the assigned work;
- When the employee refuses to follow the enterprise or a division thereof when it is relocated to another community or locality;
- When the position occupied by the employee should be vacated for the reinstatement of an unlawfully dismissed employee who had previously occupied the same position;
- Upon attainment of the age of 65 in the case of professors, associate professors, or persons holding a doctoral degree;
- When the employment relationship was established after the employee had acquired and exercised his entitlement to pension;
- When the job requirements for the position have been changed and the employee does not meet them;
- When it is objectively impossible to implement the employment contract.

Employees occupying managerial positions also may be dismissed with notice by reason of conclusion of a (new) contract for the management of the enterprise (ie, appointment of a new executive director, board of directors, or management board). The dismissal can be effected after the start of the performance of the (new) management contract but within a period not exceeding nine months thereafter.

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In case of partial closure of the enterprise or staff cuts and the reduction of the volume of work, the employer is entitled to make a selection and, in the interest of production or business, dismiss employees whose positions have not been made redundant to retain employees of higher qualifications and better performance.

The selection should be done by a commission appointed by the employer. The commission will hold regular meetings for examination of the qualifications and performance of the employees to be dismissed, and any findings should be incorporated in the duly signed minutes. Any proposal made by the commission for the termination of employees should be in writing and should be well-founded.

The employee may terminate the employment contract with notice without stating any reasons.

**Termination without Notice**

The employer may terminate an employment contract without notice if:

- The employee has been detained for execution of a sentence;
- The employee has been deprived, by a court sentence or an administrative order, of the right to practice a profession or to occupy the position to which he has been appointed;
- The employee has been deprived of his academic title or academic degree, if the employment contract has been concluded in view of his holding the respective title or degree;
- The employee has been stricken from the registers of the professional organizations under the Doctors and Dentists Professional Organizations Act, Professional Organization of Masters of Pharmacy Act, or Professional Organizations of Medical Nurses, Midwives, and Associated Specialists Guild Act;
- The employee refuses to take a suitable job offered in case of occupational rehabilitation;
- The employee is disciplinarily dismissed, in which case the employer should follow the procedure for ensuring that the disciplinary dismissal is lawful;
- The employee failed to perform his obligation to notify the employer if there is an incompatibility with the work performed in the course of such performance or such incompatibility has taken place at a later stage (this refers only to termination in enterprises of the State administration where the law has provided for certain restrictions for the occupation of an office therein); or
- A conflict of interest has been ascertained by an effective act under the Conflict of Interest Prevention and Disclosure Act.
The employee may terminate an employment contract without notice if:

- He is unable to execute the work assigned by reason of illness and the employer fails to provide him with another suitable work conforming to the prescription of the health authorities;
- The employer delays the payment of the salary or compensation under the Labor Code or the State social security;
- The employer changes the place or nature of work or the agreed salary, except where the employer has the right to make such changes, as well as where the employer fails to fulfill other obligations in the employment contract, collective agreement, or law;
- The working conditions under the new employer deteriorate substantially as a result of a change of the employer due to a transfer of undertaking;
- He starts a paid election office or begins research work on the basis of a competitive examination;
- He continues his education as a full-time student at an educational establishment or enrolls in a full-time doctoral degree course;
- He works under a fixed-term employment contract and is transferred to another work for an indefinite duration;
- He works under employment contract with an enterprise or agency providing temporary work and enters into an employment contract with another employer, who is not an enterprise or agency providing temporary work;
- He is reinstated to work according to the established procedure by a finding that his dismissal was wrongful, in order to take the work where he has been reinstated;
- He starts to work in the State administration;
- The employer has terminated activity; or
- The employer has granted unpaid leave to the employee without his consent.

The listed grounds for termination are exhaustive. Non-observance of the applicable termination grounds and procedure may result in a court dispute where the termination may be found unlawful, resulting in the reinstatement of the employee and payment by the employer of compensation to the employee for the period of unemployment but for not more than six months.

Termination is carried out by a written order served on the employee, indicating the grounds for termination and its legal basis. Some grounds for termination require a motivated termination order. The employment contract is considered terminated upon delivery of the notice.

**Special Protection of Employees**

The Labor Code provides for increased protection to special categories of employees, but it should be taken into account that:

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• Increased protection is not absolute. It would be triggered only if the employer wishes to unilaterally terminate the employment (with or without notice) on certain grounds, and termination in these cases is still possible, provided that the employer obtains the necessary permits and opinions in advance.

• Increased protection should be considered only at the moment of delivery of the termination order (i.e., there are no protected periods between the return to work and the date of termination).

When termination is done on grounds of (a) partial closure of the enterprise or staff cuts, (b) reduction of the volume of work, (c) when the employee lacks the qualities for efficient work performance, (d) when the job requirements for the position have been changed and the employee does not meet them, and (e) disciplinary dismissal, the following employees enjoy special protection:

• Mothers of children up to three years of age;
• Employees who have been reassigned to less straining positions due to health reasons;
• Employees suffering from certain diseases listed in a regulation of the Ministry of Health;
• Employees who have started using permitted leave (different from pregnancy and child birth leave);
• Employees who have been elected as employee representatives for the time they are such or are members of a special negotiating body, European works council, or representative body in a European company or a European cooperative society, for the duration of performance of such function; and
• Employees who are members of the managing body of a trade union in the enterprise or of a managing body of a trade union at the territorial, industrial, or national level, for the time they are such and within 6 months after they vacate such position.

Employees listed under the first to fifth bullets can be dismissed only with the permission of the Regional Labor Inspectorate. Prior to the dismissal of the employees listed under the second and third bullets, the opinion of an expert medical commission also should be considered. Finally, employees listed under the sixth bullet can be dismissed only with the permission of the trade union body designated by a resolution of the central management of the relevant trade union.

Pregnant employees and employees in advanced stage of in-vitro treatment may be terminated only on the following grounds:

• Closure of the entire enterprise;
• When the employee refuses to follow the enterprise or a division thereof when it is relocated to another community or locality;
• When the position occupied by the employee should be vacated for reinstatement of an unlawfully dismissed employee who had previously occupied the same position;
• When it is objectively impossible to implement the employment contract;
• The employee has been detained for execution of a sentence; and
• Disciplinary dismissal with the permission of the Regional Labor Inspectorate.

Employees using a pregnancy and childbirth leave may be terminated only in case of closure of the entire enterprise.

**Retirement, Social Security and Health Care, or Old Age Pensions**

Under the SSC, entitlement to contributory service and retirement age pension will be acquired upon reaching the age of 60 years for women and 63 years for men, and 34 years of contributory service for women and 37 years for men.

As of 31 December 2011, the retirement age will be increased, from the first day of each successive calendar year, by 4 months for both women and men until reaching the age of 63 years for women and 65 years for men. The length of contributory service also will be increased, from the first day of each successive calendar year, by four months for both women and men until reaching the total of 37 years for women and 40 years for men.

If a person is not entitled to contributory service and retirement age pension prior to 31 December 2011, he will acquire the entitlement upon attaining the age of 65 years provided that he has at least 15 years of actual contributory service.

Pensions are granted by the Social Security Institute upon written application by the candidate. The application has to be filed within 6 months from:

• The date on which the employee has become eligible to apply for and receive retirement age and accumulated length of service pension; or
• The date of termination of the social security with respect to the same employee (i.e., the date of termination of his employment contract), if such termination has taken place after he acquires the right to receive retirement age and accumulated length of service pension.

Even if the documents are submitted after the expiry of the six-month period, the employee will not lose his right to pension. He will be granted such pension but as of the date on which he filed the documents.

The SSC establishes rules for calculating the exact amount of the pension, provided that its minimum is established in the State Social Security Budget Act
for the year. In the 2012 State Social Security Budget Act, the minimum amount is BGN 145 for the period from 1 June 2012 to 31 December 2012.

Upon termination of an employee who has acquired entitlement to contributory service and retirement age pension, irrespective of the grounds for termination, such employee is entitled to compensation from the employer amounting to his gross labor remuneration for two months.

Where the employee has worked for the same employer for the last 10 years of his employment service, the compensation will amount to his gross labor remuneration for six months. Such compensation will be payable only once.

As provided by the most recent amendments to the Labor Code in 2012, the employer is no longer entitled to unilaterally terminate the employment of an employee who became entitled to contributory service and retirement age pension.

Summary of Social Costs

In General

According to the SSC, both employers and employees have to make mandatory social security contributions for the employees’ monthly social security income. The amount and type of the mandatory social security contributions depend on the category of labor performed by the employee, among others.

A special regulation on the Categorization of Labor upon Retirement defines three categories of labor, with the first two categories specifying the type of work conditions and professions covered, and the third category covering the rest. Mandatory social security contributions have to be made to the following funds:

- Pension funds;
- General disease and maternity fund;
- Unemployment fund; and
- Labor accidents and professional disease fund.

Pensions Funds

State Pension Funds

The following are the State pension funds for those born before 1 January 1960:

- At 17.8 per cent if working under the third category of labor, distributed between the employee and the employer in the following ratio: 7.9 per cent for the account of the employee and 9.9 per cent for the account of the employer; and
• At 20.8 per cent if working under the first and second categories of labor, distributed between the employee and the employer in the following ratio: 7.9 per cent for the account of the employee and 12.9 per cent for the account of the employer.

The following are the State pension funds for those born after 31 January 1959:

• At 12.8 per cent if working under the third category of labor, distributed between the employee and the employer in the following ratio: 5.7 per cent for the account of the employee and 7.1 per cent for the account of the employer; and

• At 15.8 per cent if working under the first and second categories of labor, distributed between the employee and the employer in the following ratio: 5.7 per cent for the account of the employee and 10.1 per cent for the account of the employer.

Additional Mandatory Pension Security Funds

Additional mandatory pension security funds are applicable only to persons born after 31 December 1959 who make contributions to the State pension funds.

For a universal pension fund from 2007 onwards, the contribution is 5 per cent, distributed between the employee and the employer in the following ratio: 2.2 per cent for the account of the employee, and 2.8 per cent for the account of the employer.

For a professional pension fund, the contribution is 12 per cent for employees working under the first category of labor and 7 per cent for employees working under the second category of labor. This contribution is entirely at the expense of the employer.

General Disease and Maternity Fund

The contribution is 3.5 per cent, distributed between the employee and the employer in a 40:60 ratio.

Unemployment Fund

The contribution is 1 per cent, distributed between the employee and the employer in a 40:60 ratio.

Labor Accidents and Professional Disease Fund

The contribution is between 0.4 per cent and 1.1 per cent (the exact percentage is established in the 2010 State Social Security Budget Act by main type of economic activity) and is entirely at the expense of the employer.

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The medical security contribution is 8 per cent, distributed between the employee and the employer in a 40:60 ratio.

Social security contributions are calculated from the gross social security income of the employee for the relevant month, provided that the minimum of this income is not less than the minimum monthly amount of the social security income for the calendar year by economic activity and qualification group of professions established in the 2012 State Social Security Budget Act and no higher than BGN 2,000 (the maximum monthly income for social security purposes).

The income on which social security contributions are due includes all salaries, including those that are charged but unpaid, insurance contributions that have not been charged in the accounts, and other income from work. The elements of the salary and income on which social security contributions are due are determined by an act of the Council of Ministers upon motion by the National Social Security Institute.

Salary also is subject to income tax, which is 10 per cent calculated from the gross amount of the salary minus the amount of the social and medical security contributions made at the expense of the employee.

**Conclusion**

The Labor Code has been constantly undergoing changes which try to increase the protection of employees’ rights especially in the context of the current financial crisis. At the same time, changes also try to reflect developments in the labor market and provide certain flexibility to the parties. For instance, some of the most recent changes aim to introduce rules regarding work from home, work from a distance, and the activity of enterprises or agencies providing temporary work, among others. Further changes also are expected.

On the other hand, thanks to the existence of the Labor Code for more than 26 years, the court practice on labor disputes is well-developed in almost all areas. However, courts continue to be overprotective of employees and tend to sanction employers for even minor breaches of employees’ rights.
Canada

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Canada

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Introduction

Employment Law in Canadian Federal System

Canada is a federal state with a parliamentary system of government, divided into ten provinces and three territories. The territories enjoy the legislative powers of provinces, but by virtue of federal statutes rather than the Constitution.

Provinces have exclusive jurisdiction over all aspects of employment relations, except over a number of industries specified in the Constitution. However, federal jurisdiction over employment relations remains the exception both in terms of the industries covered and in terms of the number of employees governed by federal law.

Provincial laws dealing with employment relations do not affect federally regulated employees in any way, while federal laws have no effect on provincially regulated ones. There are thus no “national standards” in the laws relating to employment, although these laws are similar in many respects for two main reasons.

First, the federal and provincial legislatures have tended to be influenced by each other’s laws and, up to the Second World War, by British legislation. Second, all jurisdictions in Canada other than Quebec (which has a civil law system) received English common law as their fundamental legal system at the time when they first became British colonies, and their courts were bound by the decisions of English courts on points of common law.

This uniformity has been reinforced by the fact that all decisions of provincial and federal courts are ultimately appealable to the Judicial Committee of the Privy Council before 1949, and to the Supreme Court since that date.

The principles of Quebec’s civil law in employment matters also have generally been applied in a manner which has produced results similar to those in common law jurisdictions.
Context of Employment Law

Modern employment law is based on contracts between employers and employees in the context of a free market economy. In principle, a potential employer and employee agree to enter into a contract of employment on mutually acceptable terms, creating the legal basis for their employment relationship. The parties may modify or end the contract by mutual agreement.

A party may unilaterally terminate the contract due to its breach, entailing the payment of damages by the party in breach. Imbalances in strength between the parties precluding meaningful bargaining has been a major motive for government intervention in employment matters.

Regulation of employment matters usually pertains to minimum standards in wages, hours of work, and vacations, which prevail over any contrary provision of an employment contract. Occupational health and safety legislation prescribing workplace safety practices and equipment takes a similar form.

Development of Employment Law

Employment law is largely a product of the nineteenth and twentieth centuries. Comparatively few “employees”, in the sense of a person performing work for another in exchange for monetary remuneration, were found in Canada before the 1820s or 1830s.

In the 1830s, the principal cities experienced rapid growth and became economically more complex. Transportation undertakings, mechanized industries, and an expanding service sector all called for larger business organizations, which led to more employees.

The spread of industrialization was accompanied by frequently harsh working conditions. These conditions, combined with the global Great Depression of the 1870’s, began prompting the growth of a trade union movement and an increase in government regulation of working conditions and occupational health and safety matters.

Trade unions were legalized from the 1870s to the early 1890s. Laws establishing the maximum hours of work for women and minors and prohibiting the employment of children below a certain age were introduced. These labor standards were gradually extended to male employees in the early twentieth century.

Minimum wage laws were first passed in the 1920s following Canada’s accession to the labor conventions sponsored by the League of Nations. Minimum wage legislation initially only applied to women and minors, but was extended to men in the 1930s.

Strikes and other forms of industrial conflict began attracting increasing governmental attention from the late 1870s, culminating in the federal Industrial
Disputes Investigation Act of 1907, features of which have remained a part of Canadian labor law ever since.¹

Fundamental changes to the industrial relations system came in the 1930s and 1940s. Most provinces adopted legislation based on the American National Labor Relations Act of 1935 confirming the lawfulness of collective bargaining, prohibiting employer retaliation against employees who joined trade unions, and requiring employers to bargain collectively with unions.

Jurisdiction over labor relations in most industries was confirmed as provincial in 1925. During the Second World War, the federal government assumed control over all labor relations and issued a series of regulations governing industrial relations. These assumed final form in the Privy Council Order 1003 of 1944 (“P.C. 1003”).

A National War Labor Relations Board was empowered to certify a union as the exclusive bargaining agent for a bargaining unit. The employer was required to bargain collectively with the certified union. The Board also had the power to enforce prohibitions against discrimination due to union membership, employer interference in internal union affairs, and attempts to set up employer-dominated unions.

Managerial employees were excluded from unionization. Arbitration of grievances was compulsory, strikes and lockouts were forbidden for the duration of a collective agreement, and the mechanism of compulsory mediation and conciliation before a strike or lockout was retained.

Jurisdiction over labor relations returned to the provinces in 1948, but P.C. 1003 served as the model for post-war labor relations legislation for all jurisdictions.

Anti-discrimination statutes were passed in a number of jurisdictions, after the Second World War Legislative interest in this area was revived in the wake of the United States civil rights movement of the 1960s and Canada’s accession to the Universal Declaration of Human Rights.

The interest in human rights issues generated by the inclusion of the Charter of Rights and Freedoms (“Charter”) in the Constitution in 1982 was followed by an immense growth in litigation on human rights issues arising under the Charter.

Recent changes in human rights statutes have adopted many important concepts from American law or legal theory, such as equal pay for work of equal value, affirmative action, and contract compliance programs.

¹ One of these was the practice of having industrial disputes investigated by tripartite conciliation boards (with labor, employer, and neutral members). Boards could issue publicly available but non-binding awards on the dispute. Another feature was the postponing of the right to strike or lockout until the board has published its report.
Charter of Rights and Freedoms

Laws not consistent with the Charter may be struck down by the courts, although the courts have so far rejected most challenges to existing legal rules. The courts also have held that the Charter does not apply to private persons; thus contracts between private employers and employees are not directly subject to the Charter.2

The courts also have rejected arguments that the compulsory payment of union dues to be used for political purposes was contrary to freedom of association,3 that the right to strike is an integral part of freedom of association,4 and that denying certification to one union in favor of the only one permitted by law to represent government employees in one of the territories infringed freedom of association.5

However, the courts have struck down the requirement of public political neutrality for most civil servants as contrary to freedom of expression,6 and provisions limiting payment of unemployment insurance benefits to those under 65 years of age.7

Still, the Charter has had a considerable indirect influence on employment law. Its equality of rights provisions have prompted the federal government and most provinces to pass legislation requiring public sector employers to increase the numbers of women, visible minorities, aboriginal people, and the disabled in their workforce. It also was a major influence in the adoption of "pay equity" legislation covering most public and private sector employees.

The courts have upheld "secondary" picketing8 as a Charter-protected freedom of expression, but have emphasized that legislatures remain free to develop their own policies on secondary picketing, as long as Charter values are respected.9

Recent court decisions may mark a significant departure from the previous relatively cautious approach to the use of the Charter in employment law matters. In 2007, the Supreme Court held that legislation which "substantially interfered" with the terms of an existing public service collective agreement was contrary to the freedom of association guaranteed by the Charter and litigation

8 This pertains to picketing at locations other than the employer’s plant.
continues over the relation between the Canadian industrial relations system and the Charter guarantee of freedom of association.  

Legal Relationship of Employer and Employee

In General

Whether a person is an “employee” may have to be determined under common or civil law for purposes of employment standards legislation or labor relations legislation. Depending on the context in which the question is asked, the answer may differ.

Under both common and civil law, employment exists when two persons (employer and employee) conclude a contract under which the employee agrees to perform certain work under the employer’s control and direction in exchange for remuneration.

The application of this definition in particular cases has given rise to tests aimed at distinguishing between employees and independent contractors (i.e., control test, four-fold test, and organization test).

Courts have considered various matters such as control, ownership of tools, chance of profit, and risk of loss to draw the line between entrepreneurs and employees. A variation of this test asks whether the person in question is sufficiently integrated into the employer’s organization for him to be an employee.

Independent contractors or other entrepreneurs are not protected by labor standards legislation or the common and civil law requirement of reasonable notice before termination of an employment contract. They also are not permitted to form trade unions.

Other persons who are not considered employees include partners in unincorporated firms, directors of corporations, and agents of an employer who perform work without being sufficiently controlled by the employer or integrated into the employer’s organization to be employees.

Labor relations statutes also exclude managerial employees and those employed in a confidential capacity from the definition of employee, although they are considered to be employees from a common or civil law viewpoint.


Contract of Employment

Contracts of employment may be oral or written. Typically, employees are hired following an oral explanation of the terms and conditions of employment or are given a letter summarizing the main terms and making reference to fringe benefits, pension plans, and the like. Common and civil law courts also will invariably imply the following terms into a contract of employment, unless they have been expressly excluded by the parties:

- The employee will carry out his duties in a faithful matter and guard the confidentiality of the employer’s trade secrets; and
- The contract of employment may not be terminated by either party except upon reasonable notice, unless cause for termination without notice exists.

Other terms may be implied depending on what a court may find to have been the intentions of the parties in particular factual situations. The terms and conditions of employment of unionized employees are set almost exclusively by written collective agreements. Although only the union and the employer are parties to collective agreements, they also bind the employees they cover. Rights and obligations set out in the collective agreement effectively override those implied into individual employment contracts.

Generally, any mentally competent adult may enter into an employment contract with any other natural or legal person. Minors above a certain age (generally 15 to 16, depending on the province) also may enter into employment contracts, subject to certain safeguards.

Special Categories of Employees

Part-Time Employees

Generally, part-time employees are not treated differently in law from full-time employees. A part-time employment contract is entered into in the same manner as a full-time one, and such employees have the same right not to be dismissed without notice except for cause. However, full-time and part-time employees are frequently placed in separate bargaining units in unionized settings.

The labor standards legislation of some provinces also does not apply to persons working less than 24 hours a week. The technical requirements of labor standards legislation in some provinces may make it more difficult for some part-time employees to claim benefits such as paid vacations or statutory (general) holidays. In practice, part-time employees frequently have fewer fringe benefits than full-time ones, and generally have more limited career prospects while remaining part-time.

Leased Employees

Employee leasing normally takes one of two forms. Persons may be employed by an agency which provides personnel for relatively short periods of service to
a client to replace the client’s employees who may be absent because of
vacations, parental leave, or sickness.

A business also may contract with a personnel agency for the long-term supply
of all or part of its personnel requirements. In both cases, the issue of whether
the personnel agency or the client is the employer may arise.

Courts and labor relations boards have recently tended to focus on which of the
possible employers exercises control and supervision over the person whose
status is in question. Such issue arises most frequently in a unionized setting.13

An employer will typically “contract in” by having persons supplied by a
personnel agency perform work formerly done by employees. The employees
are then laid-off. Labor relations boards have generally striven to find the client
to be the employer,14 which results in the client being required to recall the laid-
off employees, since the employees supplied by the agency will almost certainly
have less seniority in the bargaining unit than the laid-off ones.

Foreign Employees

In general, only citizens, landed immigrants,15 and persons who have been
granted an employment visa may legally work in Canada. An employer who
knowingly employs a person not permitted to work in Canada may be punished
by fines and imprisonment.

However, very short-term employment activities by foreign nationals may be
allowed. For instance, foreign members of professional sports teams from
outside Canada do not need employment visas to play matches with Canadian
teams. The North American Free Trade Agreement has specially provided for
the temporary employment in Canada of United States and Mexican citizens.

Few, if any, jobs in Canada are reserved to citizens. The courts have struck
down citizenship requirements for lawyers16 and civil servants17 as contrary to

340 (B.C.C.A.) (1979); Pointe Claire (City) vs. Quebec (Labor Court), 1 S.C.R.
1015 (1997); Alliance internationale des employés de scène de théâtre et de cinéma
États-Unis et du Canada (I.A.T.S.E.) section locale 523 c. Yergeau, J.Q. Number 4382
14 The Supreme Court has confirmed in Pointe Claire (City) vs. Quebec (Labor Court),
1 S.C.R. 1015 (1997), that in such “tripepartite” relationships, a comprehensive
approach to determine the identity of the employer should be adopted. This will
include an examination of the selection process, hiring, training, discipline,
evaluation, supervision, assignment of duties, pay, and degree of integration into
the business of the person whose employee status is in question.
15 These are non-citizens who have been granted permission to remain in Canada on a
permanent basis.
17 Austin vs. British Columbia (Ministry of Municipal Affairs, Recreation, and Culture),
the Charter, and it is doubtful whether a citizenship requirement could be defended for other jobs in view of this.

**Apprentices and Trainees**

All provinces and territories have laws on training requirements for entry into various skilled trades. These take the form of apprenticeships which combine classroom and on-the-job training for a number of years or for a fixed number of hours. The employer will agree to provide the required on-the-job training of a type specified by legislation.

In general, apprentices should be at least 16 years of age when beginning their training. Wages and other working conditions may not be inferior to those prescribed by regulations or set out in any applicable collective agreement.

**Child Labor**

The minimum age for employment ranges from 14 to 17 in all provinces and territories. Laws prohibit the employment of children during school hours, as well as the employment of persons of a specified age in a number of jobs which involve considerable physical danger (e.g., logging, construction, or underground mining).

**Transfers of Business**

Sales or mergers of businesses and other forms of business reorganization can result in the termination of all employees of a business. In such cases, the laws of all jurisdictions other than Prince Edward Island either provide for continuity in the application of labor standards, or deem the employee to have been continuously employed by one employer regardless of the sale or other transfer of the business.

This preserves the terms and conditions of employment which existed at the time of the sale and recognizes service with the predecessor employer for purposes of vacation entitlement, pensionable service, and calculating the length of reasonable notice to which an employee would be entitled.

The “successor rights” provisions in labor relations statutes preserve the bargaining rights of any union which was the certified or recognized bargaining agent for employees of the business which was sold. They also maintain any collective agreement in force at the time of the sale.

What constitutes a sale of a business has been much litigated, and factors such as the type of assets transferred, carrying on the business at the same location using similar methods or equipment for the same customers, and transfer of goodwill and key employees have been considered.

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Whether or not the transfer pertains to a “going concern” or “functional economic unit” also has to be determined. If so, then successor rights will likely apply.  

Terms and Conditions of Employment

Remuneration

Most employees are paid a fixed annual salary or a sum per hour worked. White-collar and clerical employees almost invariably receive salaries, while blue-collar workers are commonly paid by the hour. Productivity bonuses or piecework rates also may apply to blue-collar workers. The remuneration of sales representatives may be a fixed base salary with commissions or made up entirely of commissions.

Monetary remuneration is paid in cash, by check, or by direct deposit to a bank account. Employees frequently receive benefits in addition to monetary remuneration.

The exact minimum wage differs from jurisdiction to jurisdiction, and may also vary according to jobs in some cases. There also are lower minimum wages for persons under 18 years of age in some jurisdictions. The federal government has adopted a policy of fixing the minimum wage for employees under federal jurisdiction at the same amount as that of the province or territory in which they work. A number of jurisdictions also require contractors performing construction work for the government to pay fair wages, usually defined as the prevailing rate for unionized employees.

Employment Standards

Working Hours and Schedules

All jurisdictions provide for a standard of eight hours work per day or a maximum of 40 to 48 total allowable hours of work per week. Overtime is payable at a rate of one-and-a-half times the employee’s hourly rate when the hours of work exceed eight in a day or exceed the maximum allowed per week, although employees in most jurisdictions can be given time off rather than overtime pay when the maximum weekly hours are exceeded.

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19 For instance, Ontario and Quebec have lower minimum wages for employees who work in jobs in which the payment of gratuities by customers is usual. The minimum wage of employees in Ontario who do not normally receive gratuities is CAD 10.25 per hour, CAD 8.80 per hour in Alberta, CAD 8.50 in New Brunswick, and CAD 9.50 in Quebec.
These standards may be varied by permit from the appropriate Minister of Labor. Under federal jurisdiction, they also may be varied by mutual agreement between the employer and the union representing the affected employees or with the agreement of 70 per cent of non-unionized employees.

Some jurisdictions provide for one hour or one half-hour rest periods once every work period, or after five hours of work, while most jurisdictions provide for at least 24 to 32 consecutive hours of rest for all employees each week.

Office and manufacturing employees almost invariably work from Monday to Friday from eight o’clock or nine o’clock in the morning to four o’clock or five o’clock in the afternoon. Where production requires more than one shift, manufacturing employees will work shifts at nights and on weekends, normally on a rotating basis.

Shift bonuses are usually paid for night or weekend work. Retail businesses traditionally operate from Monday to Saturday, but are allowed to open on Sundays.20

The employment of persons below 18 years of age is subject to special restrictions. In Nova Scotia, the Labor Standards Code prohibits the employment of anyone below 14 years of age from 10 o’clock in the evening to six o’clock in the morning.

Employment standards legislation on hours of work, overtime, and similar matters usually does not apply to members of specified professions or occupations or to senior management employees.

Vacations, Holidays, and Leaves

All jurisdictions have laws requiring minimum amounts of paid vacation. The length of the paid vacation and the amount of vacation pay increase with the length of the employee’s service with the employer.

The usual statutory minimum for paid vacation is two weeks after one year’s service (Saskatchewan provides for three weeks), plus four per cent of the employee’s annual earnings. This period increases to three weeks in some jurisdictions after five years’ or seven years’ service (four weeks in Saskatchewan after 10 years’ service), with a proportional increase in vacation pay.

Vacations longer than the statutory minimum are fairly common for managerial and professional employees, long-service employees, and some unionized employees, but very seldom exceed four or five weeks.

20 R. vs. Big M Drug Mart, 1 S.C.R. 295 (1985). It was held herein that requiring Sunday closing for religious reasons violated the Charter, but several jurisdictions have passed legislation making Sunday a general day of rest on a secular basis, often explicitly stating that employees may refuse to work on Sundays without penalty.
Employees also are entitled to a number of paid statutory holidays. All jurisdictions except Saskatchewan and Quebec require that an employee who has been employed by the employer for 30 to 90 days preceding the holiday be paid for it.

Employees may be required to work on statutory holidays, but must be paid at two to two-and-a-half times their regular hourly rates for each hour worked. In Ontario, an employee who is on leave is entitled to public holiday pay for holidays falling during the leave.

Fringe Benefits

Various types of fringe benefits are frequently provided by employers, the most common being:

- Medical coverage supplementing that provided by public healthcare plans;
- Dental care insurance;
- Payment of all or part of the cost of prescription eyeglasses or contact lenses;
- Group life and disability insurance;
- Wage loss insurance; and
- Pension plans supplementing the State plans.

These fringe benefits often become more generous the higher the employee’s position is in the employer’s hierarchy. These benefits are not required by law and are mostly a matter of contract between the employer and his employees or are set out in collective agreements covering unionized employees.

However, pension plans are subject to jurisdictional legislation, and are designed to give employees over 45 years of age vested rights to payments under them. Basic healthcare coverage and medication while in the hospital are provided by public healthcare plans rather than by employers.

Vocational Training

In general, employers generally have no obligation to provide vocational training, except in the case of apprentices. Employers in Quebec are required to spend a sum equal to a small percentage of their total payroll on training.

21 In all jurisdictions, these include New Year’s Day, Good Friday or Easter Monday, Labor Day (first Monday in September), and Christmas. Victoria Day (third Monday in May), Canada Day (1 July), Thanksgiving (second Monday in October), Civic Holiday (first Monday in August), and Boxing Day (26 December) also are either statutory holidays or virtually universally observed as paid holidays in all provinces. Quebec celebrates 24 June (National Holiday or St. John the Baptist’s Day) instead of Civic Holiday. Some provinces and territories have one or two other holidays which, by law or custom, are general paid holidays.
Most vocational training is either carried out in the school system or in \textit{ad hoc} governmental training schemes. The latter often involve some form of subsidy to employers to hire employees for training or initial integration into the workforce.

\textit{Non-Typical Workers}

Public sector employees and those of Crown (State) corporations have the benefit of similar employment conditions. In most jurisdictions, the applicable employment standards law is declared to bind the Crown, thus requiring public sector employers and Crown corporations to observe such standards.

Part-time and temporary employees in the private sector are covered by the same general scheme of legislation and terms of employment as full-time ones, but their fringe benefits are often less than those of full-time employees. They may take longer to qualify for paid vacations and holidays in some jurisdictions, and their pay often tends to be lower than that of full-time employees.

There is no general legislative scheme covering seasonal workers as such. Migrant farm workers are covered by the federal Seasonal Agricultural Workers Program, under which an employment agreement between a Canadian employer and a migrant worker’s country of origin sets out a range of obligations, including provisions on maximum work hours, safety, insurance, and accommodation.

\textbf{Discrimination}

\textbf{In General}

Laws prohibiting discrimination in employment on various grounds exist in all jurisdictions, and are generally quite similar. All jurisdictions, other than British Columbia and Ontario, have human rights commissions which investigate complaints of discrimination. Such complaints are heard in first instance before human rights tribunals, whose decisions may be judicially reviewed by the courts. In Saskatchewan, the courts hear human rights complaints.

The remedies which may be granted include monetary damages to cover lost wages or benefits, sums for hurt feelings, and reinstatement where employees have been terminated or laid-off. Employees wrongfully denied promotions may be given the next available vacancy.

\textbf{Discrimination Based on Sex}

Human rights laws prohibit discrimination on the basis of sex in all aspects of employment. This may include employment requirements or conditions that have a greater negative affect on employees of one sex than on the other.

In some jurisdictions, the prohibition does not apply to domestic workers employed in the employer’s private residence or providing medical or personal
care to individuals employing them nor to persons working for charitable, fraternal, or religious bodies whose nature and activities justify the exemption.

Discrimination in employment due to pregnancy is either prohibited by being expressly defined as discrimination on the basis of sex or considered to fall within the general prohibitions on sex discrimination in all human rights legislation.

Pertinent laws grant 15 to 18 weeks (depending on the jurisdiction) of unpaid maternity leave to pregnant employees. They also are entitled to the job they held at the time of going on leave or to a comparable one with no less favorable wages and benefits.

The federal Employment Insurance Act grants relevant employees a maternity leave of 17 weeks, with a total of 15 paid weeks’ leave. Maternity leave is calculated in the same manner as employment insurance, and benefits are paid up to CAD 485 a week. Unpaid parental leave is available for both men and women for periods varying from 34 to 52 weeks, depending on the jurisdiction.

All jurisdictions require that male and female employees receive the same pay for the performance of the same or substantially similar work. It is not necessary to show an intention to discriminate or a causal link between sex and lower wages. Discrimination is normally remedied by increasing remuneration in the female-dominated job to the level of the male one in gradual phases.

The federal jurisdiction, the Yukon, Manitoba, New Brunswick, Nova Scotia, Ontario, Quebec, and Newfoundland expressly prohibit harassment on the basis of sex. Although no specific provisions on harassment exist in the Northwest Territories, Nunavut, British Columbia, Alberta, Saskatchewan, and Prince Edward Island, harassment would be considered as a form of sex discrimination in these jurisdictions.

The Ontario Human Rights Code defines “harassment” as engaging in a course of vexatious comment or conduct that is known or reasonably ought to be known to be unwelcome. Court decisions have established that sexual harassment includes coerced sexual activity and unwelcome conduct of a

22 Several jurisdictions have passed “pay equity” legislation embodying the theory of equal pay for work of equal value. “Value” is determined by evaluating the skill, effort, and responsibility required for a job and the physical and psychological environment in which it is carried out. Such legislation currently applies to public sector workers in all jurisdictions except Alberta, British Columbia, Newfoundland, and Saskatchewan. However, these provinces, except Alberta, have developed frameworks for negotiating pay equity with some public sector employees. Pay equity legislation in Ontario and Quebec also applies to private sector employers with ten or more employees. Pay equity statutes are generally administered by a specific agency, and disputes under them are dealt with in the first instance by specific administrative tribunals.

sexual nature that detrimentally affects the work environment or leads to adverse
job-related consequences for victims.\textsuperscript{24} Sexual harassment also may occur where
the harasser and victim are of the same sex.\textsuperscript{25}

In June 2004, Quebec became the first jurisdiction in North America to
introduce legislation prohibiting psychological harassment in the workplace.\textsuperscript{26}
Several other provinces, including Ontario, non prohibit workplace harassment
are either their employment standards or occupational health and safety
legislation. These laws differ from human rights legislation in that the
harassment in this case does not need to be related to any prohibited ground of
discrimination, such as race, sex, or age.

**Discrimination Based on Age**

When age discrimination provisions became widespread in human rights
legislation in the 1970s, they either expressly permitted mandatory retirement or
defined “age” in a way which effectively allowed mandatory retirement at 65
years of age.

To date, the Supreme Court has rejected challenges to mandatory retirement
based on the prohibition on age discrimination in the Charter, thus leaving the
question to legislatures. Quebec became the first jurisdiction in Canada to break
from this model, prohibiting mandatory retirement by amending its labor
standards legislation in 1982. Most jurisdictions now prohibit mandatory
retirement at a fixed age unless it is shown to be a \textit{bona fide} occupational
qualification for a particular type of work.

Regardless of the strict legal position on mandatory retirement, citizens
currently retire at an average of 61 to 62 years of age.

**Discrimination Based on Physical or Mental Handicap**

All jurisdictions prohibit discrimination based on mental or physical handicaps
in all aspects of employment. “Handicap” is usually defined to include previous
or existing dependence on alcohol or a drug.

Employers are generally required to “reasonably accommodate” the
handicapped. The practical extent of the accommodation will depend on
available technology, the employer’s ability to pay for measures of
accommodation, the effect of the accommodation on workplace efficiency, and

\textsuperscript{24} \textit{Janzen vs. Platy Enterprises Ltd.}, 1 S.C.R. 1252 (1989).
\textsuperscript{26} The Act Respecting Labor Standards, R.S.Q.C.N-1.1, S. 81-18, defines psychological
harassment as any vexatious behavior in the form of repeated and hostile or unwanted
conduct, verbal comments, actions, or gestures that affects an employee’s dignity or
psychological or physical integrity and that results in a harmful work environment for
the employee. A single serious incident of such behavior that has a lasting harmful
effect on an employee may constitute psychological harassment.

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the creation of any unusual risks to the handicapped employee, co-workers, or the public at large.

Among the usual forms of accommodation is the redesign of workplaces to make them more accessible to employees with motion disabilities and the use of devices to adapt office equipment for use by the blind or visually impaired. Measures such as vocational training for the handicapped are not generally an employer’s responsibility, but the increasingly common requirement to increase the number of handicapped employees for employment equity may change this.

An employer should establish that a prima facie discriminatory standard is a good faith occupational requirement. Employers may find it difficult to establish uniform requirements for employees performing a given job where this would have an adverse impact on handicapped employees, but courts have been less willing than some human rights tribunals to allow the creation of additional safety risks to employees and the public at large to accommodate handicapped employees.27

The duty to accommodate is not absolute or unlimited. It does not require an employer to fundamentally change working conditions or to maintain the employment of an employee who is no longer able to fulfill basic employment obligations in the foreseeable future.28

Discrimination Based on Race or National Origin

All jurisdictions prohibit discrimination on the basis of race, color, or national origin in all aspects of employment. Remedies for racial discrimination can include monetary damages for lost wages, benefits, and hurt feelings as well as placement of the complainant in the position he would have been granted but for the discrimination.

Discrimination Based on Religion

All jurisdictions prohibit discrimination on the basis of religion in all aspects of employment. Most allegations of religious discrimination involve the performance of work on a holiday celebrated by the employee’s religion.

Employers and unions have a duty to accommodate an employee’s request up to the point of “undue hardship”, which will be determined by considering matters


such as financial cost, morale problems with other employees, and the interchangeability of workforce and facilities.29

Collective Bargaining and Worker Participation in Management

Collective Bargaining

Collective bargaining law is primarily an area of provincial competence. Federal labor legislation applies only to industries under exclusive federal jurisdiction. Only the exclusive bargaining agent may attempt to represent the employees of the bargaining unit in their relations with the employer, and the employer may not attempt to bargain collectively with any other union in respect of those employees.

The “exclusive bargaining agent” is a trade union which has been certified by the relevant labor relations board or voluntarily recognized by the employer as the sole bargaining agent for the defined group of employees who form the bargaining unit.

An appropriate bargaining unit is most typically all the employees eligible for unionization at a particular worksite. Where blue-collar employees form a bargaining unit, office employees are typically in a separate unit if they are unionized.30

Not all employees may participate in collective bargaining. In general, managerial employees may not form unions or bargain collectively. In the federal jurisdiction, supervisory employees such as foremen may bargain collectively but are placed in bargaining units separate from the employees they supervise to avoid conflicts of interest and to ensure that employers do not dominate trade unions.

The collective bargaining system places a marked emphasis on the stability of collective bargaining relationships and on the avoidance of strikes and lockouts whenever possible. Recognition strikes, for example, are illegal and virtually unheard of in practice.

29 In Bhinder vs. Canadian National Railway Co., 2 S.C.R. 561 (1985), it was held that where the wearing of a protective helmet was a bona fide occupational requirement, no duty to accommodate an employee who refused to wear one for religious reasons existed. In view of later decisions, it seems likely that the Supreme Court would find that a duty to accommodate existed in similar circumstances today, but whether that duty would extend to the exemption of employees from safety standards for religious reasons remains unsettled.

30 The transportation and telecommunications industries form an exception to this pattern of single plant bargaining units. In these industries, a series of system-wide units covering all employees in related jobs is the norm. Thus, airlines large enough to warrant more than one bargaining unit typically have a series of separate units covering all flight crew, all cabin attendants, all mechanics and aircraft servicing personnel, and all baggage handlers.

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Once certified or recognized, the union remains the exclusive bargaining agent until a majority of the employees in the bargaining unit vote to change bargaining agents or to cease being represented by a union. These votes may only take place in “open periods”, typically the three months before the expiration of the current collective agreement.

The preference for stability in collective bargaining also is shown in the process required for the negotiation of collective agreements. Parties are required to meet and bargain in good faith with a view to concluding a collective agreement. If negotiations fail to produce a settlement, either party may request the naming of a conciliator by the relevant Minister of Labor.

The conciliator acts as a confidential intermediary seeking to bring the parties to an agreement. Should conciliation fail, nothing said or done during the process may be revealed or relied upon by a party in any subsequent legal proceeding. The Minister of Labor may name a mediator or mediation board if conciliation fails to produce an agreement.

The mediator or mediation board will hear the parties and produce a publicly available report containing recommendations for settlement and the parties’ positions. No strike or lockout may take place until one week after the Minister of Labor has received the mediation report or has stated his decision not to name a mediator or mediation board.

Once a collective agreement is signed, it becomes legally binding on the parties and the employees in the bargaining unit. Collective agreements must last for at least one year. In practice, most collective agreements are for two-year or three-year terms, although agreements for four or more years are becoming more common.

Parties bound by collective agreements may not strike or engage in a lockout while a collective agreement is in force and until negotiation, mediation, or conciliation is exhausted. In practice, illegal strikes are rare and are usually “wildcat” ones not supported by the union leadership, while illegal lockouts are equally rare.

A collective agreement sets out norms that are binding on its parties and on the employees it covers. It usually covers wages, working hours, seniority, job classification, paid vacations and holidays, discipline, discharge, and grievance and arbitration. It also may contain provisions on fringe benefits. No deviations from the terms and conditions of employment set out in a collective agreement are permitted, even those favorable to the employee.

All disputes concerning the interpretation or application of the collective agreement must be resolved by arbitration or some other mutually agreed upon method without resort to strikes or lockouts during the lifetime of the collective agreement. Labor arbitrators generally have a broad power to interpret and apply any legislation relevant to the disposition of a grievance before them.
Employees have the right to form trade unions and the right to bargain collectively with their employers without suffering discrimination or reprisals. These rights are enforced through unfair labor practice complaints to the appropriate labor relations board.

Unfair labor practices also include such impediments to collective bargaining as union discrimination against members by way of fines or assessments for refusal to engage in illegal strikes and bad faith bargaining.

A labor relations board is composed of equal numbers of members representing employers, unions, and neutrals who normally sit in three-member panels. Remedies for unfair labor practices can include reinstatement of wrongfully dismissed employees with back pay, posting of a board order finding an employer guilty of an unfair labor practice, and orders to bargain in good faith.

**Worker Participation in Management**

Bodies similar to works councils under European law do not exist in Canada. Some jurisdictions require the formation of joint employer-employee committees to deal with the consequences of large-scale layoffs (involving 50 or more employees in a four-week period).

Where employees are unionized, their union will provide employee representatives. If there is no union, employees select representatives from among themselves for the committee. However, these committees do not participate in the management of the employer’s business on an ongoing basis. They also cannot require changes to the decision which made the layoffs necessary.

Their role is limited to the study and establishment of various methods of minimizing the effects of the layoffs on the affected employees. Occupational health and safety matters are dealt with by joint employer-employee committees.

**Health and Safety Protection in Workplace**

An employer is required to take reasonable care for the safety of his employees. Employers, employees, and other persons in the worksite are required to observe safety standards which are often of a highly detailed and technical nature and vary from jurisdiction to jurisdiction.

These standards are enforced by full-time inspectors employed by the relevant Ministry of Labor or, in British Columbia and Quebec, by inspectors from the Workers’ Compensation Board. Inspectors may enter any business establishment to carry out inspections or investigations and are entitled to examine employers’ records dealing with work accidents, employee health, and compliance with safety standards.

An inspector may order the shutting down of a worksite where he finds breaches of these standards. Failure by an employer to carry out its obligations under
occupational health and safety legislation could subject it to fines in varying amounts, depending on the seriousness of the breach, its consequences, and the jurisdiction in which the offense took place.31

All jurisdictions give employees a right to refuse to perform unsafe work. This right is normally limited when the danger complained of is inherent in the nature of the job or where performance of the task is needed to avert death or serious injury.

The methods for dealing with disputes depend on whether a given condition that constitutes a danger justifying a refusal to work varies from jurisdiction to jurisdiction. In general, an employee may not be required to perform the task in dispute until a safety inspector or the plant occupational health and safety committee has determined that no danger justifying a refusal exists.

All jurisdictions except Alberta and the Northwest Territories provide for occupational health and safety committees composed of equal numbers of employee and management representatives. Formation of such committees is mostly mandatory in workplaces with more than 20 employees (10 in Saskatchewan, Newfoundland, and Labrador).32 The powers of these committees and the frequency with which they are required to meet vary from jurisdiction to jurisdiction.33

The committees’ role in safety issues varies from identifying hazards and making recommendations to the employer (federal), to instituting joint solutions in which the employer is to cooperate (Quebec), to making of recommendations as well as consulting and cooperating with the employer in resolving health and safety issues (Ontario).

Workers’ Compensation and Survivors’ Benefits

The power to legislate on workers’ compensation is assigned to the level of government having jurisdiction over the other aspects of the employment

31 For instance, Ontario provides for fines of up to CAD 500,000 for corporations and up to CAD 25,000, with up to one year’s imprisonment, for individuals. An accused may avoid liability by proving the exercise of due diligence to prevent the contravention, but guilt need not be proven beyond reasonable doubt. In Alberta, fines can reach up to CAD 1,000,000 for repeated offences. Prince Edward Island legislation also provides for the performance of community service. In 2004, the federal government amended the Criminal Code to extend criminal liability to persons with authority in the workplace who do not take reasonable action to prevent injury to or death of employees.

32 In Alberta, the Minister of Labor may order the formation of such committees if they are not voluntarily formed.

33 In Quebec, the committee acts as an arbitrator of disputes between the employer and employees over refusals to perform work believed to be unsafe. In Ontario, the committee participates in investigations of such refusals by an inspector. In other provinces, the committee’s role in such cases is not defined by legislation.
relationship. For most industries, this is the provincial government. However, employees in federally regulated industries are covered by the workers’ compensation scheme of the province or territory in which they normally reside or work, as there is no federal workers’ compensation law.

Each province and territory has legislation establishing a system of compensation without regard to fault for employees or employers who are injured in industrial accidents or who contract occupational diseases. No civil suits may be taken in respect of such injuries or illnesses.

The compensation system is administered by a board composed of union and employer representatives and neutral members. Funding comes from annual assessments on all employers. These assessments are based on the degree of risk of injury or disease characteristic of the employer’s industry. In many provinces, there is an adjustment based on the employer’s individual accident record.

The workers’ compensation board provides injured workers with physical and/or mental rehabilitation assistance and treatment. Workers also receive payments to compensate for loss of wages or salary due to compensable illness or injury. Where the illness or injury results in permanent disability, workers are entitled to receive a pension until retirement age, based on their degree of disability and prior earnings.

All jurisdictions provide the surviving spouses and children of workers killed in industrial accidents or who died of occupational diseases with pensions and, in many cases, lump sum payments to cover funeral or other expenses. Payments to children usually cease when they reach the age of majority (18 years). These payments are adjusted to compensate for inflation.

**Dispute Resolution**

**Non-Unionized Employees**

*Recourse to Courts*

There are no mandatory grievance mechanisms or methods of dispute resolution for non-unionized employees. Larger employers often have internal complaint and grievance procedures covering non-unionized employees, but such matters usually tend to be dealt with informally between the employee and the employer.

34 In New Brunswick, Ontario, Prince Edward Island, Quebec, and the federal jurisdiction, injured workers have a right to return to their former jobs or comparable ones when they become medically fit to do so. Except for the federal jurisdiction, this right is restricted to those who have had their jobs for one year prior to the occurrence of the injury or illness. In Ontario, this right only applies where there are 20 or more employees in the workplace at the time of the accident and can only be asserted for the two years following the accident. In Quebec, this right lasts for two years if there are 20 or more employees in the workplace and for one year if there are less than 20.

(Release 1 – 2012)
However, case law has developed with regard to the circumstances in which employers should give notice of an intention to terminate an employment relationship and the length of notice required in case of dismissals.

The employment of persons hired for a fixed period or for the performance of a specified task will automatically end upon the expiration of such period or upon the completion of the task, without need for either party to give notice. However, most employees are employed for an indefinite term. Employment contracts are presumptively for an indefinite term, in the absence of an express provision to the contrary.

An employee employed for an indefinite term is entitled to reasonable notice of termination or monetary compensation in lieu thereof, unless he has given cause for dismissal. The employer has a similar right to notice in advance of an employee’s intention to resign, but litigation on the length of such notice is very unusual because of the practical difficulty an employer faces in proving it has suffered damages if an employee gives insufficient notice.

In the rare cases where an employer can prove such damages, its legal right to them is clear, as confirmed in a 2008 Supreme Court of Canada decision awarding damages for employees’ failure to give the 2.5 weeks’ notice the court found was required.35

Employment contracts for an indefinite term may contain a term specifying the length of notice to which either party is entitled. The courts will then limit the amount of damages to the length of the notice period specified. Should the contractual notice period be less than the minimum specified in law, the courts will ignore the contractual period and proceed to determine damages as if the contract were silent on the issue.36

Where no notice period is specified in the contract, the courts will infer that the contract is terminable upon reasonable notice. The period of reasonable notice depends on the circumstances of the case and the case law dealing with similar instances.

Matters usually considered in deciding on the length of the reasonable notice period include the employee’s age, length of service, type of position, salary, and the availability of suitable similar employment.37

   2008 SCC 54 (in addition to the 2.5 weeks' notice, which amounted to a total of CAD 40,000, the Supreme Court confirmed a CAD 325,000 award of punitive damages, CAD 65,000 of which had to be paid by the employees).

(Release 1 – 2012)
Although the courts in all provinces treat the exact length of notice on a case-to-case basis, four to 10 months’ notice is often granted to managerial employees with four to ten years’ service. The notice period may be decreased by an employee’s lower rank or increased by a lengthy period of service. The notice period for long-serving employees may range from 18 to 24 months.

If the court determines that the employer has not given sufficient notice of termination or payment in lieu thereof, it will assess the employee’s damages for breach of the implied term. Damages will be in the form of compensation for lost wages and benefits which would have been earned during the reasonable notice period. Special damages have been awarded where circumstances warrant, so long as the loss was a reasonably foreseeable result of the employer’s failure to give reasonable notice.

The Ontario Court of Appeal, which often has an important influence on the development of common law in Canada, has upheld awards of damages for mental distress due to the circumstances of a termination, and to dismiss supervisory employees equivalent to the pay and benefits they would have received until their normal retirement age.

It also has rejected the idea of a 12-month maximum as the length of notice for non-managerial employees. All damages are subject to a duty to mitigate and to a reduction for contingencies.

The following types of employee misconduct can justify dismissal without notice, particularly if the conduct is repeated after clear warnings that improvement is required:

- Excessive absenteeism;
- Dishonest conduct;
- Insubordination;
- Fighting;


39 Canadian Jewish Congress vs. Polger, 2011 QCCA 1169 (24 months’ notice for 22 and 36 years’ service; the plaintiffs had originally been awarded 33 months’ notice); McBrearty vs. Cerescorp Company, 2009 QCCS 3134 (24 months’ notice and 39 years’ service); Aksich vs. Canadian Pacific Railway, 2006 QCCA 931 (24 months’ notice and 27 years’ service); Schmidt Printing Ltd. vs. Bill Sayer Sales Agency Inc., C.A. Montreal, D.T.E. 2004T-396; Lachapelle vs. Bourse de Montréal, D.T.E. 92T-218 (S.C. Mil) (16 months’ notice and 18 months’ service); Sauvé vs. Banque Laurentienne du Canada, RJQ 79 (1999) (18 months’ notice and 29 years’ service).


Sabotage;
Intoxication or drug use in the workplace;
Negligence or incompetence in the performance of work; and
Conflicts of interest and certain conduct which is incompatible with the continuation of the employment relationship (e.g., certain crimes).

However, courts are reluctant to allow termination without notice unless the employer’s case is quite strong.

Recourse before Arbitrators

Most non-unionized employees in the federal jurisdiction, in Quebec, and in Nova Scotia also may have their dismissals dealt with by an adjudicator named under labor standards legislation, but this remedy is not available to senior management employees in the federal jurisdiction and in Quebec.

These statutory adjudicators follow informal procedures similar to those used under collective agreements. Unlike courts, adjudicators may order the reinstatement of a dismissed employee if the dismissal was without just and sufficient cause.

Statutory adjudicators are reluctant to uphold dismissals unless they have been preceded by the application of progressive discipline, especially where the ground for dismissal is incompetence, insubordination, excessive absenteeism, intoxication, or drug use.

Incidents which would likely have been considered as cause for dismissal without notice by a court have been held not to be just cause for dismissal by statutory adjudicators.

In cases where dismissals were found not to be justified, statutory adjudicators (sometimes by the parties’ agreement) have only accorded damages calculated on the basis of the reasonable notice of termination which ought to have been given, following similar principles as the courts. However, adjudicators have a tendency to award longer notice periods.

Where reinstatement is ordered, damages are normally awarded for the salary and benefits lost between the date of the discharge and the date of the reinstatement order, less any period of notional suspension which the adjudicator finds would have been a proper disciplinary measure.

Unionized Employees

In all jurisdictions, disputes relating to the interpretation or application of a collective agreement must be submitted to binding arbitration or dealt with in some other binding fashion which the parties may agree to.

If the essential character of a dispute arises from the interpretation, application, administration, or alleged violation of a collective agreement, the dispute is
within the sole jurisdiction of an arbitrator named under the agreement. In practice, all such disputes are dealt with under grievance and arbitration procedures.

The exact nature of the grievance and arbitration procedure is negotiated between the employer and the union, though all labor relations statutes in Canada give arbitrators certain powers, such as a power to summon witnesses, that supplement their powers under the collective agreement.

The use of a single arbitrator is most common. Some collective agreements provide for arbitration by a panel composed of one member nominated by each party together with a neutral chair. Where parties are unable to agree on the choice of an arbitrator or chairman, the appropriate Minister of Labor may name one.

Following a hearing where the union and the employer present evidence and make submissions, the board or arbitrator will render a decision on the grievance. A labor arbitrator has the power and the responsibility to rule on and enforce substantive rights and obligations under applicable statutes as if they were a part of the collective agreement.

The decision of the arbitrator or board is legally binding on the union, the employer, and the employee(s) involved. An arbitration decision may be filed with the appropriate superior court for enforcement as a court order. In practice, arbitration decisions are usually complied with by the parties without recourse to the courts.

Judicial review of arbitration decisions is available in certain circumstances. The standard of review has varied over time and according to the nature of the question in which court intervention is sought. The deferential standard of “reasonableness” will be used in reviewing most arbitral decisions, and it is only where there is a question of natural justice or of general importance in which arbitrators have no expertise will the court review arbitrators’ decisions on the standard of correctness.

The party bringing the grievance is required to prove his case on the ordinary civil standard of a balance of probabilities. In cases of discharge, arbitrators are very reluctant to dismiss a grievance unless the employer shows that it has followed a course of progressive discipline aimed at correcting the employee’s behavior. Only the most serious of disciplinary offenses will generally justify dismissal without prior use of progressive discipline.

43 Regina Police Assn. Inc. vs. Regina (City) Board of Police Commissioners, 1 S.C.R. 360 (2000).

(Release 1 – 2012)
The usual disciplinary measures in the unionized sector include oral or written warnings, suspensions from work (with consequent loss of pay) for increasing lengths of time, and discharge. Arbitrators may substitute some lesser sanction where it is considered that some discipline was justified. Disciplinary notations also may be ordered changed or removed from an employee’s file.

**Termination of Employment**

**Restrictions on Termination**

*In General*

An employee may be terminated for economic reasons upon receipt of reasonable notice. Where employees are unionized, seniority will normally play a major role in determining which employees will be laid off for economic reasons. Serious disciplinary faults on the part of unionized or non-unionized employees may justify termination without notice.

In the federal jurisdiction and in the provinces except Prince Edward Island, an employer which carries out a “mass termination” must notify the appropriate Minister of Labor in advance.\(^{46}\) In some provinces, the length of notice required increases with the number of employees terminated.\(^{47}\) Layoffs which exceed a certain length of time, generally about six months, are considered to be terminations for this purpose.

Upon receiving the employer’s notice, the Minister of Labor may require the establishment of a joint employer-employee committee to deal with ways of minimizing the effects and scope of the lay-offs, if possible. Where the employees are unionized, the union will form half of the joint committee.

Employees may be offered retraining, assistance in finding other work, transfers within the firm, or early retirement. In the federal jurisdiction, provision is made for the arbitration of differences which the joint committee is unable to resolve.

**Required Notice Periods**

There are statutory minimum notice periods for termination of employment other than for causes justifying immediate dismissal. Employers may give the notice in advance or give the appropriate amount of pay in lieu of notice. These periods are often less than what managerial or long-service employees could

\(^{46}\) The number of terminations triggering this obligation varies from 10 in Quebec, Saskatchewan, New Brunswick, and Nova Scotia; 25 in the Yukon, Northwest Territories, and Nunavut; and to 50 in a four-week period in Ontario, Manitoba, Alberta, British Columbia, Newfoundland, and federally.

\(^{47}\) In British Columbia, eight weeks’ notice is required for 50 to 100 terminations, 12 weeks’ notice for 101 to 300 terminations, and 16 weeks’ for 301 or more terminations. In Ontario, the obligation to give notice also is triggered where the termination is caused by the permanent discontinuance of all or part of the business.
expect to receive. However, deviations which are more favorable to the employee are permitted.

The exact amount of minimum notice varies from jurisdiction to jurisdiction and with the length of the employee’s service. In Ontario and in several provinces, the period increases from one week for employees with more than three months’ service, two weeks for one to three years’ service, three weeks for three to four years’ service, to a maximum of eight weeks’ notice for employees with eight or more years of service.

Other jurisdictions provide for short minimum notice periods with no increase for longer service. For instance, the federal jurisdiction requires two weeks’ notice for all employees with over three months’ service. Benefit plan contributions continue during the notice period.

**Procedures for Termination**

The written notice of termination should specify the effective date of termination and the reasons for termination, particularly if it is for disciplinary reasons. No approval from any third party is necessary for the termination to be effective.

**Severance and Redundancy Payments**

Ontario and the federal jurisdiction require that severance be paid in certain circumstances. This severance pay is distinct from and in addition to termination pay.

In Ontario, employees with more than five years of service who were terminated in the course of a mass termination, and those with over five years of service for an employer with a payroll in Ontario that is more than CAD 2.5-million per year, are entitled to one week’s pay for each year of service. Severance pay is limited to 26 weeks’ pay.

In the federal jurisdiction, employees with more than one year of service are entitled to two days’ pay for each year of service or five days’ pay, whichever is greater, unless they are dismissed for cause.

Redundant employees are commonly offered severance packages based on their age, length of service, and position held. Employees nearing the retirement age are frequently offered severance packages where the employer is reducing the workforce to enable other employees to be kept on. Such payments are not required by statute, but will be based on what might be considered reasonable notice where the employee is terminated without cause.

**Unemployment Insurance**

The federal government has exclusive jurisdiction over unemployment insurance. The federal statute establishing the unemployment insurance system,
the Employment Insurance Act,\textsuperscript{48} thus applies to all types of undertakings and employees in Canada.

The unemployment insurance system is financed by employee contributions deducted from salaries and by employer contributions of 1.4 times the employee contributions. These are paid into a fund which is segregated from other government revenues.

Benefits are paid out of this fund. Employees in certain categories are excluded from paying into the fund and are ineligible for payments from it, such as an employee who controls more than 40 per cent of the voting shares of the employer corporation.

Benefits are provided to employees who are laid off or terminated for economic reasons or who have just cause for resigning. Employees who are terminated for just cause or who resign without sufficient cause are excluded from benefits.

These benefits are payable for up to 52 weeks, following an initial two-week waiting period from the date of unemployment. Employees must have worked a varying number of hours, depending on the rate of unemployment in the region in which they work and their place of residence to qualify for the full 50-week benefit.

The maximum benefit period is reduced on a graduated basis to at least 19 weeks in areas with a six per cent or lower unemployment rate. Unemployment insurance benefits are currently 55 per cent of the employee’s earnings at the time he became unemployed, subject to a weekly maximum.

The unemployment insurance program also is used to provide other benefits to certain groups of employees. Outside of Quebec, female employees who have worked 600 or more hours in the preceding 52 weeks are eligible for maternity and parental leave. Maternity leave is 15 weeks, following a two-week waiting period. Parental leave is a further period up to 35 weeks. Benefits are payable at the rate of 55 per cent of previous earnings up to CAD 413 per week.

Employees participating in certain job sharing, job creation, or approved job training programs also may have their unemployment insurance benefits extended.

Quebec began implementing the new Quebec Parental Insurance Plan (QPIP) in 2006, thereby opting out of the federal unemployment insurance program for maternity, adoption, and parental leave benefits. QPIP benefits consist of a percentage of covered earnings for a period of weeks, subject to an earnings cap. However, QPIP benefits differ from the federal benefit in the following ways:

- The insured earnings cap is higher (CAD 66,000 under QPIP versus CAD 49,500 under the federal unemployment insurance);

\textsuperscript{48} S.C. 1996, c. 23, as amended.
The benefit rate is based on a higher percentage of insured earnings (70 per cent or 75 per cent for QPIP versus 55 per cent federally); there is no two-week waiting period under the QPIP before the first benefit payment; fathers can receive five weeks’ paternity leave in addition to regular parental leave, which may be taken by either parent or shared between parents; and individuals have the choice of receiving higher benefits for a shorter period or lower benefits for a longer period.

Mandatory Job Training
While the federal and provincial governments operate a variety of job training programs, they are not generally mandatory for employees or the unemployed. In Quebec, the Act to Promote Workforce Skills Development and Recognition requires all employers whose payrolls exceed an amount fixed by regulation (CAD 1-million in 2012) to spend a sum equivalent to at least one per cent of their payroll on training expenditures.

Retirement, Healthcare, and Old Age Pensions

State Pensions
There are two State pension schemes in Canada. Under the federal Old Age Security Act, all legal residents are entitled to a flat rate monthly pension upon reaching the age of 65. To be eligible for the full amount, a person must have resided in Canada for 40 years between the ages of 18 to 65. Those with shorter periods of residence are entitled to proportionately reduced pensions. Payments are not dependent on previous income.

The federal Canada Pension Plan (CPP) and Quebec Pension Plan (QPP) are essentially identical and fully portable, but with different funding vehicles. The QPP covers residents of Quebec, while the CPP covers those of the rest of Canada. Both are earnings-related and are financed by contributions from employers, almost all employees, and the self-employed.

Employees contribute 4.95 per cent of their earnings in excess of CAD 3,500 per year up to the maximum pensionable earnings, while employers make a matching contribution. The self-employed may contribute up to 9.9 per cent of their income over CAD 3,500.

49 R.S.Q., c. D-8.3.
50 R.S.C. 1985, c. 0-9 AS AM.
51 In the 29 March 2012 budget, the federal government announced it will increase the normal pension age to 67 by 2029.
Contributors may begin drawing a full pension at the age of 65 or a reduced one at 60. The amount of the pension depends on the size of their contributions. Persons who are not self-employed or working in employment covered by the CPP or QPP cannot contribute to these plans and do not receive pensions from them.

**Health Care**

Benefits under the public healthcare program are not related to prior employment status or earnings. The various public supplementary healthcare programs for the aged also are not tied to previous employment status or income.

Employers contribute to public healthcare plans most often in the form of income and other taxes, but they may provide private pension plans as a fringe benefit. Such plans may give retirees supplementary healthcare benefits beyond those provided by the public plan.

**Summary of Social Costs**

There are four programs in Canada which are financed wholly or partially by employer and employee contributions: unemployment insurance, the CPP and QPP, workers’ compensation and, in some provinces, the public healthcare plan (Medicare). Other social welfare programs exist, but are funded from income, excise, and other taxes levied generally.

Unemployment insurance and CPP or QPP contributions are levied on a uniform basis throughout the country. The maximum annual contribution to unemployment insurance which an employee may be required to make in 2012 is CAD 839.97 while employers pay 1.4 times the contribution made by each employee. For Quebec employees, that maximum annual contribution is CAD 674.73 since the province manages and funds its own parental, maternity, and paternity insurance plans.

Workers’ compensation costs vary from province to province and according to the degree of risk created by the industry in which the employer is engaged. These costs are paid through a payroll tax levied on employers.

Medicare is financed in different ways in different provinces. Medicare costs are usually defrayed out of general tax revenues. In Ontario, Quebec, and Manitoba, such costs are met by a payroll tax on employers. In Alberta and British Columbia, individuals are responsible for the payment of monthly premiums in principle, although employers often pay for these in practice as a fringe benefit.

52 An average of 0.6 per cent of gross payroll has been found for employers in all sectors in all provinces, but wide divergences from this exist. Employers engaged in manufacturing, for example, will pay 2.83 per cent of gross pay for workers’ compensation across the country.
On average, employer contributions to social welfare programs have amounted to 5.4 per cent of gross payrolls. Employee contributions would be considerably lower. Both figures exclude other State welfare plans financed from general taxes.

**Conclusion**

Although the power to make laws affecting employment is divided among various jurisdictions, employment law shows a great deal of uniformity across boundaries. Employment standards, workers’ compensation schemes, and systems for dealing with legal issues surrounding employment contracts at both the individual and collective levels are similar. The collective bargaining law shows the most variety in important aspects.

A number of trends can be expected to affect employment law in coming years. First, claims under human rights legislation can be expected to increase in number and expansiveness, and the courts seem likely to continue to give a receptive hearing to such claims.

Second, the gradual increase in legislative protection offered to employees can be expected to continue. While radical departures from current standards are unlikely, employee rights in areas such as parental and family-related leaves may be expanded.

Third, there may be changes of a less strictly legal nature in workforce organization and working practices. Greater use of other ways of increasing employee involvement in their work and increasing their understanding of how their work fits into the business as a whole also is to be expected.

Some of these changes may require the rethinking of existing law, especially in the field of labor relations, where the law is premised on a strict separation between unions and employers. Others will require changes in practices and orientations on the part of employers, unions, and employees.
Chile

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Chile

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Introduction

Various laws relating to labor existed prior to the Labor Code of 1931, such as:

- Law Decree Number 44 of 14 October 1924, establishing the Secretary of Hygiene, Assistance, Social Security, and Labor (currently the Ministries of Health and Labor);
- Law Decree Number 261 of 10 February 1925, on leases;
- Law Decree Number 308 of 9 March 1925, on promotion of inexpensive construction;
- Law Decree Number 442 of 18 March 1925, on protection of labor maternity; and
- Law Decree Number 2,100 of 31 December 1927, creating the Labor Courts.

The Labor Code of 1931 was substantially changed by the end of the Communist administration in 1973. The historical distinction between workmen (*obreros*) and employees (*empleados*) with regard to social security benefits was abolished by incorporating workmen into the Employees’ Social Security System, which provided better coverage.

The Labor Code of 1931 was subsequently replaced during the military administration. The Social Security System also was basically privatized with the creation of private pension fund administrators (AFPs).

Law Decree Number 2,200 of 15 June 1978 was enacted to address individual employment benefits, while Law Decree Number 2,758 and Law Decree Number 2,756 of 1979 regulated unions and collective bargaining.¹

¹ These laws have been amended several times, such as the amendments introduced by Law Number 18,011 regulating the work of seamen, and by Law Number 18,032 regulating the work of port workers.

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The Constitution of 1980 provided specific labor protections and guaranteed every citizen the freedom to work, right to fair compensation, freedom from discrimination, and rights to collective bargaining and self-organization.

In 1987, Law Number 18,620 approved a new Labor Code that contained most of the existing labor legislation. Law Number 19,010 on the termination of employment contracts, Law Number 19,049 on union organizations, and Law Number 19,069 on collective bargaining were subsequently issued.

A new Labor Code was enacted in 1994, and which is still in force. Legislation on unemployment insurance and the Labor Reform to the Labor Code were approved in 2001, and several laws have since become effective.

**Legal Relationship between Employer and Employee**

**Individual Employment Contract**

The individual employment contract is an agreement wherein the employee commits to personally carry out services under dependence and subordination to the employer who, in turn, commits to pay the employee a certain remuneration for such services.

The employment relationship does not include those services: (a) performed directly to the public; (b) performed at home, irregularly or sporadically; (c) performed by students for a certain period to fulfill training requirements; and (d) performed by independent workers.

When an employment relationship exists, an employment contract will be implied by law even if there is no written evidence of such contract. However,

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2 These included Law Decree Number 2,200, Law Decree Number 2,756, and Law Decree Number 2,758.

3 These include: (a) Law Number 20,001 of 5 February 2005 on the maximum load that may be lifted by employees; (b) Law Number 20,005 of 18 March 2005 sanctioning sexual harassment; (c) Law Number 20,087 of 3 January 2006 establishing a new labor procedure (Reforma Procesal Laboral); (d) Law Number 20,137 of 16 December 2006 amending existing and established new birth and death leaves; (e) Law Number 20,123 of 15 January 2007 on subcontracting; (f) Law Number 20,255 of 17 March 2008 reforming the existing social security system; (g) Law Number 20,281 of 21 July 2008 regulating the Sunday or holiday premium (semana corrida) and the minimum monthly wage; (h) Law Number 20,348 of 19 June 2009 protecting the right to equal remuneration between men and women; (i) Law Number 20,422 of 10 February 2010 establishing rules referred to equal opportunities for disabled persons; (j) Law Number 20,539 of 6 October 2011, on new rules for work in night shifts of employees younger than 18 years of age; (k) Law Number 20,540 of 6 October 2011, on new rules for deductions over remunerations for educational purposes; and (l) Law Number 20,545 of 17 October 2011, on new rules applicable to maternal leave.
the Labor Code requires an employment contract to be executed in writing no later than the fifteenth day after the employee began rendering the services.

Where an employment contract exists for carrying out a particular task or for a duration of less than 30 days, it should be executed in writing no later than the fifth day after the employee began rendering the services.

A fine may be imposed if the employer fails to put the employment contract into writing. In any action before the Labor Court, it also will be presumed that the terms and conditions of the employment contract are those stated by the employee.

**Terms of Employment Contract**

The Labor Code requires an employment contract to contain the following information:

- The date and place of execution;
- The identity of the executing parties, including the nationality and date of birth of the employee;
- The date on which the employee is to start or actually has started rendering services;
- A description of the services and details of the location where the services are to be performed;
- The employee’s wage, and the system and time of payment;
- The number of working hours and when they are to be worked, unless the employer has a shift system in place, in which case the employer’s internal regulations will apply;
- The term of the contract, which will be indefinite unless the contract is for a fixed term;
- The home place of the employee, in case he has to move his domicile due to the contract;
- Any additional benefits which will be granted to the employee (e.g. home, lighting, transportation, or meal allowance.); and
- Any other terms and conditions agreed to by the parties.

If an employer grants the employees any right, benefit, or privilege on a regular basis, such may be deemed to be part of their employment contracts as implied terms (*cláusula tácita*). The employer will not be able to change, suspend, or terminate these benefits or change their terms without the agreement of the employee.
The employer has a limited right to change the services and/or the location where they are performed. He may change the services that an employee carries out if the existing and the proposed services are similar, and the proposed change is not detrimental to the employee. He also may change the location where the services are performed if the proposed change is not detrimental to the employee and the new location is within the same place or city.

**Capacity of Parties**

Persons who are at least 18 years of age may freely enter into employment contracts, while those who are younger than 18 and older than 15 may enter into employment contracts with the express authority of a parent (or grandparent, guardian, an institution that is responsible for the minor, or a Labor Inspector, in lack thereof).

Minors may provide services with the proper authorization if they have fulfilled high school obligations or are currently in school, and only if they perform light tasks that may not harm their health and development and that do not prevent them from attending school and educational programs, if applicable.

People younger than 15 years of age may only enter into employment contracts related to theaters, movies, radio, television, circus, and similar activities, in qualified cases and with prior authorization of the parents or the corresponding Family Court.

People younger than 21 years of age may not be hired for underground mining works without passing an aptitude test, while persons under 18 years of age may not be employed in cabarets and other similar places with live shows and places where alcohol is sold to be consumed in the same place.

Employees younger than 18 years of age may not perform heavy and/or hazardous work, may not render services for over eight hours a day, and may not work at night shifts in industrial and commercial businesses for a period of 11 consecutive hours (at least from ten o’clock in the evening until seven o’clock in the morning). Employees younger than 18 years of age who are currently in school may not render services for over 30 hours a week during the school period.

**Foreign Employees**

*In General*

From a labor law perspective, foreign employees are subject to the same regulations as Chilean nationals. To legally work in Chile, a foreign employee generally should obtain an employment contract visa, a temporary resident visa, or a special short-term work permit.

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4 Labor Code, art 12.
5 Work at night shifts for employees younger than 18 years of age was changed by Law Number 20,539 of 6 October 2011.
Employment Contract Visa

An employment contract visa may be granted to any foreigner who comes to Chile to work for an employer legally domiciled in Chile. The holder of such visa can only perform the remunerated activities provided under the employment contract which is the basis of the visa. The following criteria should be met before an employment contract visa may be granted:

- The employer should be domiciled in Chile.
- If the employment contract is executed in Chile, it should be signed by the employer and the employee before a notary public. Otherwise, it should be signed by the parties before the Chilean consulate corresponding to the city of residence of the employee and duly legalized by the Ministry of Foreign Affairs in Chile.
- The employment contract should contain certain information.

Employment contract visas are normally granted for two years, unless the employment contract is for a shorter term, and may be renewed indefinitely for up to two years. A foreign employee may apply for a permanent residence visa after two years of residency in the country.

An employment contract visa may be obtained directly from a Chilean consulate abroad if the foreigner has not yet arrived in Chile. He should personally appear before the corresponding Chilean consulate and submit his visa application.

The documents required to apply for a visa may vary from consulate to consulate. As a general rule, the consulate may require a copy of the relevant employment contract and, in some cases, a health certificate stating that the foreigner has no infectious diseases (including HIV), a police record, and identification photographs. Under certain circumstances, the consulate also may require additional documents such as proof of marital status, economic situation, or qualifications.

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6 The same visa will be granted to the foreigner’s family members. The visa will be granted as “holder” in the applicant’s case, while it will be granted as “dependent” in the case of his family. Dependents are not allowed to work in Chile under this type of visa.

7 These include: (a) the date and place of execution; (b) the name, nationality, and domicile of the parties; (c) the marital status, occupation, birth date, and home place of the employee; (d) the nature of the activities to be undertaken by the employee in Chile; (e) the working hours’ limitation, place of work, and wage; (f) the employer’s obligation to pay the employee’s employment tax; (g) the term of the contract; (h) the date on which the employee is to begin work, which may not be before he obtains the corresponding visa; (i) the employer’s obligation to provide the employee and his family members return travel tickets to the country of origin, in case of termination of the employment relation; and (j) whether the employee is going to enroll with the Chilean social security system or will maintain his system abroad.

(Release 1 – 2012)
The time to complete this process varies from consulate to consulate, but may take three weeks to three months. The applicant will be notified once the visa has been granted. Upon receipt of the notification, he should go to the consulate to have his visa stamped.

An employment contract visa also may be obtained through the Ministry of Interior (Ministerio del Interior, Departamento de Extranjería) when the employee is already in the country (usually on a tourist visa) and wishes to stay to commence work under an employment contract.

The procedure with the Ministry of Interior takes about three to four months. However, it is possible to obtain a special work permit once the visa application is filed, allowing the holder to work in Chile while the visa application is in process.

Temporary Resident Visa

A temporary resident visa will be granted to a foreigner who intends to live in Chile and shows family ties or interests in the country. The residence should be considered useful or advantageous to Chile by the corresponding authority. The same visa will be granted to members of the applicant’s family.

The temporary resident visa has a maximum term of one year and can be renewed only once for the same period of time. A temporary resident who completes a year of residence in Chile may apply for permanent residence, while one who completes two years of residence should apply for such permanent residence.

The holder of a temporary resident visa can carry out any lawful activity in Chile. The procedure for obtaining a temporary resident visa is the same as that for an employment contract visa.

Work Permit

The Ministry of Interior may grant special short-term work permits to foreigners. The permits are granted for 30 days and may be extended for periods of 30 days until the holder’s 90-day tourist visa expires. To obtain this permit, an applicant should be able to show that he has sufficient economic solvency to live in Chile.

If the holder of a special short-term work permit wishes to leave Chile, he should take his permit card to the Ministry of Interior and exchange it for his original tourist visa. The permit will expire as soon as he leaves, and another application for a special short-term work permit will have to be made upon his return to Chile.

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8 These include an agent or representative of a foreign corporation, those conducting training programs, or foreign investors, among others.
Foreign Identity Card

If the visa was requested and stamped at a Chilean consulate, the visa holder will have a 30-day period upon entering the country to register his visa with the International Police and to request an identity card at the Civil Register Office. The same procedure is applicable to all dependents over 18 years of age.

A visa holder should personally inform the International Police within 30 days after any change of domicile or activity. If the visa was issued by the Ministry of Interior, the 30-day period will commence on the date his visa is stamped.

Taxation of Foreigners

Foreign individuals are subject to a flat 20 per cent or 35 per cent withholding tax on their work-related income until they acquire tax residency in Chile (usually after six months). Once foreign individuals acquire tax residency, they are subject to second category tax, which is based on an individual’s total gross monthly earnings minus the social security contributions.

Citizens under an employment contract are subject to second category tax from day one on their work-related income, with rates varying from zero to 40 per cent. An employer should withhold second category tax from an employee’s wages at the date of payment.

All foreigners during their first three years of residence or domicile in Chile (which may be extended for an additional three years) are only subject to taxes in Chile on their Chilean source income. All income received by foreigners arising from goods or assets located in Chile or from activities performed in Chile will be Chilean source income.

In general, a foreigner should pay tax on his worldwide income once the first three years of residency (or its extension) has ended. In the case of income originating abroad, only the foreigner’s net income will be taxed unless a double taxation treaty exists.

Pension Fund and Insurance Contributions

Employees with employment contract visas who have technical or higher education qualifications may be exempt from making pension fund and health insurance contributions in Chile. To do this, an employee should have and maintain an affiliation to a social security system abroad that should at least provide for retirement, death, illness, and disability. He may evidence this affiliation through a legalized certificate issued by the foreign social security institution.

He also should present evidence of his technical or higher education qualifications through the corresponding diploma, duly legalized before the Chilean consulate of the city in which the diploma was issued.

(Release 1 – 2012)
Chile has entered into social security agreements with several countries, allowing foreigners to be exempted from joining the Chilean social security system in certain cases. Employers should pay contributions to the employees’ compensation insurance for foreign employees. This insurance covers labor accidents, death, and illness. Foreign employees also should enroll with the unemployment insurance and pay the corresponding contributions.

**Part-Time Employees**

The parties may agree on part-time employment contracts with a maximum working time of 30 hours. Part-time employees have the same rights as full-time employees, but governed by the following rules:

- The legal profit-sharing may be reduced in the same proportion as the relation between the agreed number of part-time hours and full-time ordinary hours.
- The parties may agree on alternative working hours. The employer will be entitled to determine, with at least one week’s advance notice, one of the alternatives for the following week or period.
- The employee receives the greater between the statutory severance or a severance pay based on the average of the remunerations received by him during the employment contract or the last 11 years.

**Transfer of Business**

Changes in connection with the ownership, possession, or holding of the business will not affect the rights and obligations of employees pursuant to their individual or collective employment contracts, which will remain in effect with the new employer.9

**Subcontracting and Temporary Agencies**

**Subcontracting**

Work under a subcontracting regime is defined by the Labor Code as one performed by virtue of an employment contract executed between an employee and an employer — denominated contractor or subcontractor — where the latter executes works or services at his own risk and with workers of his dependency, for a third party who owns a work, company, or worksite in which the services or works are executed (the “Principal Company”).

If the services rendered do not fulfill the requirements or are limited to a mere intermediation of workers to a work, company, or worksite, the Principal Company is deemed to be the actual employer of the employees. The Principal Company will be jointly responsible for the labor and social security obligations of the contractor to his employees. Such liability may be reduced to a subsidiary degree if the Principal Company exercises its prerogative to be informed by the

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9 Labor Code, art 4, paragraph 2.
contractor of the status of the fulfillment of such obligations and withholding in case of unpaid contributions.

Temporary Agencies

Supply agreements of transitory workers are contracts wherein an employee and a temporary agency mutually require the former to render specific services to a user of the temporary agency (the “User Company”) and the latter to pay the employee remuneration for the time in which he rendered services. Temporary employment through supply agreements of transitory workers is regulated in the Labor Code and is subject to special conditions. A User Company may use transitory workers only under any of the following circumstances:

- Suspension of the employment contract or of the obligation to render services of one or more employees due to medical leaves, maternity leaves, or holidays;
- Special events, such as the organization of conferences, fairs, or expositions;
- New and specific projects of the User Company, such as the building of new facilities, enlargement of already existing markets, or expansion to new markets;
- Period of initiation of activities, in the case of new companies;
- Activity increase of a determined section, worksite, or establishment of the User Company; or
- Works which are urgent, precise, and may not be deferred and which require immediate execution, such as repairs in the User Company’s facilities and services.

A supply agreement of transitory workers for the first item, above, may last while the corresponding employee’s contract or services is suspended, while its duration may not exceed 90 days for items two and five, above. Finally, its duration should not exceed 180 days for items three and four, above. Such terms are non-extendible.

However, the Labor Board has ruled that a worker may be supplied to the same User Company several consecutive times, as long as each supply complies with a different legal circumstance which authorizes the supply pursuant to the Labor Code.

Supply agreements of transitory workers may only be executed with temporary agencies which are listed in a special registry held by the Labor Board and which also should fulfill other specific requirements established by the Labor Code.
Terms and Conditions of Employment

Remuneration

The monthly minimum wage for a full-time employee is currently CLP 182,000. All employers making profits should share such profits with their employees by adopting any of the following profit-sharing schemes:

- The employer may distribute once each fiscal year among the employees at least 30 percent of the net profits earned during that year.
- The employer may pay to each employee an amount equivalent to 25 percent of his accrued monthly wages during the fiscal year, but not to exceed 4.75 monthly minimum wages. Thus, profit-sharing under this scheme is not based on the employer’s actual profits, protecting him against high payments in profitable years.
- The employer also may agree with his employees on other profit-sharing schemes providing equal or higher benefits. The profit-sharing requirement may not be satisfied by a productivity bonus or by specifying that the profit sharing is included in an employee’s base remuneration.

Employees receiving variable remunerations or mixed remunerations (partly fixed and partly variable amounts) are entitled to a Sunday or holiday premium (semana corrida) consisting in the payment of remuneration for Sundays and holidays not worked. This is an additional payment that may not be deemed included in the base salary.

The Sunday or holiday premium is calculated by dividing the variable remunerations accumulated by an employee on a daily basis during the corresponding week by the actual number of days worked during that week.

Working Hours

In General

Employers should keep a record (i.e., attendance book or control clock with registration cards) of employees’ attendance to determine the total number of hours worked each day by each employee. Other recording methods may be used with prior authorization of the Labor Board.

Maximum Working Hours

In general, an employee cannot work for more than 10 hours a day or more than 45 hours a week. The weekly 45 hours may be distributed over no more than six

10 Labor Code, art 47.
11 These are the profits calculated by the Internal Revenue Service (Servicio de Impuestos Internos) for purposes of income taxes, without deducting losses corresponding to previous years, minus ten percent of capital on account of interest on the employer’s capital.
or less than five days a week. However, the following employees are excluded from the rules on maximum working hours:

- People who render services to different employers;
- Managers, administrators, attorneys with administration powers, and those who work without direct supervision;
- People hired to render services from their home or other places freely determined by them;
- Commission and insurance agents, traveling sales persons, collectors, and other employees who carry out similar services;
- Employees who render services on fishing boats; and
- People hired to render services outside of the company’s premises by means of telecommunication.

**Overtime**

An employee will have worked overtime if the hours worked during a week exceed the contracted working hours or the legal maximum hours per week, whichever is lower. Overtime may only be agreed and worked in case of temporary needs or situations affecting the business.

An employer and an employee may agree in writing on overtime of up to two hours a day, provided that there is no damage to the employee’s health. Such agreement may not last for more than three months, subject to renewal through mutual agreement. Overtime hours should be paid at a rate of 1.5 times the employee’s regular hourly wage, and should be paid together with the employee’s wage.

**Rest Periods**

The working day should be divided in half, with at least half an hour in between as free time for the employee to have a midday meal. This rest period is not considered as worked when determining the duration of the working day.

The Labor Code provides for a weekly rest day on Sunday and for rest days on national holidays. Work on these days is only permitted in case of force majeure or when expressly authorized by law and/or by the Labor Board, such as in continuing process industries, certain seasonal work, commercial facilities directly serving the public, and work at remote sites, among others.

**Annual Vacation**

An employee is entitled to 15 working days of annual vacation with full pay after a year of service for an employer.

An employee with 10 or more years of service for one or more employers also has the right to an additional day of vacation for every three years of service in
excess of 10 years. Saturdays are considered as non-working days when allocating annual vacation.

**Maternity Leave**

The law provides for fully paid maternity leave of six weeks before birth (*pre-natal*) and 12 weeks after birth (*post-natal*). If the birth occurs before the 33rd week of pregnancy or if the child weighs less than 1,500 grams at birth, the *post-natal* will be extended to 18 weeks.

Once the *post-natal* has expired, female employees are entitled to an additional paid maternity leave after birth of another 12 weeks (*post-natal parental*). During the *post-natal parental*, female employees may decide to go back to their work for half day, in which case the *post-natal parental* is extended to a total of 18 weeks.

Maternity leave is paid through a subsidy by the employee’s health insurance, which has a monthly ceiling currently of CLF 67.4. If the working mother decides to return to her work for half day, she will receive 50 per cent of the subsidy (i.e., currently CLF 33.7), and at least 50 per cent of her fixed remunerations set forth in the employment contract, plus any other variable remuneration to which she may be entitled.

If both parents are employees, either of them, at the mother’s choice, may take the additional paid maternity leave after birth as of the 7th week thereof and for the number of weeks indicated by the mother. If the father uses this additional paid maternity leave, he will receive the monthly subsidy from the health institution calculated on the basis of his remuneration, with the ceiling of CLF 67.4.

During pregnancy, maternity leave, and the year following the end of maternity leave, a woman’s employment contract may be terminated only with prior approval of the Labor Court.

**Sick Leave**

Sick leave requires a doctor’s certificate and immediate notice to the employer. The employee’s health insurance pays his wage during sick leave up to a monthly ceiling of CLF 67.4 (a) as of the fourth day of sick leave, if it is granted for a period shorter than 10 days, and (b) as of the first day of sick leave, if it is granted for a period longer than 10 days.

**Other Leave**

In case of death of a child or a spouse, an employee is entitled to seven continuous days of paid leave, which should be effective as of the date of the corresponding death. In the case of birth or adoption of a child, the father is entitled to five days of paid leave, which should be made effective within the first month following the birth or adoption.
In case of death of an unborn child or the parents of an employee, he is entitled to three working days of paid leave. The paid leave should be effective as of the date of the death or, in case of the death of an unborn child, as of the date of the death certificate.

Where the poor health of a child under one year of age requires a parent’s attention at home (as evidenced by a doctor’s certificate), the parent (at the mother’s choice) is entitled to leave for such time as is determined by the doctor. This leave is paid by the employee's health insurance.

Female employees are entitled to a special leave equal to the number of hours equivalent to 10 ordinary working schedules per each year in case of severe illness of a child who is less than 18 years of age. They also are entitled to be paid for the leave by the employer but are required to make up for the time taken off work at a later date without further payment.

Other Benefits

Day care for infants younger than two years of age should be provided by employers with 20 or more female employees. Infant day care may be provided at the employer’s premises or at another location. The employer may comply with this requirement by paying an infant day care nursery to provide this service.

Where work is carried out at remote sites, the employer is normally required to provide transportation, housing, and food to the employees therein. Adequate dining facilities should be provided if the employer requires the employees to eat at the workplace.

Protection against Sexual Harassment in the Workplace

The Labor Code defines “sexual harassment” as a unilateral and unwelcome sexual advance or request for sexual favors, in any form, that involves a threat to the individual’s employment opportunities or adversely affects his work environment and performance. Sexual harassment in Chile is limited exclusively to the workplace.

All companies with more than 10 employees are required to develop an internal procedure for dealing with all cases of sexual harassment within the company. If the sexual harassment is confirmed by investigations carried out by the employer or the Labor Board, the employer may dismiss the offender on grounds of serious fault, without severance pay. If the alleged victim is deemed to have purposely made a false accusation of sexual harassment, the alleged wrongdoer is entitled to seek compensation from the accuser.
Discrimination

In General

Article 19 of the Constitution prohibits discrimination based on criteria other than personal capacity and suitability. The Labor Code contains the same prohibition, particularly as regards any discrimination, exclusion, or preference based on race, color, sex, age, marital status, union membership, religion, political opinion, nationality, ancestry, or social origin.

Thus, no employer may subject the hiring of employees to any of these circumstances. However, distinctions, exclusions, or preferences based on qualifications required for a particular job will not be considered as discrimination.

An employer may not require the absence of economic, financial, banking, or commercial obligations as a condition for the hiring of an employee. He also may not require HIV or pregnancy tests, or certificates of financial or commercial records.

Nevertheless, the law requires an employee to have Chilean nationality in a limited number of cases, and allows for the imposition of certain age limits. Discrimination and violation of fundamental rights may be severely sanctioned through the New Labor Protection Procedure (Procedimiento de Tutela Laboral), including the obligation to indemnify moral damages.

Gender Discrimination

No employer may base the hiring of female employees on the absence or existence of pregnancy or require any certificate or medical examination to verify this circumstance. Furthermore, Law Number 20,348 (Equal Pay Act) protects the right to equal remuneration between men and women by:

- Establishing a principle according to which men and women that render the same services for the same employer should be equally remunerated;
- Providing that every employer should establish an internal procedure applicable to claims based on alleged infractions of the equal remuneration principle;
- Requiring employers who have 200 or more employees to include a registry stating the different positions existing in the company and their essential technical characteristics in their Internal Order, Hygiene, and Safety Regulations; and
- Rewarding employers who do not make arbitrary remuneration differences between their employees through a 10 per cent reduction of the fines imposed by the Labor Board in addition to any other reduction to which the employer may be entitled through the corresponding fine challenge procedure.
Collective Bargaining and Worker Participation in Management

In General

The Constitution recognizes unions as legal entities and recognizes the right of employees to form, join, not join, and withdraw from a union. It also prohibits unions from participating in political activities. There is no distinction between foreign employees and nationals in union matters, thus they enjoy the same rights to form and join unions.

The role of the union is to represent its members in carrying out and enforcing their individual and collective employment contracts and agreements. It also represents its members in collective bargaining and assists them in the enforcement of employment laws, mutual aid and welfare, workplace safety, training, and leisure activities. Unions may establish, join, and withdraw from federations.

Unions generally have no right to interfere with the administration or management of a business, except as regards workplace hygiene and safety regulations, among others, which give employees the right to select representatives for hygiene and safety committees.

Union Structure

A union is comprised of members and a board of representatives. Union members elect the members of the board of representatives from their peers. The number of representatives on a union’s board will depend on the union by-laws, but the union leaders with dismissal protection rights are limited by law according to the size of the union.12

Union meetings may be held within the workplace but should be held outside of working hours. Union representatives are entitled to special permits from their employers, who should allow them time off work to attend to union matters.

Each union representative is entitled to special permits for no less than six hours a week (or eight hours for unions with 250 members or more). The number of union leaders with this right also is limited. The wages of the union representative for the hours not worked due to union activities are paid by the union.

Procedure for Formation of Union

A union should be formed in accordance with the procedure set out in the Labor Code in order to be legally recognized. The formation of a union in a business with not more than 50 employees requires eight workers. Otherwise, the

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12 For instance, a union with 25 to 249 members will have three representatives with dismissal protection.
formation of a union requires at least 25 employees representing at least ten per cent of the total employees working for the business.

Still, eight employees may form a union where there is none, subject to achieving the balance of the required number of employees within one year. Failure to achieve the quorum will cause the automatic expiration of the union’s legal existence.

Two-hundred-and-fifty or more employees of a business may agree to form a union regardless of the percentage of the workforce they comprise. Depending on the number of employees, a workforce may have more than one union.

If the business has more than one establishment, the workers in each establishment can form a union, with at least 25 employees representing 30 per cent or more of the employees working therein. Employees who wish to form a union should hold an assembly of employees before a public officer, usually a notary public or an officer of the Labor Board. A secret poll to vote on the formation of a union will be held in the assembly.

If the required number of votes is not reached, the union will not be formed, but the employees may still assemble at any time in the future for the purpose of voting again on the formation of a union. If the formation of a union is approved in the assembly, the employees also should vote to approve the union’s bylaws and appoint the union representatives therein.

Within 15 days after the date of the assembly, the union representatives are required to file the original minutes of the assembly and two copies of the bylaws (each certified by the attending public officer) with the Labor Board.

The Labor Board then registers and files these documents with the Register of Unions. A union becomes a legal entity once it is registered by the Labor Board. It may not engage in any union activities other than the procedures necessary for its formation during the formation procedure. Employees are free to join or refrain from joining a union and may withdraw from membership at any time.

To preserve employees’ rights, an employer may not:

- Force his employees to establish or join a particular union;
- Engage in any activity to restrain, limit, or coerce his employees in the exercise of their rights of self-organization;
- Engage in discrimination on account of membership or participation in union activities;
- Interfere in any vote to form a union; or
- Impose membership or non-membership in a union as a condition for employment.

An employer who engages in such conduct may be severely sanctioned due to unionization unfair practices.
Collective Bargaining

In General

The right to collective bargaining is granted by the Constitution and the Labor Code. Unless expressly excluded, all employees (whether full-time or part-time) have the right to engage in collective bargaining.

However, collective bargaining is not allowed in: (a) State businesses dependent on the Ministry of National Defense or related to the State through such Ministry; and (b) businesses or public or private institutions with more than 50 per cent of their budget financed by the State in any of the last two years. The following employees also are excluded from the right to collective bargaining:

- Employees subject to apprenticeship contracts, temporary employees, and those hired for a particular work, task, or assignment;
- Managers, executives, agents, and officers having general managerial roles;
- Employees with the power to hire and lay off other employees; and
- Employees who, although not actually part of management, hold positions of authority which give them a say in the policies and manufacturing or trading processes of the business.

However, the employment contract of an employee in the second through forth categories should expressly state that he is to be excluded from collective bargaining to be so excluded. Still, being excluded from the right to collective bargaining does not exclude him from the right to form and join a union.

The Labor Code limits collective bargaining to matters relating to common conditions of employment, such as wages, other monetary and fringe benefits, working hours, Christmas bonuses, Independence Day bonuses, and payments on the birth of children. All of these conditions of employment should be collectively bargained at the same time.

Matters that limit the employer’s authority to organize, direct, and manage his business and matters unrelated to the business cannot be subject to collective bargaining. Those who participate in a collective bargaining negotiation are defined as the “bargaining unit”, which is generally restricted to the employer and his employees. Union representatives and employee groups (where such are formed for the purpose of collective bargaining) may represent the employees.

The Labor Board does not play a role in defining the bargaining unit as in other jurisdictions. The law permits different unions and different employers to come together as a bargaining unit, but only upon agreement of all the people involved.
Financial Information

A union or employee bargaining unit may request the employer, within three months before the expiration of a collective employment contract, to provide the information necessary for the preparation of a new collective employment contract. These include:

- The balance sheets of the last two years, except if the business has a shorter life, in which case the obligation will be reduced to the time during which the business has been in existence;
- The necessary financial information during that period;
- Payroll costs; and
- Future investment policy, provided that such information is not considered confidential by the employer.

Opportunity for Collective Bargaining

Collective bargaining may only commence a year after the date in which the business started its activities. If a collective employment contract or agreement already exists, collective bargaining for a new agreement may not commence earlier than 45 days or later than 40 days before the expiration of the existing contract or agreement.

The law limits the duration of collective employment contracts or agreements to a minimum of two and a maximum of four years. Collective bargaining begins with the employees’ proposal, which consists of a draft of the proposed agreement detailing the names of the employees participating in the collective bargaining. The proposal is submitted to the employer by the employees’ representatives who are:

- In most cases, the employees’ union;
- In some cases, more than one union (where more than one exists in the same business), such that proposals should be submitted jointly; and
- Occasionally, an employees’ group (not organized as a union) which meets the numbers and percentages required for the formation of a union.

Bargaining

The employer should respond to the employees’ proposal within 15 days after receipt. He should send a copy of his response to the Labor Board. Delay in responding is sanctioned through fines and may result in the implied acceptance of the employees’ proposals.

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The law is not clear on the meaning of “starting activities”. At present, the Labor Board considers the starting date to be the date in which the business has been registered for tax purposes.
After the employer’s response is filed, there are no formal rules regarding the time and location for negotiating, although the law requires the parties to meet and bargain in good faith. Collective bargaining generally may not exceed 45 days. At the end of such period, employees should choose whether to:

- Continue the collective bargaining negotiations through mutual agreement;
- Vote on whether to accept the employer’s final offer or reject it and vote to strike; or
- Keep, for the next 18 months, the terms of the existing collective employment contract or agreement or terms of employment under existing individual employment contracts, but excluding increases in pay in both cases.

An employer who has made a final offer that meets the statutory requirements may hire replacements for striking employees earlier than otherwise, and his employees may individually choose to return to work earlier than is usually allowed.

Although an employer may not interfere with or force his employees to accept a final offer, he may inform his employees of the advantages of the final offer. The final offer should be made to the employees’ representatives at least seven days before the expiration of the collective employment contract or collective agreement, if there is one, or before the expiration of the 45-day period, if there is not a collective employment contract or collective agreement currently in force in the company.

Upon reaching an agreement, a collective employment contract will then be executed by the parties’ representatives. A copy of the contract should be delivered to the Labor Board within five days of its execution. The collective employment contract will specify its duration. During its term, the employees benefiting from it may not strike and may not force any other collective bargaining on matters negotiated in the contract or any other matter.

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14 The final offer should at least contain the following: (1) Provisions identical to those contained in the former collective employment contracts or agreements (or, if appropriate, the arbitration award currently in force), increased in accordance with the variation in the Consumer Price Index between the date of the last indexation of salaries and the date on which the former collective employment contract or agreement (or arbitration award) expired; (2) A minimum annual increase in accordance with the increase in the Consumer Price Index during the term of the agreement, excluding the last 12 months; and (3) A replacement bonus of CLF 4 for each employee hired as a replacement. The total amount of such bonus will be paid in equal parts to all the employees involved in the collective bargaining within five days after conclusion of the process. If there is no former collective employment contract or agreement, the final offer only needs to provide the benefits stated in the individual employment contracts plus the Consumer Price Index adjustments and the replacement bonus.
Collective Employment Contracts and Agreements

At any moment, the employer and one or more unions may conduct direct negotiations to agree on common employment conditions and remunerations for a certain period. These agreements are called collective agreements and generally have the same effects as collective employment contracts. Other than a union, a group of employees joined together to negotiate also may subscribe a collective employment agreement, provided the following requirements are followed:

- The group should be comprised of at least eight employees;
- The employees should be represented by a bargaining unit of three to five members elected by the employees involved in the negotiation in a secret poll held before a notary public or a Labor Inspector;
- The employer should respond to the proposal of the employees within 15 days; and
- The employees should vote to approve the employer’s final offer in a secret poll held before a notary public or a Labor Inspector.

If these requirements are not met, the executed agreement will be valid only as an individual employment contract. A collective employment contract or agreement may be enforced before the Labor Board or the Labor Courts. Arbitration also may be used as a means of resolving disputes on collective employment contracts or agreements, provided this was agreed to in those contracts or agreements.

 Strikes

In General

Only employees involved in a collective bargaining are legally permitted to strike. If the employer and the employees’ representatives cannot reach an agreement by the last five days of the bargaining period or any extension thereof, the employees may vote to strike.

The strike will be effective on the third day after the strike vote and will begin in the first shift of the day. Strikes have no legal time limits. Any other activity which employees may use to force an employer to accept a proposal (e.g., work slowdown, boycotts, secondary picketing) is illegal. Violence during a legal strike is uncommon and police action will be taken where it occurs.

Rights during Strike

Employees who are on strike receive no pay but have the right to work elsewhere. They also are entitled to go back to their old jobs at the end of the strike, even if the employer has hired replacement workers.

If an employer has not made a final offer or has made one that does not meet the statutory requirements, the employees may individually return to work 30 days
after the beginning of the strike. If the final offer was submitted late but meets the statutory requirements, the employees may individually return to work 15 days after the submission of the final offer.

If an employer has made a timely final offer that meets the statutory requirements, the employees may individually go back to work 15 days after the beginning of the strike. Employers who have not made a proper final offer or have made a late offer can only hire replacement employees 15 days after the beginning of the strike as long as they pay the required replacement bonus.

If the employer has made a timely final offer, he may hire temporary replacements as of the first day of the strike. Reassignment of non-striking employees to perform the duties of striking employees is subject to the rules of the Labor Code.

**Employer’s Right to Declare Lockout**

Once a strike has begun, the employer may declare a lockout by temporarily closing all or part of his business operations. A lockout can only be declared if the strike affects more than 50 percent of the total number of employees of the business or results in the stoppage of essential activities for its operation.

In any event, the lockout may not extend beyond 30 days from the date the strike began or, if earlier, the date of the termination of the strike.

**Other Means of Resolving Disputes**

At any time during collective bargaining, the parties may agree to the appointment of a mediator. The mediator should follow the procedure agreed by the parties, or that established by law if there is no agreement.

The parties may call in an arbitrator during the collective bargaining or during a strike or lockout. They should agree on the procedure that the arbitrator should follow, otherwise the arbitrator will determine such procedure.

Arbitration is mandatory where a strike or temporary closure of the business is prohibited (e.g., in the public sector), as well as in cases where the continuation of the employer’s activities is ordered by the President as expressly permitted by law.

Within 48 hours after the employees have voted to strike, any of the parties may request the intervention of a Labor Board Inspector to facilitate agreement (*buenos oficios*). If an agreement is not reached within five days, the Inspector will conclude intervention and the strike will be effective as of the next business day. The five-day period may be extended for another five days by agreement of the parties.
Health and Safety in Workplace

The main laws and regulations related to health and safety in the workplace are the: (a) Constitution; (b) Labor Code; (c) Labor Accidents and Professional Disease Act; (d) Regulations on the Constitution of Hygiene and Safety Committees; (e) Sanitary Code; (f) Regulations on Basic Sanitary and Environmental Conditions in Work Places; (g) Regulations on Professional Risk Prevention; (h) Subcontracting Law; (i) Mining Safety Regulations; and (j) Authorization for Radioactive Facilities. The Labor Code requires the employer to adopt all necessary measures to effectively protect the life and health of employees.15 This obligation generally includes the duty to:

• Preserve the adequate health and safety conditions at the worksites;
• Maintain the necessary devices to prevent work-related illnesses and accidents; and
• Provide or ensure the elements necessary for employees to obtain timely and adequate medical attention in case of accident or emergency.

Some specific obligations imposed by law to comply with such general obligations include:

• Complying with standards for the protection of workers in charge of manually performed loading and unloading operations;
• Preparing internal order, hygiene, and safety regulations;
• Establishing one or more Health and Safety Committees16 at any factory or worksite where more than 25 people work;
• Creating a Work-Related Risk Prevention Department at mining, industrial, or commercial operations with more than 100 workers;
• Providing timely information to all workers regarding the hazards entailed by their jobs, preventive measures, and adequate work methods;
• Immediately notifying the Labor Board and the Health Ministry upon the occurrence of any fatal and serious work-related accident, suspending affected activities, and allowing workers to evacuate the workplace if necessary; and
• Providing the necessary devices to protect employees from ultraviolet radiation.

Businesses having contractors’ or subcontractors’ employees on site also should adopt all measures necessary to effectively protect the life and health of such employees.15 In this matter, the Supreme Court has held that “effectively” means the highest level or standard of care through which the employer should comply with prevention and safety obligations.

16 These serve to: (a) assist employees in the correct use of safety gear; (b) supervise employer and employee compliance with safety and hygiene rules; (c) investigate causes of work accidents and occupational diseases; and (d) propose hygiene and safety rules to prevent labor accidents and occupational diseases.
workers, regardless of the ties of subordination involved. Consequently, the principal company should ensure that contractors or subcontractors fulfill health and safety regulations.\footnote{To this end, the principal company should: (1) Maintain workplaces in the necessary health and environmental conditions to protect the life and health of all workers regardless of their ties of subordination; (2) Advise workers and contractor and subcontractor companies on the inherent risks existing in the workplace and on preventive measures even before work starts and whenever working conditions undergo changes; (3) Establish the necessary coordination work with contractor and subcontractor companies to comply with safety standards; (4) Implement a Workplace Health and Safety Management System; (5) Implement a Worksite Registry; (6) Maintain Special Contractor and Subcontractor Regulations; (7) Maintain Worksite Safety Committees; and (8) Maintain Worksite Risk Prevention Departments.}

The law requires additional safety measures for activities qualified as dangerous or hazardous or that have particular characteristics (e.g., mining and industrial work, works in heights). Employees should have a medical certificate to be able to work in industries or on tasks qualified as dangerous or unhealthy. Breach of these obligations may result in labor, tort, and even criminal liability in some cases. The law also expressly allows the possibility of claiming moral damages as regards labor accidents.

**Workers’ Compensation and Benefits**

**Pension Funds and Health Insurance Contributions**

All employees are required to make pension funds and health insurance contributions. Although such contributions are on the employee’s account, it is the employer who is legally bound to withhold from an employee’s wage the proper amounts and pay them to the employee’s chosen pension fund and health insurance institution.

The mandatory pension and health insurance contributions to be made in respect of an employee amount to approximately 20 per cent of his wage. For the purpose of such contributions, the employee’s wage has a notional monthly ceiling of CLF 67.4.

Except for employees who have remained with the old State-run social security system, the majority of the pension funds are administrated by independent private institutions known locally as Administradoras de Fondos de Pensiones (AFPs). Contributions to an employee’s pension fund are credited to his individual account.

Health insurance contributions are paid, at the employee’s election, to the private health sector (“the ISAPRES”) or to the public health sector (“FONASA”).
An employer should pay a mandatory additional contribution to the pension fund of employees carrying out heavy work. The amount of this contribution varies from one per cent to two per cent of the employee’s wage and is on the employer’s account.

Unemployment Insurance

Unemployment insurance protects all dependent workers who start or restart employment on or after 2 October 2002, which was the starting date of the insurance. Employees with employment contracts in force at the starting date of the insurance also may enroll in this insurance by notifying the employer one month in advance.

The management of unemployment insurance is granted by the government to an administrator through a public bidding process. The insurance is currently managed by a private institution called AFC Chile.

For employees employed for a definite term or for a specific work or service, the insurance is financed entirely by the employer, who should contribute three per cent of the employee’s gross wage, with a legal cap of CLF 101.1, whereby 2.8 per cent of the contribution is credited to the employee’s individual account, while the remaining 0.2 per cent is credited to a public “solidarity fund”.

For employees hired under an indefinite term employment contract, the insurance is financed by the employer (2.4 per cent of the employee’s gross wage, with a legal cap of CLF 101.1) and the employee (0.6 per cent of the employee’s gross wage, with a legal cap of CLF 101.1). There is a credit of 1.6 per cent of the employer’s contribution to the employee’s individual account, while the remaining 0.8 per cent is credited to a public “solidarity fund”.

Where the employment contract is terminated by business necessity or at will, the employer is entitled to deduct from the statutory legal severance payment or the contractual severance payment the amounts contributed by him to the employee’s individual account, plus the income produced by such contribution, minus the administration costs. The “solidarity fund” also is financed by insured contributions and State contributions.

Compensation Insurance for Work-Related Accidents and Illnesses

To provide compensation for employees injured in work-related accidents and professional diseases, employers should make contributions to a private or public employee compensation insurance scheme.

The contribution to be paid varies according to the nature of the activity and the employer’s accident records. It may range from 0.95 per cent (basic contribution) to 4.35 per cent (0.95 per cent of basic contribution and 3.4 percent of additional contribution) of the employer’s payroll, calculated over a maximum monthly wage of CLF 67.4. The additional contribution could be increased up to 6.8 per cent (and consequently the total contribution up to 7.75
per cent) in case the employer does not grant the sufficient health and hygiene conditions for its employees nor implements the safety measures ordered by the labor authorities.

**Disability and Survival Insurance**

The employer should contribute 1.49 per cent of the employee’s monthly wage in order to finance the Disability and Survival Insurance (Seguro de Invalidez y Sobrevivencia), with a cap over remuneration of CLF 67.4.

**Independent Workers’ Social Security Contributions**

As of 1 January 2012, independent workers (a honorarios) are required to make pension fund contribution. Women over 50 years and men over 55 years are excluded to make this contribution.

The application of this contribution is progressive: 40 per cent during year 2012; 70 per cent during year 2013; and 100 per cent during year 2014.

This contribution should be made over the annual incomes obtained by the independent worker. For these purposes, the calculation basis of this contribution is equal to 80 per cent to the gross incomes subject to the tax set forth in article 42, Number 2 of the Income Tax Law, obtained by the independent worker in the last calendar year. This calculation basis is subject to a legal cap which currently is equal to CLF 808.8.

This contribution should be paid on an annual basis. However, the independent workers may contribute to their pension funds on a monthly basis.

Health contribution for independent workers will be mandatory as of 1 January, 2018.

**Summary of Social Security Costs**

In Chile, the employer should bear the following social costs:

- For workers’ compensation, 0.95 per cent (basic contribution) to 4.35 per cent (0.95 per cent as basic contribution and 3.4 per cent as additional contribution) of the monthly wage, with a ceiling of CLF 67.4;
- For workers’ unemployment insurance, 2.4 per cent of the monthly wage, with a ceiling of CLF 101.1;
- For heavy works contribution, one per cent or two per cent of the employee’s wage, with a ceiling of CLF 67.4; and
- For workers’ disability and survival insurance, 1.49 per cent of the employee's wage with a ceiling of CLF 67.4.
The employee should bear the following social costs:

- For social security, approximately 13 per cent of the monthly wage (10 per cent to the fund and 2–3 per cent for commission to the administrator of the fund), with a ceiling of CLF 67.4;
- For health insurance, seven per cent of the monthly wage, with a ceiling of CLF 67.4;
- For worker’s unemployment insurance, 0.6 per cent of the monthly wage, with a ceiling of CLF 101.1; and
- For heavy works contribution, 1 per cent to 2 per cent of the employee's monthly wage, with a cap over remuneration of CLF 67.4.

**Termination of Employment**

**In General**

An employment contract may only be terminated on the grounds set forth in the Labor Code, divided into those that do not grant the employee the right to a severance payment and those that do.

Grounds for termination that do not grant the right to a severance payment may be classified into (a) those where there is no fault of the employee, and (b) those where the employment contract is brought to an end due to serious fault of the employee. The grounds where there is no fault of the employee include:

- Agreement of the parties;
- Resignation of the employee;
- Death of the employee;
- Expiration of the term of a fixed-term employment contract;
- Completion of the specific work or service for which the employee was hired; and
- Act of God or *force majeure*.

The grounds where the termination is due to the fault of the employee are the following:

- Lack of probity in the performance of duties, sexual harassment, physical aggression or injury against the employer or other employees, verbal aggression against the employer, and serious immoral conduct affecting the business;
- Carrying out certain acts in the same line of business as the employer where such acts have been expressly forbidden in the employment contract;
- Absences from work with no justified cause during two consecutive days, two Mondays in a month, or a total of three days in a month, as well as unjustified absence (or without previous notice) if in charge of an activity, work, or
machinery wherein abandonment or paralysis constitutes a serious disturbance to the development of the work;

• Abandonment of work, which entails: (a) unreasonable or unjustified departure from the workplace and during working hours without the employer’s permission; and (b) failure to perform the work agreed in the contract without justified cause;

• Acts, omissions, or fearless imprudence which affects the safety or functioning of the business or the safe performance of work by other employees or their health;

• Intentional material damage caused to the facilities, machinery, tools, products, or goods of the employer; and

• Serious breach of obligations in the employment contract.

Grounds for termination of an employment contract where the employee is entitled to severance payment include: (a) business necessities; and (b) “at will”, which applies only to employees with authority to represent their employer (i.e., managers, assistant managers, agents or those having power of attorney, and employees who are within the confidence of the employer, provided they hold a managerial position).

Procedure for Termination

No Right to Severance Payment

If the employment contract is terminated upon agreement of the parties, the resignation of the employee, or the death of the employee, the employer is not required to serve the employee any notice or to notify the Labor Board.

If the employment contract is terminated due to the expiration of a fixed term, the completion of the specific work or service for which the employee was hired, an act of God or force majeure, or any of the grounds based on serious fault of the employee, a termination notice should be served on the employee with a copy sent to the Labor Board.

The termination notice and copy should be served within three days after the employee ceased to perform the services. If the employment contract is terminated due to force majeure or act of God, the employee should be served a termination notice, with a copy sent to the Labor Board, within six days after he ceased to perform the services.

Failure of the employer to serve the termination notice as required or within the time limits will not affect the validity of the termination, but may result in the imposition of a fine. The employer’s position also may be severely damaged in any subsequent court action brought by the employee. However, termination of the employment contract will be invalid if the employer has not paid all due pension and health insurance contributions.
With Right to Severance Payment

If the termination is based on a ground which entitles the employee to severance payment, the employee has to be notified at least 30 days in advance, with a copy sent to the Labor Board.

The requirement for 30 days’ advance notice may be waived if the employer pays the employee an indemnity payment equivalent to one monthly wage, with a legal cap of CLF 90.

Where the employment contract has been in effect more than one year and the termination is on the ground of business necessities or at will, the employee is entitled to a severance as expressly agreed by the parties.

Where there is no special agreement, the employer should pay the legal severance equivalent to 30 days’ wage for each year of service (or a fraction thereof equal to or greater than six months). The agreed severance payment should not be less than the statutory severance.

The Labor Court may increase severance payments by 30 per cent to 100 per cent if an employer has no grounds for terminating an employment contract. If the dismissal is a result of an anti-union practice, the employer may be liable to pay an additional six to 11 monthly wages.

The employer may likewise be sanctioned if the Labor Court determines that he violated the employees’ constitutional rights due to the dismissal.

It has been ruled on several occasions that employers cannot terminate fixed-term employment contracts on the ground of business necessities or at will before the expiration of the fixed term.

An employee whose fixed-term contract has been terminated without grounds will be entitled to the total of the wages agreed under his contract until the contractual expiration date. A similar approach is being taken with regard to the early termination of project-based employment contracts. The Labor Code provides for a special form of voluntary severance payment, but this is restricted to cases where the employee has worked for the employer for at least seven years.

Labor Discharge and Release

A general discharge and release (finiquito) should be executed upon termination or upon agreement. The employee should state therein that the employer has paid all due amounts owed to him, giving full discharge and release to the employer.

18 The 30 days’ wage is the amount of the employee’s final month’s wage, or the monthly average of the last three monthly wages in case of employees subject to variable remunerations. However, the number of years of service is limited to 11 years, except for employees hired before 14 August 1981, and the final month’s wage is limited to CLF 90.
Upon execution of the discharge, the employer is required to either pay at that very moment any due amount owed to the employee or to agree on a deferred form of payment. Refusal to pay the offered compensation may result in an increase of 150 per cent.

In order to be valid in trial, the discharge should be signed by the employee and the president of the union or the personnel delegate, or signed and ratified by the employee before a notary public or a Labor Board Inspector.

**Limitations on Termination**

*Payment of Social Security Contributions*

In certain cases, an employer may not terminate an employment contract without demonstrating to the employee (by producing the appropriate receipts) the due payment of all pension, health insurance, workers’ compensation, and other social security contributions.

This is applicable where the termination is grounded on the expiration of a fixed-term employment contract, completion of the work or services, *force majeure* or act of God, business necessities, at will, and on grounds where the termination is due to serious fault of the employee.

If the employer has not paid all of the employee’s due social security contributions, the termination will be invalid, and the employee will be entitled to receive full wages until the employer pays all due amounts. A discharge or release also will not be authorized if the employer does not show that he is up-to-date in the payment of such contributions.

*Payment of Accrued Vacation*

Upon termination of an employment contract, all accrued vacation should be paid to the employee at the normal rate. For this purpose, vacations are deemed to accrue on a daily basis.

*Termination with Labor Court Approval*

The employment contracts of the following individuals cannot be terminated without prior Labor Court approval: (a) union leaders; (b) workers involved in a collective bargaining process; (c) employees who are going to create a union; (d) pregnant women during pregnancy, while on maternity leave, and within the year following the end of the *post-natal* maternity leave; and (e) the employee’s representative in the company’s hygiene and safety committee.

Dismissal of these employees without the required approval could result in a court order for their reintegration to the company.
Termination during Sick Leave

If an employee is on paid sick leave, his employment contract may not be terminated on the ground of business necessities or at will.

New Labor Protection Procedure

The new Labor Protection Procedure (Procedimiento de Tutela Laboral) is applicable to cases where there is an infraction of the following constitutional rights:

- Right to life and the physical and psychological integrity of the employee;
- Respect and protection of the private life and honor of the employee and his family;
- Inviolability of all means of private communication;
- Freedom of conscience, manifestation of all beliefs, and free exercise of worship that is not opposed to moral and proper behavior and public order;
- Freedom of speech and to inform, with no previous censorship in any way or by any means; and
- Freedom to work.

It also is applicable when an employer has engaged in discriminatory acts under Article 2 of the Labor Code, except discriminatory acts in job offers. If the cause for dismissal would have been an infringement of any of these rights and the employee sues the company in a Labor Protection Procedure, the company could be made liable to pay an indemnification ranging from six to eleven monthly salaries in addition to the usual termination severance payments. Furthermore, if the Labor Court determines that the dismissal has been discriminatory, it could order the reintegration of the employee to the company if the employee so wishes.

Dispute Resolution

The Labor Board is the administrative agency responsible for ensuring compliance with labor law. It has local offices all over Chile called Labor Inspections (Inspecciones del Trabajo), and may act on its own initiative (e.g., following an inspection of a workplace) or at an interested party’s request (e.g., an employee claiming a labor law infringement).

The Labor Board has ample powers to enforce labor law, including the authority to serve notices and impose fines on infringing parties. Employees or their unions may sue employers in the Labor Court when an infringement of labor law is alleged and to resolve disputes on the application of employment contracts. The general stance adopted by the Labor Board and the Labor Court in applying and interpreting labor law is the protection of the employee.
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Introduction

Theoretically, the role of workers in the People’s Republic of China is critical given the nature of its communist founding. The Constitution of 1982 contains several provisions referring to workers’ rights, duties, and aspirations. Thus, it is of no surprise that China has extensively legislated on and tightly regulated employment and employee-related matters, which present complicated legal, policy, and practical issues, not only to the employers and employees but also to the government and entire society given the dynamics surrounding the transition from central planning to market economy as well as from authoritarian rule to rule of law (or rule by law).

The economic transformation in China not only affects economic and living conditions but also reshapes the parameters of the labor market and the labor governance regime. Prior to the promulgation of the Labor Law, the basic employment system was a cradle-to-grave “iron rice bowl” system, under which the State-owned enterprises (SOEs) as the main employers would not only hire all the employees in the urban areas but also take care of their social welfare and benefits.

The uniqueness of this system was that employees had no right to choose and change a job and employers were unable to fire employees unless for gross misconduct or criminal acts. Even worse, the employees are attached to the employers for life, and the employers had to take care of the employees’ welfare payments.

The passage of the Labor Law in 1994 represents a critical movement from the planned economy to a market-oriented one, as well as an attempt to strike a balance between employee protection and employer needs. The Labor Law and its implementing rules offer more protections to employees, especially underage

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1 For the purpose of this chapter, this refers to China, excluding the Hong Kong Special Administrative Region, Macau Special Administrative Region, and the territory of Taiwan.
2 Constitution, arts 42-44.
and female workers, given their relatively disadvantageous positions in the negotiation of employment contracts and labor relations.

Meanwhile, the government has been steadily reforming the “iron rice bowl” system to a social insurance safety net covering employees’ social insurance and welfare and freeing SOEs and employers from financial burdens. Along with these reformist movements, the PRC has implemented social insurance reform and enacted a number of key labor-related legislation, such as the Labor Union Law. In more recent years, the government has been switching its focus from labor protection to labor relation stability. The Labor Law and other labor-related rules and regulations well cover almost all the aspects of labor relation such as employee promotion, career training, labor contract, collective contract, labor standards, labor protection, social insurance, and resolution of labor disputes.

However, an increasing number of high-profile and eye-catching labor unrests and strikes have recently taken place due to poor treatment and benefits received by the relatively low-skilled and poorly educated country workers. Migrant workers also are constantly abused and receive inferior and unequal treatment, including underpayment and excessive working hours.

The central government has been taking meaningful actions to the worsening labor conditions and benefits. The new Labor Contract Law can be seen as a critical attempt to address the deteriorating employment relationship in the marketplace.

Another piece of labor legislation is the Labor Disputes Mediation and Arbitration Law, under which mediation ranks first as the favored approach for resolution of labor controversies, and arbitration as the final step in certain disputes, subject to the right of appeal to the courts. Encouraging the use of mediation and arbitration reduces the chances of worker protest, which may give rise to unrest, strikes, or even chaos. Both the Labor Contract Law and the Labor Disputes Mediation and Arbitration Law may help create a genuine collective bargaining system.

Hiring local employees overall is not a concern to foreign investors. From the very early beginning, foreign investors had autonomy to hire and fire local employees without interference. Nevertheless, human resources problems were always ranked as one of top problems facing foreign investors in China. In a mid-1997 poll of 22 multinationals, human recourses problems such as acute shortages of capable Chinese managers, high costs of expatriate staff, low

3 Effective as of 1 January 2008.
productivity of local staff, high costs of salary, benefits and housing to retain staff were listed as major problems.\(^5\)

Since 1999, human resources constrains (29 per cent) has always been one top concern from foreign investor respondents in the survey of the American Chamber of Commerce.\(^6\) The situation does not seem to improve. Ten years later, a US-China Business Council survey of its members still ranked recruiting and retaining qualified workers as their top operating issue in China.\(^7\) In the 2007 survey, 20 per cent of AmCham respondents cited labor costs as the biggest risk for coming years.\(^8\) After the latest financial crisis, the local labor market becomes more competitive due to the shortage of managers with local experience in Asia (including China).\(^9\) There are some local dimensions to the Chinese labor market. First, the country is an increasingly important job market for western executives while many multinational companies are trying to localize their China operations and management. Second, more and more Chinese companies are become more international, which means these Chinese companies are now recruiting foreign talents.

In 2010, Lenovo became the first Chinese company that entered Universum’s World’s Most Attractive Employers list (a global index of employers attractiveness) and was ranked at 44 among engineers.\(^10\) Third, foreign businesses seem to become a force objecting to the labor law reform and law protection. Foreign business associations, in conjunction with local businesses, objected to a stronger union, shorter probationary periods, less rights to terminate employees, and severance payment.\(^11\) Both the international labor organizations and US Congress criticized foreign business groups for playing a

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5 Economic Intelligence Unit, “Multinational Companies in China: Winners and Losers” (Economist Intelligence Unit, Hong Kong 1997) x-xvii.
negative role in labor protection movement in China and harming the interests of Chinese workers.\textsuperscript{12}

**Legal Relationship of Employer and Employee**

The employment contract is conclusive evidence of the employment relationship. An employment contract comes into effect when the employer and the employee have reached an agreement through negotiation and each of them has signed or affixed his seal on the written version of the contract.\textsuperscript{13}

However, it is not correct to assume that there is no employment relationship without an employment contract. The relationship commences when the employer starts using the employee.\textsuperscript{14} An employment contract can be concluded within one month from the date on which the employee starts working for the employer.\textsuperscript{15}

The parties to an employment contract should have legal capacity. For example, a person under the age of 16 cannot be hired by an employer, as he neither has the civil capacity nor the ability to assume independent civil liability under the law. Due to his lack of capacity, an employment contract signed by him is invalid.

The employment relationship between an employee and the representative office of a foreign company is more complicated. A representative office is a mere representation of a foreign company in China and is not a separate legal entity. It is unlawful for a foreign company (and thus a representative office) to employ resident Chinese citizens to work for the foreign company and the representative office in China, as the hiring of Chinese personnel by a foreign representative office should be entrusted to a designated foreign labor service organization. For instance, for a foreign representative office based in Shanghai, the employment relationship is established by the employment contract between the Shanghai Foreign Service Co., Ltd. (FESCO) and the employee rather than directly between the employee and the representative office.

Local employees should first be legally employed by FESCO and then seconded to the representative office pursuant to a labor services contract. Although such local employees may be selected and paid directly by the representative office, their personnel file is kept by FESCO. FESCO also makes their social security payments (about twenty per cent of salary). For providing these labor services, the representative office pays FESCO a management fee that includes the cost of social security.

\textsuperscript{12} Letter from United States Congress to the White House, 31 October 2006.
\textsuperscript{13} Labor Contract Law, art 16.
\textsuperscript{14} Labor Contract Law, art 7.
\textsuperscript{15} Labor Contract Law, art 10.
The representative office may have an offer letter or Standard Terms of Employment with local employees, which may outline basic terms and conditions of employment. The foreign representative office may negotiate some terms with FESCO, so long as the proposed terms are consistent with Chinese labor law, and then make amendments in the Agreement on Employment of Chinese Staff (a supplementary agreement to the labor services contract).

The following diagram explains the above-mentioned relationships. This is the practice foreign representative offices should have followed. There are usually three agreements involved so the foreign representative office must get copies of each of them and follow the relevant terms in hiring local employees.

Although a foreign representative office is not legally the employer of local employees, it bears the liability to withhold the employee's personal income tax and pay it directly to the tax authorities where it pays salary directly to its staff.¹⁶

The foreign company may negotiate a compensation package with FESCO primarily based on the cash element at market rates. The foreign company (or its representative office) should avoid any kind of complex cash or non-cash perquisite schemes (e.g., contributions to life policies, savings plans, or housing benefits) that are not customary among foreign representative offices.

¹⁶ It is advisable that the foreign company implement a system of quoting gross salaries to local employees while indicating the amount of tax which will be deducted and the net salary to be paid each month. Failure to do this may result in having to gross up salaries, thereby incurring additional tax liability on the amount of the gross up.
Terms and Conditions of Employment

In General

As a general rule, the employment contract should be made on the principles of equality, free will, and mutual consent. A deception or coercion may constitute a violation of these principles. A breach of this general rule may result in a full or partial nullity of the employment contract.

Mandatory provisions of laws or administrative regulations should be followed by the employer and the employee when they enter into an employment contract. The validity of an employment contract is determined only by the labor dispute arbitration commission or the courts.

The form by which the employment contract is concluded also affects its validity. An employment contract should be made in writing. Foreign-invested enterprises (FIEs) should prepare the employment contract for their local employees in Chinese in addition to an English version. An employment contract should contain the following clauses:

- The name, domicile, and legal representative or main person in charge of the employer;
- The name, domicile, and number of the resident identification card or other valid identity document of the employee;
- The term of employment;
- The job description and the place of work;
- The working hours, rest, and leave; and
- The employment salary.

A probation period should be specified in the employment contract by reference to the term of employment. The employer also may set out a service period in

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17 Labor Law, art 17.
18 Labor Contract Law, art 26(1).
19 Both the Labor Law and the Labor Contract Law permit companies or enterprises to formulate their own rules provided that they are not in violation of laws or regulations. The importance of these internal rules is reflected in the legal requirement that a serious violation of such rules by the employee may justify the employer’s decision to dismiss him. Labor Law, art 25(2).
20 Labor Law, art 18.
21 Labor Law, art 19; Labor Contract Law, art 10.
22 Labor Contract Law, art 19. The probation periods are as follows: (a) for a term of employment less than three months or for piecework employment, there is no probation period; (b) for a term of employment of three months to less than one year, the probation period is not more than one month; (c) for a term of employment of one year to less than three years, the probation period is not more than two months; and (d) for a term of employment that is at least three years or for an open term, the probation period is not more than six months.
the employment contract. Under this clause, the employee serves the company for a certain period in exchange for special funding spent by the employer on his technical or professional training.\(^ {23}\)

The employee’s performance of his duty should comply with the employer’s internal regulations and employee manuals as provided in the employment contract. It is important to include a confidentiality covenant to protect the employer’s intellectual property rights, trade secrets, and know-how. The employer also may insert a non-competition covenant, the validity and enforceability of which depends on its scope, geographic area, and term. For instance, a non-competition covenant should not be longer than two years.

To make the non-competition covenant valid, the employer should pay economic compensation to the employee on a monthly basis during the non-competition term after the termination of employment contract. The amount of the compensation package is subject to negotiation,\(^ {24}\) but local regulations may dictate the minimum of legally sufficient consideration. Where the employee breaches the confidentiality or non-competition clause of the employment contract, he is liable for the employer’s economic losses.\(^ {25}\)

The place of work is not only a technical term but also relates to the employee’s economic benefits as the government in different localities may set a different rate for the social insurance contribution.

### Working Hours and Rest Periods

Although the employer should limit the employees’ working hours, he can extend such hours due to production requirements after consultation with the labor union and the employees.\(^ {26}\) In practice, extensive working hours occur in many industries, especially in export-oriented manufacturing that attracts most international attention. Some reported cases are egregious. Staff may be required to work for 48 hours straight during “peak” season, reaching 150-200 hours per month,\(^ {27}\) well in excess of the maximum working hours per week. Both general data and recorded stories shows a casual linkage between long working hours and poor physical and mental health as well as the erosion of personal and family life.\(^ {28}\) The primary rules pertaining to working time emanate from the Labor Law, which set out straightforward norms and standards.

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23 Labor Contract Law, art 22.
24 Labor Contract Law, art 23.
25 Labor Law, art 102; Labor Contract Law, art 90.
26 Labor Law, art 41.
The maximum working time is eight hours per day and forty hours per week, with at least one day off per week. Employers using piece rates should adapt their quotas and remuneration to this forty-hour system.

Enterprises that are not able to implement the working time requirements due to the nature of the job should obtain approval from the labor administrative bureau. However, the Labor Law also allows for departures from the standards. Certain work in sectors such as aviation, agricultural, medical, and transport require extensive working hours.

The working hours can be extended beyond the regulatory limits where urgent repairs are necessary for production facilities in the case of an emergency threatening the health of workers or the safety of property, and in other circumstances stipulated by laws and administrative rules. These leave central and local labor authorities greater discretion to devise their own rules and application. For instance, the Ministry of Labor and Social Security promulgated the Working Hours Measures that use catchall phrases permitting broad exclusions from the law. These phrases include “workers who, because of job responsibilities, are suitable for non-standard working hours”, “other workers whose work cannot be measured in standard hours” and “other employees for whom accumulated hours schemes are suitable.”

These opt-out phrases eventually leave uncontrolled discretion to local labor bureaus even though the Ministry of Labor and Social Security lists some factors the local labor bureaus need to take into account in approving the schemes: the employers must listen to their opinions and protect their right to rest and leave while ensuring the completion of production tasks, and protect the employees’

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29 Labor Law, Article 36 (setting a maximum of 44 working hours per week); Working Hours Regulations, art 3 (lowing the maximum of 44 hours to 40 hours per week); Ministry of Labor, “Answers to Questions Concerning State Council Regulations on Employees’ Working Hours” (1 May 1997).
30 Labor Law, art 38.
31 Labor Law, art 39.
32 Labor Law, art 42.
33 For instance, the Ministry of Labor and Social Security promulgated the Working Hours Measures that use catchall phrases permitting broad exclusions from the law. These eventually leave uncontrolled discretion to local labor bureaus although the Ministry of Labor and Social Security lists some factors that have to be taken into account in approving the schemes. This open-ended derogation of standards risks distorting and rendering them inapplicable to many workplaces as local authorities may have close or even corrupt relations with local businesses.
34 Working Hours Measures, art 4(1) and (3).
35 Working Hours Measures, art 5.
health. Local variation is in existence. Beijing, for example, tightens the circumstances in which these opt-out schemes can be used.

This open-ended derogation of the standards risks distorting and rendering them inapplicable to many workplaces as the local authorities may have close or even corrupt relations with local businesses. The Chinese legislative approach is unique in the sense that unlike its European, English  and Australian counterparts, Chinese legislation gives wide discretion to labor bureaus to enable employers to derogate from the mandated scheme regardless of employee wishes.

The rest days for most employees in the working hour system are Saturdays and Sundays. Rest days may be set on other days as long as the same length of time is guaranteed. Where the employer applies the non-fixed working hour system because of special production circumstances or work requirements, working hours are not calculated according to a fixed-length working day. If employees on this system work on Saturdays, Sundays, or statutory holidays, they are not necessarily entitled to overtime payment unless local regulations provide otherwise.

Working hours also may be calculated according to the comprehensive working hour system, which allows the aggregate calculation of working hours on a periodic basis, i.e., monthly, quarterly, or annually. This applies to some industries that may require employees to work on a seasonal basis or continuously.

Employees will not be entitled to overtime pay if they have to work on Saturdays or Sundays, but they may still be paid at least 300 per cent of their normal wages if they work on public holidays. In any event, the average daily and weekly working hours should basically be the same as the legally prescribed standard working hours to guarantee that the employees have sufficient time to rest. Enterprises that implement the non-fixed working hour system and the comprehensive working hour system need to apply for and obtain approval from the labor administrative bureau for each position that will be subject to the special working hour system.

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36 Working Hours Measures, art 6.
37 Beijing Measures on Enterprise Implementation of Systems of Accumulated Hours of Work and Non-Standard Working Hours, 9 December 2003, art 11(5).
40 Workplace Relations Act 1996 (Cth), s 226.
Leaves

Employees have ten public holidays per year and are entitled to full pay on holidays and vacations. Employees who have worked continuously for at least one year are entitled to paid annual leave. One year of continuous work can be for one or more employers.

An employee who has worked for one to ten years is entitled to five days of paid annual leave, while one who has worked for more than 10 years but less than 20 years is entitled to 10 days of paid annual leave. An employee who has worked in the aggregate for more than 20 years is entitled to 15 days of paid annual leave. An employee may not be entitled to paid annual leave where:

- He is legally entitled to winter or summer vacations, the length of which exceeds the statutory entitlement to paid annual leave;
- He has taken leave for a private matter for a total of twenty days or more, but the employer has not deducted any salary for the leave;
- He has worked for a total of one to ten years but has taken sick leave for two or more months in the aggregate;
- He has worked for a total of ten to twenty years but has taken sick leave for three months or more in the aggregate; or
- He has worked for more than twenty years in the aggregate, but has taken sick leave for four months or more.

Employers may arrange an overall schedule for annual leave in light of the actual production and work situation and with employee consent. In case the employer is unable to offer annual leave or will permit the employees to carry over any annual leave to the following year due to work reasons, he is required to consult with the employees.

Where an employer is unable to arrange annual leave with the employee’s consent, he should compensate the employee for each annual leave day not taken at the rate of 300 per cent of the employee’s daily wage per day. The employer is not required to compensate the employee for any accrued but untaken annual leave if the employee does not want to take annual leave and serves a written notice to the employer.

Failure to arrange annual leave for the employee or to pay the statutory compensation may trigger an order of rectification by the local labor administrative bureau. The local labor bureau or the employee may apply for an

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41 Labor Law, art 40.
42 Labor Law, art 45.
43 Annual Leave Regulations, art 3.
44 Annual Leave Regulations, art 4.
46 Annual Leave Regulations, art 5.
enforcement order from the court if they encounter any difficulty in protecting the employee’s rights.

Where employees lawfully enjoy annual leave, home visit leave, marriage leave, or funeral leave, the employer should pay wages following the standards in the employment contract. An employer may not reduce the base salary or terminate the employment contract of a female employee during her pregnancy, delivery, or nursing periods.

Where an employee suffers a disease or injury not related to work, he is entitled to a period of medical treatment with pay. Pregnant employees are entitled to maternity leave for 90 days, 15 days of which may be taken before birth. The maternity leave can be increased to 105 days if the female employee is in a difficult delivery case. Fifteen days may be added for each additional child in case of multiple births.

In abortion cases, the employee may be entitled to a period of maternity leave according to the supporting evidence from the hospital. Generally, an employee who has had an abortion is entitled to 15 to 30 days of maternity leave if the pregnancy is less than four months, and 42 days where the pregnancy is longer than four months.

After giving birth, a female employee may nurse or feed her infant (who is younger than one year old) twice a day for 30 minutes each time. During nursing periods and pregnancy, female employees should not be required to work overtime. In her seventh and later months of pregnancy, a female employee may not work night shifts, and a fixed amount of rest time should be allotted during working hours.

An employee also is entitled to marriage and bereavement leave of one or three days when he marries or when a direct relative (e.g., parents, spouse, or children) dies. He is entitled to usual wages (except travel expenses and costs) during the leave.

The travel leave (depending on the distance to be traveled) may be granted if the employee’s groom or bride is not working in the same place at the time they are married or the employee needs to travel to attend the funeral of a direct relative.

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47 Wage Payment Regulations, art 11.
48 Female Employees Labor Protection Regulations.
49 The pre-birth maternity leave of 15 days cannot be combined with the post-birth leave. The time left in the pre-birth leave may be combined with the post-birth leave if the employee gives birth prior to the expected delivery date. Conversely, the time that exceeds the pre-birth leave should be regarded as sick leave if the birth-giving date takes place after the expected delivery date.
50 Where the female employee has more than one child younger than one year old to feed, additional 30 minutes will be added for each child each time. The nursing time and travel time for nursing will be treated as working time. The nursing period can be further extended if the employee’s child is particularly weak or if the nursing period expires in summer.
who lived in another place. Many local labor regulations also specify a three-day marriage leave. Additional days may be granted under local labor regulations if an employee marries for the first time and at the “late marriage age”.\footnote{This is 25 years old or above for male employees and 23 years old or above for female employees. Shanghai and Guangdong, for example, grant a seven-day and a 10-day marriage leave in addition to the normal three-day leave to a citizen who marries for the first time at the late marriage age.}

Family visit leave only applies to full-time employees of SOEs, government officers, and social organizations’ workers. An employee is entitled to take leave to visit his spouse if he has worked for more than one year, does not live with his spouse, and is unable to visit his spouse on public rest days.\footnote{State Council’s Regulations Concerning Employee Family Visit Leave (March 1981).}

Married employees are given a 30-day period each year to visit their spouses, and a 20-day period every four years to visit their parents. Family visit leave is granted to employees who are not living with their parents and who are unable to visit their parents during public rest days.\footnote{Parents here do not include parents-in-law but include those who raised the employee. A relative who supported and raised the employee also may count.}

In contrast, unmarried employees have 20 days a year to visit their parents, or 45 days every two years if the employer is unable to give family leave owing to the nature of work or work requirements. Family leave also includes public holidays and legally stipulated holidays within the granted period. An employee should receive his standard salaries during the period of family leave.

An employer may need to bear travel expenses for unmarried employees visiting their parents or married employees visiting their spouses. However, married employees visiting their parents should bear travel expenses if the total amount of such expenses falls within 30 per cent of the employee’s standard salary, while the employer bears the rest of the expenses.

**Salary**

*In General*

“Salary” or “wage” is not a well-defined legal term in Chinese labor law, but labor regulations provide some guidance to its composition. For instance, Article 3 of the Provisional Regulations for the Payment of Wages states that the wage refers to various forms of remuneration paid by employers to employees in a lawful currency in accordance with the provisions of the employment contract. This definition may rule out payment in-kind as an alternative to the salary.

The total wages is composed of wages based on time (time wages), wages based on piecework (piece wages), bonuses, subsidies and allowances, overtime payments, and wages paid under special circumstances.
Bonuses are extra payments given to employees as incentives, and include production bonuses, economization bonuses, labor competition prizes, and incentives. Allowances are payments to employees to compensate for special expenses arising from their work such as health allowances, technical allowances, and yearly allowances, while subsidies include payments to employees as salary insurance against inflation.

Some payments made by the employer to the employee are not regarded as wages. These include bonuses for inventions, insurance fees, and welfare benefits; pensions; food subsidies and transfer expenses; interest paid for purchasing shares and bonds; medical and severance pay; processing fees for hiring casual workers; and processing fees paid to home workers and contracting fees paid to contractors for goods processing upon orders. The employer may determine the salary scheme independently according to law and based on his own manufacturing, economic, and business situation. The general principle is “equal pay for equal work” under which the remuneration provided to employees should be similar if the quality and quantity of work performed are similar. However, the remuneration may differ according to different types of work, the level of the quality and quantity of work, the degree of expertise, and the physical requirements for the job.

It is the employer’s obligation to set and adjust the level of wages according to the performance of the company and price fluctuations subject to laws. The salary scheme should be gradually raised in accordance with economic development levels, which arguably may justify a salary decrease in case of financial crisis or economic downturn.

The determination of wage levels also should satisfy the minimum salary standard, which is in turn determined by factors such as the minimum cost of living for employees and their average number of dependents; the average salary levels in the society; labor productivity; overall employment situation; and differences in the economic development levels among different regions.

The calculation of the minimum wage does not include overtime pay; allowances for working during the night or afternoon shift, in extreme temperatures, underground, and in toxic or hazardous environments; and social insurance and other welfare benefits required by laws.

Production or business bonuses, energy-saving bonuses, work competition bonuses, allowances for employees’ special or extra labor expenses, allowances for health and fitness, technology allowances, time allowances, and subsidies do not constitute wages.
If an employer pays his employee less than the local minimum wage, the local labor administrative bureau can order the employer to reimburse the shortfall and, if necessary, pay damages (at a rate of 50 per cent to 100 per cent of the amount payable) or other compensations within a specified period.

**Stock Option Scheme**

Employees may acquire or be rewarded with stocks or stock options in a locally listed enterprise at which they work. The management personnel or employees with higher responsibilities may hold as much as five to 15 times the stock held by other employees. Employees working in an FIE may participate in the employee stock option plan (ESOP) of the FIE’s foreign parent company.  

Chinese employees’ participation in such ESOPs may need the approval of the State Administration of Foreign Exchange for foreign exchange matters. The employee also may need to satisfy certain application and filing criteria in relation to the opening of a foreign exchange bank account, designation of appropriate brokers, agents, and administrators, settlement of an annual purchase quota, and making of foreign exchange payments. For companies limited by shares, an ESOP that has been formally endorsed by the Ministry of Labor and Social Insurance is possible. However, creating an ESOP scheme in a company limited by shares is not easy as the thresholds for setting up a company limited by shares are high and cannot be satisfied easily.

The employee’s participation in the ESOP is on a voluntary basis. The employer is required to discuss items such as the criteria of qualified employees, the amount of shares to be purchased, and the plan of purchase with the employees collectively and to get approval from the shareholders. Employees can subscribe for shares or be awarded with shares.

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57 If the FIE is not a locally listed company, it cannot carry out an employee share purchase scheme for two reasons. First, an FIE does not issue shares. Instead, the shareholders only subscribe to a percentage of registered capital. Second, there is a limit on the number of shareholders that a limited-liability company may have (i.e., not less than one and not more than 50).

58 The old Company Law restricted the repurchase of shares by the company itself, except when canceling shares to reduce its capital or when merging with another company or companies that hold its shares. This effectively restricted the source of shares to be purchased by employees, as the company has to issue new shares to them. The new Company Law of 2005 allows a company limited by shares to buy back its stocks to be rewarded to its employees. Nevertheless, implementing an ESOP may be still difficult because the shares held by existing shareholders is the only source for the share buyback and such shares may be bought back by the company only if the shareholders agree to sell.
Profit-Sharing Schemes

Small enterprises are encouraged to adopt a profit-sharing scheme if their capital return ratio and net assets gain ratio are above the social average level. The scheme should be approved by the employees’ representatives committee or the labor union, as well as by the board of directors and the shareholders.

The scheme also should be examined and approved by the labor bureau and the assets management department of the government before implementation. Given the lack of detailed rules, the scheme is rare in the marketplace.

Service Awards

The concept of “seniority allowance” is equivalent to the concept of “service awards”. The employer has the discretion to offer a special bonus to a particular employee because of his long-term service. The seniority allowance is part of the employee’s total wages.

Company Vehicles

The employer is not required to provide company vehicles to the employee. Some large SOEs may offer free shuttle bus services to employees.

The employer also may offer free limousine services to senior management. These services may be taken away when the employee is no longer in a senior position with the employer.

Medical Services

Employers are no longer required to offer medical services to employees except for basic medical insurance fund contributions, but they are encouraged to take out additional commercial medical insurance.

The employers may be equipped with on-site medical facilities and medical staff to offer simple medical advice and ordinary medicines to employees.

Other Benefits

Childcare benefit, free parking, holiday home facilities or benefits, or on-site fitness and leisure facilities are not commonly offered by employers. The employers may offer some collective living welfare facilities and cultural entertainment facilities, but these facilities have largely been taken over by the social service sector.

The employer may provide these facilities with money from the reserve funds. In any event, he has the discretion to decide whether and how much these benefits will be offered. Employers may offer additional benefits such as dental and optical insurance. Employees do not need to bear any cost or subsidy.
Overtime Payments

Overtime is limited to one hour per day, but can be extended up to three hours for “special reasons” on the condition that the worker’s health is protected and the total monthly extension is no more than 36 hours.59 Any extension of working hours is subject to consultation with the unions and the workers concerned. The employer should satisfy the following standards for overtime payment:

- If the employee extends his working time beyond the statutory standard daily working hours, the overtime payment rate is not less than 150 per cent of the hourly wage standard for the employee as provided in the employment contract.
- If the employee works on a rest day and the employer is not able to arrange compensatory time off, the overtime payment rate is not less than 200 per cent of the daily or hourly wage standard for the employee as provided in the employment contract.
- If the employee works on a statutory holiday or vacation period, the overtime payment rate is not less than 300 per cent of the daily or hourly wage standard for the employee as provided in the employment contract.

The piece rate wages of employees who have completed their quotas and are required by the employer to work overtime should be paid in accordance with these rates.

Allowances and Subsidies

Under Chinese labor law, “allowances and subsidies” are part of the total wages.60 Allowances refer to payments given to workers to compensate for special expenses arising from their work. On the other hand, subsidies are various payments used to compensate for the impact of inflation.

Allowances and subsidies are regarded as part of the employee’s wages, and may include transport allowance and family reunion travel allowance, subsidy for employees in difficulties of living, single child subsidy, allowance for direct relatives of a deceased or a disabled employee, and bathhouse and hairdressing expenses.

Social Insurance

The employer is required to pay for employee social insurance, including old age pension and insurance for medical, unemployment, work-related injury, and maternity. Failure to pay the social insurance premiums may trigger an order of correction, a late payment fee, fines, and other administrative penalties.

59 Labor Law, art 41.
60 Total Wages Provisions, art 8.
The employer also should make the housing provident fund contributions for the employee so as not to trigger the imposition of an order of correction and fines.

**Labor Protection and Working Conditions**

The employer should strictly comply with labor safety and health standards and procedures. Any job-related death, injury, poison, or harm may subject the employer to investigation and settlement of the accident. The employer is required to report such death, injury, poison, or harm to the labor or other administrative bureaus.

In case of non-compliance, the labor administrative bureau has the authority to impose an order of correction, fines, suspension of production and operation of the business, and/or suspension of the dangerous equipment. Employers are prohibited from hiring workers under the age of 16, otherwise such employers will be subject to penalties, i.e., revocation of the business license under the most serious circumstances.

Workers between the ages of 16 and 18 receive special protections. Underage workers will not be assigned work in mines or wells, any work involving danger of injury or poisoning, work that requires physical labor (of the fourth grade of intensity), or other work that is specified by the State.

Employers should arrange periodic health examinations for underage workers. The details of the types of work, work hours, work intensity, and protection measures for underage workers are set out in other labor regulations. Employers that violate the protection legislation will be ordered to correct the situation and to pay penalties.

Female workers also are given special protection. They are not allowed to engage in physical labor work of the fourth grade of intensity, and may not be assigned to work in operations involving heights, low temperatures, contact with cold water, or physical labor of the third grade of intensity during their menstrual periods.

Pregnant workers should not be assigned to work in physical labor of the third grade of intensity, or in any other work that should be avoided during pregnancy. They should not be assigned to night shifts from their seventh month of pregnancy. Female employees are entitled to at least three maternity leaves.

Female workers nursing babies less than one year old should not be assigned to work involving physical labor of the third grade of intensity, or to any other

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61 Labor Law, art 65.
62 Labor Law, art 95; Labor Law Penalty Measures.
63 Labor Law, art 59. The grades of intensity are the national labor intensity standards called GB 3869-83 Physical Labor Intensity Level Setting, prescribed by the Ministry of Labor and Social Security and approved by the Ministry of Standards effective on 1 December 1984.
64 Labor Law, art 62.
work that should be avoided during nursing. They should not have their work hours extended and should not be assigned to night shifts. Violation of female employee protection will subject the employer to administrative punishment.

Other Terms

The employment contract may be amended due to changes in the law, changes to the basis of the contract, or changes in circumstances beyond the parties’ control. These changes make the performance of the original employment contract impractical unless some terms are amended or supplemented.

These changes may include an increase or decrease in workload or job responsibilities, an extension or reduction of the term of the employment contract, a change in the nature of the position or duties of the employee, or an increase or decrease in remuneration.

Varying the terms in the employment contract should be distinguished from the scenario in which the employee is transferred from the employer to another company in the group or the employer merges with another company. In these scenarios, the original employment contract should first be terminated and a new employment contract may be entered into by the employee and the new employer later on.

Discrimination

The term “discrimination” is not defined under Chinese labor law, thus labor discrimination is not well classified in law. In practice, employment discrimination refers to the differential treatment given to employees in employment opportunities or in labor treatment. In principle, employment rules or measures are formulated to ensure employment equality. Discrimination on the basis of nationality, sex, race, and religious belief is prohibited.65

There are two types of laws as regards anti-discrimination. The first type addresses employment equality among all laborers and includes the Employment Promotion Law, the Labor Law, and the Labor Contract Law, which set out basic principles such as equal pay for equal work and equal hiring opportunities.

The second type focuses on the employment of disadvantaged groups such as the Law on the Protection of the Disabled and the Law on the Safeguard of Rights and Interests of Women. They contain prohibitive provisions for avoiding employment discrimination on disadvantaged groups.

There also are administrative rules against discrimination in employment, such as the Regulations on the Education of the Disabled, Regulations on Labor Protection for Female Employees, Regulations on Work-related Injury Insurance,

65 Labor Law, art 12.

At the local level, the local legislature and government also formulate rules dealing with discriminative practices and implementing national rules. The categories of protection against discrimination also are expanded to cover disability, rural laborers, and persons carrying infectious disease pathogens.

When a job applicant is carrying infectious disease pathogens, the employer is prohibited from rejecting him simply because of this disease, but he should not be made to engage in restricted jobs that may facilitate the distribution of the disease before he is cured or is excluded upon suspicion of carrying infectious disease pathogens.

Other laws and regulations provide for rules against gender discrimination. Women should not be refused employment because of their gender in the recruitment process, but they may be turned down if the posts or jobs are determined unsuitable for women. The employer also should not discriminate against female staff with respect to promotions, evaluations, and the granting of professional technical titles.

Employers are prohibited from adding any provisions in an employment contract with a female employee that restricts her from getting married, becoming pregnant, or giving birth. The employment contract should reflect the general principle of equal payment for male or female employees. A female employee may not be dismissed due to the fact that she is married, pregnant, or on maternity or nursing leave.

Still, there are no provisions in law with respect to an employer’s responsibility to take measures to prevent discrimination other than sex discrimination. It also is not clear if an employee is responsible for non-discrimination.

The general concept of harassment has not been formally defined and applied under the law. An act of harassment may be regarded as an infringement on an individual’s personal rights, which are protected under the General Principles of Civil Law and the Criminal Law.

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68 Promotion of Employment Law, art 27.

69 Law on Protection of Female Rights and Interests, art 4.
The first piece of legislation addressing sexual harassment is the Law on Protection of Females’ Rights and Interests, which defines “sexual harassment” as a prohibited act. It provides a clear legal ground for sexual harassment cases to be filed before a court. Before its passage, the sexual harassment case may be only heard and ruled on the basis of the infringement of civil rights or personal rights. The Law on Protection of Females’ Rights and Interests provide a clear legal ground for sexual harassment cases to be filed before a court. A victim may now file a civil lawsuit with the court for some redress or report the case to the public security bureau.

The public security bureau may detain the employer or person in charge up to 15 days, impose a fine, or issue a warning depending on the level of seriousness of the case. If the infringement of personal rights constitutes a crime, the criminal liability may be pursued.

Collective Bargaining and Worker Participation in Management

Collective Bargaining

Collective bargaining was once effective in setting labor standards and strengthening labor protection involving associations of employers and employees. However, the use and effect of collective representation has recently declined and is gradually replaced with new forms of association, i.e., NGOs.

In general, collective bargaining is weak in China due to two factors. First, most blue-collar laborers are poorly educated, unskilled, and less informed in labor representation. The majority of laborers’ low education, poor remuneration, and tenuous residency status make them far more vulnerable than well-educated white-collar workers.

Second, collective bargaining is not necessarily government-backed, which suggests that some collective bargaining is only an informal gathering in China’s regulatory environment. As a result, the real function of collective bargaining is questionable and may even be compromised if activities cross the boundaries of coordinated organization.

70 Promulgated on 1 October 1992 and revised on 28 August 2005.
71 These wrongful acts include compelling workers to work by use of force, threat, or by resorting to means designed to restrict personal freedom; or insulting, physically punishing, beating, illegally searching, or taking workers into custody. The Labor Contract Law widens the scope of wrongful acts to using means such as violence, threats, or illegal restriction of personal liberty to compel workers to work; instructing or arbitrarily ordering a worker to carry out a dangerous operation that jeopardizes his personal safety in violation of regulations; insulting, corporally punishing, beating, or illegally searching or detaining a worker; or seriously harming the physical and/or mental health of workers due to odious working conditions or serious environmental pollution.
Collective Contracts

More and more collective contracts are signed between the employer and labor unions or employees’ representatives on behalf of the employees. The employer is not required to sign a collective contract unless the labor union makes such a request.

A collective contract may be one with a specific focus, covering only one of the aspects of employment. A collective contract also may be an industrial collective contract covering one of certain industries or a regional collective contract covering one of several regions.

Negotiation of the collective bargaining agreement at the industry or regional level is less common in China, although collective bargaining is allowed within a certain industry or within areas below the county level. The collective contract should cover matters such as labor compensation, working hours, rest, leave, work safety and hygiene, insurance, and benefits.\(^{72}\)

The collective contract may include provisions that do not usually appear in the individual employment contracts. For instance, it may include provisions regarding the conditions and procedures for redundancy and for compensation for the reduced staff. However, it cannot include provisions that are only applicable to a particular employee.

If the labor union is strong, more favorable terms such as additional compensation may be incorporated in the collective contract. The collective contract may be modified during the contract term or pre-terminated if: (a) the contract cannot be performed due to merger, dissolution, or bankruptcy of the employer; (b) the contract or any part of it cannot be performed due to reasons such as *force majeure*; (c) the occurrence of the contractual conditions for modification or early termination; or (d) other situations provided for by laws and regulations.

The collective contract should be submitted to the local labor administration bureau for recordal after its conclusion. It becomes effective 15 days from receipt by the labor administration bureau unless the latter raises any objections to the contract.\(^{73}\)

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72 Under the Regulations for Collective Contracts (20 January 2004), the following should be contained in a collective contract: remuneration; working hours; rest and holidays; working safety and sanitation; supplemental insurance and welfare; special protection for female employees and employees who are minors; operational skill training; employment contract administration; award and punishment; redundancy; term of the collective contract (one to three years); procedures for modification and termination of the collective contract; provisions for the consultative handling of disputes arising from the performance of the collective contract; liabilities for breach of the collective contract; and other terms.

73 Labor Contract Law, art 54.
Once the collective contract comes into effect, it is binding upon the employer and all employees in the company. Nevertheless, an individual employee may still bargain for better terms and conditions in his individual employment contract.

As the law only requires that the terms and conditions in the individual labor contract are no less favorable than those in the collective contract, the latter is signed in conjunction with, rather than to replace, the individual employment contract.

The enterprise may engage in consultations on collective wages and may enter into a collective wage agreement. Disputes arising from the collective contract should involve at least three employees and sometimes all the employees in the factory. The employees in a collective contract dispute share the same objective and should not pursue their individual interests separately. They may thus be represented by the labor union or their representatives in the dispute settlement process.

**Labor Unions**

The labor union movement in China dates back to the early years of the twentieth century. The current labor union system was rebuilt in the 1980s. Although labor unions have the right to carry out their work independently and autonomously, these rights are subject to the Labor Union Law and the laws enshrining the supremacy of the Chinese Communist Party (CCP) over labor unions.

On its face, Article 35 of the Constitution guarantees the freedom of assembly and freedom of association, but these freedoms can only be exercised within limits. Union organizations are subordinated to the All-China Federation of Labor Unions (ACFTU), which is the sole government-backed and monitored union lawfully permitted to exist in China.

Self-run labor unions are now allowed in China largely because the CCP is afraid of the development of alternative centers of powers. In practice, labor unions continue to play their role as “transmission belts” between the CCP and working classes, which may explain why there have been no significant labor union activities on an industry-wide scale or in a certain geographical area, although ACFTU has a nationwide network with branches at all levels. The government is recently pushing for the establishment and utilization of more labor unions in FIEs and private enterprises, particularly in Fortune 500 subsidiaries in China.

As labor unions are government-backed, they are not necessarily supportive of industrial actions. The primary function of the labor union is to smooth the employer-employee relationship and try not to turn the labor disputes into labor unrests, strikes, or even chaos. However, some opine that low union credibility
in fact contributes to unstable industrial relations. From time to time, under the increasing social and political pressures from the society and CCP, the labor union is now more often involved in the negotiation of collective contracts, resolution of labor disputes, negotiation of and adjustment to the resettlement plan of the enterprises, etc. However, in practice, the role of the labor union is not that active. The rights and obligations of labor unions in China are primarily set out in the Labor union Law.

Participation in a labor union is an employee’s right, but is subject to some limitations. The employee here refers to all employees in China whose main income is derived from wages, and such employee has the right to join an official labor union recognized by the government. In addition, the local level union can only be set up in the enterprise, thus employees from various employers cannot form a cross-employer labor union. Once a labor union is set up in the enterprise, it is open to all employees in this enterprise including low-, middle- and senior-level employees as well as expatriate employees who are not able to form separate labor unions in one enterprise.

Finally, the right to unionize is a right rather than an obligation. The employee is not subject to compulsory unionism. Employees also have the right to elect members of or representatives in the committees of the labor unions.

An FIE should consult the labor union and appropriately adopt its suggestions. The FIE should support the work of the labor union, including the provision of necessary housing and equipment for handling labor union work. Two per cent of the total actual wages of all employees (including foreign nationals) should be contributed by the FIE to the labor union as outlay on a monthly basis.

The employer may not terminate the employment contract simply because the employee joins a labor union or has been involved in labor union activities. Otherwise, the employer will be ordered to reinstate the employment contract and to pay retroactively any remuneration due during the period of termination and make compensation double the annual income of the employee concerned.

The labor union has a wide variety of rights and powers under the Labor Union Law to represent all employees, including senior management personnel and executives. It may order the enterprise to make corrections if the employer violates the system of employees’ representative assemblies, and to safeguard the employees’ rights to exercise democratic management.

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75 Labor Union Law, art 3.
76 Measures of the Shenzhen Special Economic Zone for Implementing the PRC Labor Union Law (effective as of 1 August 2008), art 55.
77 Labor Union Law, art 52.
It can review, adopt, and decide certain proceedings or matters that are required to be submitted to it by the enterprise. It also can voice out its opinions if it considers that any employee is inappropriately penalized by the enterprise.

The labor union has the right to supervise the design, construction and operation of safety and health facilities, and it can participate in the investigation of job-related accidents resulting in injury or death. It also may report infringement cases to relevant government authorities and request the local government or relevant department to handle infringements on their rights and interests or to file lawsuits in court. It also can assist employees in signing individual employment contracts, or it can sign a collective contract with the employer on behalf of the employees.

The labor union is sometimes granted the right to participate in the decision-making process of the employer when decisions will affect the immediate rights and interests of employees. The enterprise also is required to listen to the opinions of the labor union when it considers major operational, management, and development issues.

This consultation process does not seem to grant the labor union a right to veto or obstruct the employer’s decision. However, when the board of directors’ or senior management’s decisions relate to employee rewards and penalties, wage systems, wage benefits, labor protection, and labor insurance, the labor union may have de facto veto right as the employer’s decision without the labor union’s attendance and cooperation may lead to the invalidity of the company action.

The labor union’s primary responsibility is to safeguard the employees’ legal rights and interests. Consequently, it should participate in the negotiation and collective contract system, assist employees when their interests are infringed by the employer, make suggestions to resolve situations such as work stoppage or a slowdown in the enterprise, and participate in the labor dispute settlement process.

Labor unions also should not act against the interests of the government, the CCP, and the people as a whole. A labor union and the enterprise may negotiate and determine the number of full-time personnel working for the labor union. Full-time personnel will continue to receive wages, bonuses, and allowances from the enterprise and enjoy the same social insurance and welfare benefits as regular employees.

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78 For instance, the labor union representatives should attend the board, management, or even departmental level meetings in the enterprise on issues such as wages, benefits, labor safety and hygiene, and social insurance.
79 Labor Union Law, art 38.
80 Labor Union Law, art 6.
81 Labor Union Law, art 21.
82 Labor Union Law, art 27.
83 Labor Union Law, art 28.
A full-time chairperson may be needed if the enterprise has 200 employees or more. His transfer or dismissal before the expiration of his term requires the consent of the labor union committee or the majority resolution of the union meeting. The personnel working for the union (except full-time personnel) should conduct their union activities outside working hours, or during working hours with the enterprise’s prior consent.\footnote{Labor Union Law, art 40.}

**Employee Participation**

Employees have the right to know the employer’s internal regulations and decisions on material matters that have a direct bearing on their interests. The employer should thus make these public or should communicate them to the employees.

The employer should consult with the labor union, employee assembly, or all of the employees when formulating, revising, or deciding on matters such as compensation, working hours, leave, working safety and hygiene, insurance, benefits, employee training, work discipline, or work quota management. The employees and their representatives can make proposals to and comments on these matters through the consultation process.

Employees do not play a decision-making role. They can only make proposals to the internal regulations and standards put forward by the employer. At best, the employer will improve the internal regulations and decisions by taking into account the employees’ or the labor union’s comments or proposals.

**Health and Safety Protection in the Workplace**

The employer is required to establish a labor safety and hygiene policy. An employment contract should contain clauses on labor protection, working conditions, and protection against occupational hazards.

An employee may refuse to take instructions from the employer if such may expose him to danger. He may even immediately terminate the employment contract without prior notification to the employer if he is instructed to or ordered to perform dangerous operations that may harm his personal safety.\footnote{Labor Contract Law, art 38.}

The employee can report to the labor authority or file a formal complaint against the employer in respect of working conditions that jeopardize his personal safety or health. Promoting safe practices imposes various obligations on the employer. He should train employees to grasp necessary skills and knowledge before they take up their posts. He has to ensure that the new employee will receive no less than forty hours of safety training before assuming office.

He also should provide protective equipment to employees and conduct regular health examinations for employees who work in areas exposed to potential...
occupational hazards. Failure to provide employees with necessary safety facilities and conditions or to comply with relevant rules may trigger rectification orders from the local labor bureau or other competent authorities or even a fine. In very serious circumstances, employers may be ordered to halt production or business operations.

Additional measures may have to be taken to protect female and underage employees. Female employees are entitled to protections during their menstrual, pregnancy, delivery, and nursing periods in relation to the type of work, intensity of the work performed, and shift on which the work may be performed. The employer also should comply with labor rules in respect of the work type, time, and intensity that underage employees may be involved in. Employers who violate these mandatory provisions will be subject to administrative punishment. In serious cases may employers’ violations constitute criminal offense. Aggrieved female employees will be entitled to economic compensation from their employers. Workers between 16 and 18 years of age are defined as underage employees. The employer must comply with labor rules in respect of the work type, time, and intensity that underage employees are able to be involved in.86 The employer’s violation may trigger fines of up to Renminbi 3,000 per underage worker and an order of correction by the labor administrative authorities.87

Civil liability of employers for industrial accidents may be heavy. Compensation should be paid for medical expenses,88 loss of income,89 living expenses,90 and other unspecified expenses in personal injury cases. Funeral expenses and expenses for the maintenance of the dependents of the deceased should be covered by the party at fault. The contributory negligence of the infringed party may lead to the deduction of the monetary amount of compensation of the infringing party.

An employer may be subjected to administrative penalties or criminal liability where he (a) instructs or orders a worker to carry out dangerous business operations that jeopardize the worker’s personal safety, or (b) seriously harms

86 Special Protection of Underage Worker Protection, promulgated by the Ministry of Labor on 9 December 1994, in effect on 1 January 1995.
87 Special Protection of Underage Worker Protection, promulgated by the Ministry of Labor on 9 December 1994, in effect on 1 January 1995.
88 Medical expenses are usually calculated on the basis of diagnostic proof and medical and hospital bills from the local hospital treating the injured person. Expenses incurred in another hospital or clinic without the required approval from the relevant medical service department may not be compensated. Expenses for the unauthorized purchase of medicine unrelated to the specific personal injury or for the treatment of other illness may not be compensated.
89 Loss of income is often calculated on the basis of the loss of working time of the injured person receiving medical treatment or special nursing care (with approval from the hospital or clinic) at his normal salary rate.
90 There are no set rules in calculating the amount of payment for living expenses and “actual circumstances” may be taken into account.
the physical or mental health of workers due to odious working conditions or serious environmental pollution.\footnote{Labor Contract Law, art 88.}

Sanctions may be imposed on the person held liable for industrial accidents. These may include imprisonment or detention for three years in normal circumstances, or imprisonment or detention for seven years in particularly serious circumstances.\footnote{Criminal Procedure Law, art 135.}

Staff and workers who violate management rules at work or force other workers to encounter risks resulting in serious accidents involving injury or death will be sentenced to no more than three years of fixed-term imprisonment,\footnote{Criminal Law, art 134.} which may be extended to three to seven years if the accidents are especially serious (e.g., fires, breaches of dikes, explosions, poisonings, or other accidents that lead to serious injury or death).

The person may be sentenced to up to three years’ imprisonment if he violates regulations concerning the control of explosives, combustibles, or of radioactive, poisonous, or corrosive materials and causes a serious accident in the course of storage, transportation, use, or production.

**Dispute Resolution**

**In General**

Labor disputes have been in explosive growth along with China’s economic reform and development. Prior thereto, mass labor disputes or collective actions rarely took place due to strict State control over the working population and superficial equality among employees. Before China’s economic reform, it was the SOEs that absorbed the entire population in all the industries at a fixed remuneration and contributed all the production in national economy. Due to the iron rice bowl policy in China’s strict planned economy, all the working population was employed and was not subject to dismissal even for bad performance.

The introduction of the concepts of market force and capitalist labor relations resulted in employers being more concerned about the profitability of enterprises rather than employees’ benefits. The interests of the employer and employee are now divergent which leads to more labor disputes.

Some labor disputes may escalate into unrests or strikes. Labor protests are far more widespread and coordinated than previously expected. Strikes are more popular to a younger generation of blue-collar workers.\footnote{Patti Waldmeir, “Chinese Strikes Focus on More Workers’ Rights”, *Financial Times*, 14 June 2010, at p. 1.} It has been reported that strike actions are organized and coordinated via mobile telephones, QQ, and...
text messages.95 Most of these labor protests across the Pearl River Delta and Yangtze River Delta were caused by low wages, poor working conditions,96 rising living costs or even “the scrapping of a plan to allow workers to receive a refund on pension payments when they move province”,97 which was intensified with the labor shortage in these areas.

There are currently no formal legal mechanisms to resolve industrial actions. The Labor Law somehow provides an informal mechanism dealing with work stoppage or work slowdown in an enterprise — the labor union should represent the employees in consultations with the enterprise, reflect the opinions and demands of the staff and workers, and put forward opinions on resolving the matter. This mechanism indicates that the legislature envisions the occurrence of strikes or work slowdowns. More interestingly, this provision actually outlines the role of the labor union in the strikes or unrests: mediating the dispute rather than leading the dispute. It is unclear that what actions the employer can take or what remedies they have against the strikers in the event of strikes, unrests, work stoppage or work slowdown.

Given the fact that the strike is not clearly allowed, can the employer claim that the strike is a violation of law so as to terminate the employment contract of the strikers? There is no clear answer to this. Similarly, under the current law, neither the employer nor the employee is entitled to claim damages or compensation from the other side due to industrial actions.

The labor union also needs to assist the enterprise in carrying out the work concerned and resuming production and work as quickly as possible.98 Still, the actions to be taken by employers and the remedies that they have against strikers in the event of strikes, unrests, work stoppage, or work slowdown remain unclear.

Types of Labor Disputes

A labor dispute refers to a dispute (a) over confirmation of a labor relationship; (b) which occurs due to conclusion, performance, novation, rescission, or termination of an employment contract; (c) which occurs due to the dismissal of an employee or his resignation; (d) over working time, rest and leave, social

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96 For instance, the strike in Suzhou NSG plant was due to the workers’ fear of the long-term health damage of the glass-thinning process. The chemicals used in this process caused dry throats, sore legs and eye problems. Patti Waldmeir, “Chinese Strikes Focus on More Workers' Rights”, Financial Times, 14 June 2010, p.1.
98 Labor Union Law, art 27.
insurance, welfare, training, or labor protection; or (e) over remuneration, work-related injury medical fee, economic compensation, or damages.99

However, some disputes concerning the labor relationship are not regarded as labor disputes. 100 The general principles in settling labor disputes are legality, justice, promptness, and facts-based. Labor disputes are resolved through consultation, mediation, arbitration, or litigation, but the law puts more emphasis on mediation in resolving labor disputes.

Consultation

Consultation is a voluntary process to resolve labor disputes. When a labor dispute arises, the employee may consult with the employer or may invite the labor union or other third party to jointly consult with the employer to reach a conciliation agreement. 101 The disputing party may apply for mediation or arbitration if one party refuses to participate in the consultations, the consultation is not fruitful, or one party fails to perform the consultation agreement.

Mediation

Mediation also is a voluntary dispute resolution mechanism but is characterized as a quasi-formal method to resolve labor disputes. It may be conducted at (a) the enterprise’s labor dispute mediation committee, (b) the basic level people’s mediation organization established according to law, and (c) the organization at the rural town or urban street level with the capacity for labor dispute mediation.

An enterprise may establish a labor mediation committee that often consists of employee and enterprise representatives. The employee representatives should be members of the labor union or employees appointed by the staff, while the employer representatives should be appointed by the person in charge of the enterprise. The head of the committee should be someone who is jointly appointed by both sides. Alternatively, a member of the labor union can be the head of the committee.

Mediation should be completed within 15 days from the date on which the mediation application is received by the mediation organization. Mediation is deemed a failure if no agreement can be reached. The mediation organization can make a mediation agreement on the basis of the agreement reached by the

99 Labor Disputes Law, art 2.
100 For instance, a dispute concerning an employee’s claim for social insurance payment from the social insurance processing institution is not a labor dispute. A dispute between an employer and an employee on the transfer of an SOE residential house as a result of the reform of the State-owned residential house system is not a labor dispute. None of the disputes between a domestic helper and a family or individual, between an individual craftsman and his apprentice, or between a leaseholding farm household and the person hired by it is a labor dispute.
101 Labor Disputes Law, arts 4 and 5.
disputing parties in the mediation process, and such mediation agreement has binding effect.

Nevertheless, one party to the dispute cannot enforce the mediation agreement through the court. When one party fails to perform the mediation agreement, the only route to enforce the agreement is to apply for arbitration, except when the mediation agreement deals with monetary issues such as the payment of remuneration, work-related injury medical fee, severance pay, or damages. The party concerned may move forward to arbitration if one party is not willing to participate in the mediation, mediation is not fruitful, or the other party fails to perform the mediation agreement.

Arbitration

Arbitration at the labor dispute arbitration committee is mandatory. The provincial government may decide to establish a labor dispute arbitration commission at the city, district, or county level. Jurisdiction is thus a key issue before the disputing parties decide to submit the dispute to the commission. The labor dispute arbitration commission has jurisdiction over disputes arising within the administrative area where it is located.

Such jurisdiction is largely dependent on one of two factors: the employment contract is performed in the administrative area or the employer is located in the administrative area. Where two commissions have jurisdiction over the labor dispute, the commission located in the same locality where the employment contract is performed should handle the case.

The labor dispute arbitration commission consists of representatives of the local labor bureau, the labor union, and the employer. A party to the labor dispute should apply for arbitration within one year from the date he knows or should have known that there has been a violation of his rights or interests. This one-year time limit does not apply to a dispute over payment of remuneration when the labor relationship still exists. However, it applies to the payment of

102 Labor Disputes Law, art 15.
103 The number of members in the committee should be an odd number. A committee member should have one of the following qualifications: (a) ex-judge of the courts; (b) person engaged in legal research or teaching and having a medium- to high-level professional title; (c) person with legal knowledge and work experience in human resources or in a labor union for at least five years; or (d) lawyer with at least three years of practice experience.
104 The written application usually includes information such as the employee’s name, gender, age, occupation, address of residence, and working unit; the employer’s name, address, and name of his legal representative; claims, facts, and reasons on which such claims are based; and evidence and sources, witnesses’ names, and addresses of residence.
105 This one-year time limit should supersede the 60-day timeframe outlined in Article 82 of the Labor Law, as the latter is an older and more general piece of legislation.
remuneration if the employment contract is terminated, and commences at the
time when the contract is terminated.

The one-year timeframe will be interrupted if one party makes a claim directly
to the other party or to the relevant labor bureau, or where the other party agrees
to perform its obligations. The one-year period may be suspended due to force
majeure or other proper reasons, but will resume on the day when the reason
causing the suspension is eliminated.

The committee should decide to accept or reject the case within five days of
receipt of the application. The committee should give a reason for rejecting a
case, e.g., the dispute does not arise out of a labor relationship. The committee
will send a copy of the application for arbitration to the respondent within five
days from acceptance of the case.

Meanwhile, it will form a three-person arbitral tribunal to handle the labor
dispute raised in the application. Each party to the dispute can appoint one
arbitrator and the lead arbitrator is appointed by the chairman of the committee
or his authorized representative. In some simple cases, the tribunal may only
have one arbitrator.

Both parties have the right to be represented in arbitration. When a party
appoints a lawyer as his representative, a power of attorney with a specific scope
of authorization should be prepared and submitted to the tribunal.

Within five days after the committee decides to accept the case, the labor dispute
arbitration committee should notify the parties in writing of the constitution of
the arbitral tribunal. Within ten days of receipt of the application for arbitration,
the respondent should submit a letter of defense together with relevant evidence.
His failure or delay to submit such will not affect the hearing of the case.

The tribunal will inform the parties of the date, time, and place for the
arbitration hearing five days in advance. Failure to attend the hearing without
reasonable ground or retreating from the hearing without the tribunal’s consent
may result in an award in favor of the counterparty.

A party is responsible for providing evidence for his claims. When the evidence
relating to the disputed matter is controlled by the employer, he is the party to
provide evidence and prove it. The tribunal is required to mediate the dispute in
the arbitration proceeding and may issue an arbitral award only if the mediation
failed. It will prepare a written settlement agreement that will become legally
effective from the date of service on the parties.

Arbitration should be completed within forty-five days from acceptance of the
application by the labor dispute arbitration committee. The award is rendered on
the basis of the majority view of the arbitrators. In some cases, the time limit for
delivering the arbitral award can be extended to 15 days.

106 Labor Disputes Law, art 29.
The arbitral award comes into effect if no party appeals the case to the court within 15 days from receipt of the award. However, the award immediately comes into effect if the dispute is about a claim for remuneration, work-related injury medical fee, severance pay, or damages for an amount not exceeding twelve months’ salary or arising out of the implementation of work time, rest and leave, or social insurance.

The employer may apply to the court for revocation of the award within thirty days from receipt of the award if the evidence proves that the immediately effective arbitral award falls into any of the following circumstances:

- The labor dispute arbitration committee has no jurisdiction over the case;
- There is a violation of statutory procedures;
- Evidence material to the decision is forged;
- One party was prejudiced by the other party’s hiding of evidence; or
- The arbitrator accepted bribes or abused his power, among others.

The winning party may apply to the court for enforcement of the award if the losing party fails to perform his obligations under an arbitral award. The court may decide not to enforce an award if:

- The subject matter of the arbitral award is not within the scope of arbitration, or on which the arbitral tribunal has no authority to arbitrate;
- The law has been wrongly applied by the tribunal;
- The arbitrators have resorted to deception for personal gain or have perverted the course of justice by the award; or
- The court decides that the enforcement of the award will violate public interest.107

Once the application for enforcement is rejected by the court, the parties may file a lawsuit on that particular labor dispute.

**Litigation**

Resolving labor disputes through litigation is not common due to the complicated, time-consuming, and costly court procedure. If the labor dispute has not been arbitrated, the case will not be accepted by the court. The labor dispute case should be heard by the basic level court in the place of the employer’s operations or in the place of performance of the employment contract.

The court may accept a case if it has been decided and rejected by the labor dispute arbitration committee for not being a labor dispute. The court also may accept a labor dispute case as a normal civil case.

107 Labor Disputes Law, art 51.
The presentation, preparation, and hearing of a labor dispute case should follow the procedural rules laid down in the Civil Procedure Law. The principle of mediation also applies to labor dispute cases. The parties may reach a mediation agreement on a voluntary basis, but the terms in the mediation agreement have legal effect and can be enforced by the court.

Any party objecting to the court’s judgment can appeal to the court at a higher level within 15 days from delivery of the judgment. The judgment of the court of second instance is final. A party also may apply to the court of first or second instance for reconsideration even if the judgment is final, but the court is not bound to reconsider the case. This process is regarded as the second appeal proceeding and will not suspend the enforcement of judgment. However, the court is not bound to reconsider the case. In other words, the court may exercise its discretion.

Termination of Employment

In General

Prior to the passing of the Labor Contract Law, employers paid little attention to terminating employees as very few of them saw little legal risk in sacking employees. However, this is no longer the case after the Labor Contract Law is put in place.

The Labor Contract Law leaves very little scope for termination and restructuring in China without giving someone a huge payout.\(^{108}\) Under Chinese labor law, there are five types of terminations.

Means of Termination

Termination by Agreement and Automatic Termination

An employment contract may be terminated by agreement of the parties after consultations and negotiations.\(^{109}\)

An employment contract also may be immediately terminated upon: (a) the expiration of the term; (b) the employee’s drawing his basic old age insurance pension in accordance with law; (c) the employee’s death or being declared dead by the court; (d) the employer’s being declared bankrupt; (e) revocation of the employer’s business license or business closure or dissolution; or (f) other circumstances specified in laws or administrative regulations.

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\(^{109}\) Labor Contract Law, art 36.
Termination by the Employer

The employer may terminate the employment contract by serving a termination notice at any time.\textsuperscript{110} He also may terminate the contract with a thirty-day written notice or with a one-month wage payment in lieu of notice.\textsuperscript{111} Termination by the employer is referred to as dismissal in practice. Dismissal should satisfy the legal requirements. First, the employer should decide whether the cause of dismissal falls into any of the items listed in Articles 39 and 40 of the Labor Contract Law. There are nine scenarios in which an employee may be dismissed:

- Where it is proved that the employee failed to satisfy the recruitment conditions during the probation period;
- Where the employee has seriously violated labor discipline or the rules promulgated by the employer;
- Where the employee has committed serious dereliction of duty or graft, causing substantial harm to the employer’s interests;
- Where the employee has established another labor relationship with another employer that may have materially affected the completion of his work with the first employer or if he refuses to rectify the matter after the same is brought to his attention by the first employer;
- Where the employee uses deception or coercion, or takes advantage of the employer’s difficulties to cause the employer to conclude an employment contract that is contrary to his true intent;
- Where the employee is subject to criminal prosecution in accordance with law;
- Where the employee has fallen ill or sustained a non-work related injury, and cannot engage in the original work or in other work arranged by the employer after the expiration of the medical treatment period;
- Where the employee is incompetent to perform the job and remains so after training or being transferred to another post; or
- Where major changes in the circumstances under which the employment contract was entered into have rendered it incapable of being performed, and the parties have failed to reach an agreement on the amendment of such contract after consultations and negotiations.

If the cause for dismissal falls into any of such circumstances, the employer then needs to check whether the employee falls into any of the statutory circumstances that protect him from being dismissed.

The employee may not be dismissed under certain circumstances, even if conditions (7), (8) and (9) are satisfied, such as:

\textsuperscript{110} Labor Contract Law, art 39.
\textsuperscript{111} Labor Contract Law, art 40.
• The employee has lost the capacity to work due to an occupational disease or work-related injury;
• The employee is engaged in operations exposing him to occupational disease hazards and has not undergone a pre-departure occupational health check-up, or is suspected of having contracted an occupational disease and is being diagnosed or under medical observation;
• The employee has been working continuously for the employer for at least 15 years and is less than five years away from his legal retirement;
• A female employee during the period of pregnancy, confinement, and nursing; or
• An employee during the required period of medical treatment for an illness or an injury not related to work.

Before termination, the employer also has to comply with the required notification and consultation procedures under the law. For instance, he should give a thirty-day written notice to the employee or pay him one month’s wages in lieu of such notice. The lack of a required notice will make the dismissal unlawful, and may make the employer liable for damages to the employee.

Where the employer unilaterally terminates the contract, he should give the labor union prior notification of the reason for the termination. The labor union may order the employer to rectify the matter if the termination violates the law or regulations, and the employer should report to the labor union the outcome of handling the labor union’s order.

Termination by the Employee

Termination by the employee is often referred to as resignation. The employee may terminate the employment contract with notice (not necessarily in writing) at any time in the following circumstances:
• The employer fails to provide the labor protection or working conditions specified in the employment contract;
• The employer fails to pay labor compensation in full and on time;
• The employer fails to pay the social insurance premiums for the employee in accordance with law;
• The employer has internal rules and regulations that violate laws or regulations, thus harming the employee’s rights and interests; and
• The employment contract is invalid because the employer has used deception or coercion, or takes advantage of the employee’s difficulties, to cause the employee to conclude a contract that is contrary to his true intent.

112 Labor Contract Law, art 38(1).
In extreme cases, the employee can immediately terminate the employment contract without notice, such as the employer’s use of violence, threats, or unlawful restriction of personal freedom to compel the employee to work, or the employee’s being instructed in violation of rules and regulations or being peremptorily ordered by the employer to perform dangerous operations that threaten his personal safety.

Alternatively, the employee may terminate the contract with a thirty-day written notice or three days’ notice during the probation period in all other circumstances. As long as the employee follows the notification requirement, the employer may not reject his resignation.

Without a proper notice, the employer is entitled to compensation from the employee for losses suffered due to the termination of the employment contract. Unless a service term is explicitly set out in the employment contract, the employer may not be entitled to liquidated damages from the employee in case of early termination. The employee has to comply with some post-termination obligations, such as confidentiality or non-competition covenants, within a specified period according to the employment contract.

**Redundancy or Mass Layoffs**

Redundancy is defined as a reduction of employees by twenty or more persons or by a number of persons that is less than twenty but accounts for ten per cent or more of the total number of the enterprise’s employees. Redundancy is justifiable where:

- An employer is undergoing reorganization according to the enterprise bankruptcy law;
- An employer faces serious difficulties arising in production or business conditions;
- An employer switches production, introduces a major technological innovation, or revises his business method, and after amendment of employment contracts, still needs to reduce his workforce; or
- Other major changes in the objective economic circumstances relied upon at the time of the conclusion of the employment contracts, rendering them incapable of being performed.

Under such circumstances, the employer has to explain the situation to the labor union or to all employees thirty days in advance, and to seek the opinions of the labor union or employees. The employer may reduce employees after submitting a report to the local labor bureau.

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113 Labor Law, art 41.
114 Local legislation may contain other standards that constitute “serious difficulties” to the enterprise, such as three years of continuous losses, insolvency, 80 per cent of employees having no work to do, or incapability to pay minimum living allowances to employees for six months.
The local labor bureau does not approve the redundancy plan, but it can object to the plan. With the green light from the local labor bureau, the employer can publish the reduction plan, proceed with the termination of the employment contracts, make severance payments, and issue the release certificates to the laid-off employees.

A redundancy agreement is not required to be prepared and signed although the employer is required to prepare a redundancy plan. After seeking opinions from the labor union, all the employees, and the labor bureau, the employer should make necessary modifications or improvements to the redundancy plan.

There are no guidelines for deciding the number of employees to be reduced. In most cases, it is the employer who proposes the number of employees to be laid off, although he may be advised to consider the restrictions imposed on the types of employees who cannot be made redundant.

Employees to be retained include those (a) who have concluded relatively long fixed-term employment contracts with the employer, (b) who have concluded open-term employment contracts with the employer, or (c) who are the only ones in their families that are employed and whose families have an elderly person or a minor for whom they need to provide.

However, as the number of laid-off employees should be agreed to by the labor union and the local labor bureau, the employer should have a strong reason for making proposed employees redundant.

**Re-Employment**

After the employer carries out the redundancy plan and starts hiring new employees within six months of the date of redundancy, he is required to give notice to the persons subject of the redundancy and should recruit them in priority of business needs on equal conditions.

While SOEs are undergoing further reform, the re-employment and administration of redundant employees from SOEs has become a major concern for the government and the public. The SOE should follow certain procedures before putting employees off-post. It should notify the labor union or the employee representative committee of the status of production and management in the enterprise and the proposal to put employees off-post. It should then

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115  The redundancy plan should set out the names of the staff to be reduced, the period for the redundancy, the implementation process, and the economic compensation payable to the reduced staff, among others.

116  Labor Contract Law, art 41.

117  The term of off-post refers to scenarios in which the employees are not required to come to work because of the inadequacy of work or the dissolution of the employer while the employment relationship still exists between the employer (or the department in charge of the employer) and the employees.
formulate an employee off-post and re-employment plan and set up a re-
employment center (without which no employee can be put off-post).

An employee off-post registration form should be submitted by the SOE to the
local labor bureau (or the enterprise supervising department) for verification,
confirmation, and filing. The employee will be issued an off-post employee
certificate by the local labor bureau through the enterprise re-employment center.

The center will sign a basic life security and re-employment agreement with the
employee, who replaces the old employment contract between the SOE and the
employee. The center, under the new agreement, will provide the off-post
employee with some basic life allowances that will be reduced gradually but will
not be lower than the unemployment remedy standards.

In addition to individual accounts for old age and medical insurances, the center
should contribute to the off-post employees’ old age, medical, and
unemployment insurance premiums. The new agreement will be terminated if
the off-post employee is hired by another work unit during the term of the new
agreement.

Termination Benefits

Severance payment, or “economic compensation” in Chinese legal terminology,
is the major type of termination benefits available to the employee by virtue of
termination. However, severance payment is only available in the following
cases:

- Termination by the employee under circumstances that allow him to terminate
  the employment contract with notice at any time or without notice;
- Termination proposed by the employer and agreed to by the employee;
- Termination by the employer under circumstances that allow him to terminate
  the employment contract with a thirty-day written notice or a one-month-wage
  payment in lieu of notice;
- Termination of a fixed-term employment contract upon its expiration (except
  where the employee refuses to renew the contract or rejects a new offer); or
- Termination in the case of bankruptcy, closure, dissolution, or revocation of
  the employer’s business license.

The calculation of severance pay is based on the number of years the employee
worked with the employer at the rate of one month’s wages for each full year
worked. The employee will be entitled to one month’s wages even if he

118 Labor Contract Law, art 47.
119 The monthly wage refers to the employee’s average monthly wage for the twelve
months prior to the termination. In addition, there is a cap on the monthly wage, i.e.,
no more than three times the average monthly wage in the employer’s area that is
usually published by the local government. In other words, severance pay, at most,
only works for six months to one year, and a half-month salary will be paid if the employee works for less than six months. The monthly wage refers to the employee’s average monthly wages for the 12 months prior to the termination of his employment contract. In addition, there is a cap on the monthly wage, that is, no more than 3 times the average monthly wage in the employer’s area that is usually published by the local government. In other words, severance pay, at most, is at the rate of three times the average monthly wage for no more than 12 years of work.\(^{120}\)

Severance payment also is available to an employee whose employment contract is terminated due to his incompetence, a change of circumstances, redundancy, or the employer’s failure to pay wages. Where the employment contract is terminated due to the employer’s failure to pay wages, the employee may request the local labor bureau to step in by ordering the employer to pay the unpaid wages or overtime salary within a specified period.

The employer may be requested by the local labor bureau to pay additional damages at the rate of 50 per cent to 100 per cent of the amount payable if the employer does not make prompt payment to the employee within the time limit.

The local labor bureau may make a similar request to the employer who fails to make severance payment to the employee, and his further failure to do so within a time limit will trigger the payment as damages to the employee at the rate of 50 per cent to 100 per cent of the amount payable.

The compensatory incomes (including severance payment, life subsidies, and other subsidies) received by a laid-off employee is exempt from individual income tax.\(^{121}\) However, if the amount of compensation in a lump sum is more than three times the amount of the local average salary for the year prior to the year of the termination, the exceeded part is taxable.

A medical subsidy is available to an employee whose employment contract is terminated due to his illness or injury not related to work. However, it is not clear if the payment of a medical subsidy is compulsory or not.

Unlawful Termination

Any dismissal in violation of relevant regulatory or contractual provisions is an unlawful dismissal, which makes the employer liable for damages to the employee at twice the rate of economic compensation (or severance pay).\(^{122}\)

\(^{120}\) Employment Contract Law, art 47.

\(^{121}\) Ministry of Finance and State Administration of Taxation, Circular Concerning Exemption of Taxation on Compensatory Incomes Paid in Lump Sum Upon Termination of Labor Relationships between Individuals and Employing Units (2001).

\(^{122}\) Labor Contract Law, art 87.
The employer and the employee are free to negotiate more favorable remedies and incorporate them into the employment contract. The employee may demand continued performance of the employment contract unless such is not possible. The employer will be liable for damages to the employee if he refuses to continue to perform the contract or the employee does not make such a request.

**Dismissal Procedure**

The employer should provide the employee with an appropriate document evidencing the termination, which is often in the form of a certificate of termination (or a release certificate). The release certificate is normally issued upon termination and contains such information as the name of the employee, duration of employment, date of termination or expiration, job description, and reason for termination. The legal significance of this release certificate is to prove the termination of the employment contract to the new employer.

The employer is subject to a rectification order from the labor bureau if he fails to issue the release certificate. He also may be liable for damages if the employee suffers harm. After the issuance of the release certificate, the former employer is required to transfer the employee’s personnel file to the new employer or to the relevant authorities, e.g., the personnel exchange center in most cases. The social insurance account also has to be transferred. The termination should be registered with the employment service institution within 15 days.

**Terminations in Special Scenarios**

*Transfer of Business*

In theory, the business of an enterprise can be transferred from one entity to the other only if these two enterprises have the same or comparable business scope. As part of the business transfer, the transferee may agree to hire some of the existing workforce of the transferor.

Employees cannot be directly transferred from the transferor to the transferee. Instead, the transferor should first terminate the employment relationship, and the transferee will subsequently enter into new employment contracts with the employees. In this sense, the employees are not transferred to but hired by the transferee as new employees. As the transferor, transferee, and employee agree with this arrangement, the transferor need not pay severance payment.

*Mergers and Acquisitions*

Acquisitions can be achieved through the acquisition of shares (in companies limited by shares) or the acquisition of capital contributions (in limited-liability companies). After the acquisition is completed, the shareholders may be

123  Labor Contract Law, art 50.
different while the enterprise remains a separate legal personality. As a result, existing employment contracts remain unchanged.

Unless the new shareholder prefers to implement its group practice into the acquired entity, the existing employment contracts can be left unamended. In practice, the employment contracts with senior management and technicians may have to be re-signed as the acquirer may want to insert some more stringent terms, such as confidentiality or non-competition. The acquired entity also may change its business name after the completion of the acquisition, and the employment contracts may be re-signed to be consistent and clear.

There are two types of mergers under Chinese law. In merger by absorption, one enterprise is absorbed into the other so that the absorbed entity is no longer in existence after the merger. Consequently, the employees of the absorbed company also will be absorbed into the absorbing entity. The absorbing entity has to enter into employment contracts with such employees, but their years of service should include their past service.

In merger by new establishment, two or more companies are merged to form a new company. The new company will enter into new employment contracts with all employees previously employed by the merged entities.

**Retirement, Social Security, Healthcare, and Old Age Pensions**

**In General**

Prior to the social welfare reform in the 1980s, all social welfare costs were borne by individual enterprises. As part of the marketization of the economy and enterprises, the government implemented a widespread social insurance and welfare reform that helps individual enterprises reduce non-business costs of operation and thus increases their competitiveness. It also helps preserve workers’ benefits and facilitates greater mobility in the labor market.

The Labor Law laid down the foundation of the social welfare system and requires the establishment of funds to support such benefits as pension, medical, worker compensation, maternity, and unemployment. A unified social security program was established at the central level in 1999 and employers and employees were required to pool their contributions into locally administered insurance funds.

An employee is entitled to “employee benefits”, which are classified as social insurance benefits or employee welfare benefits. Social insurance benefits are those benefits to which an employee is entitled under the social insurance system, including social insurance (old age pension, medical pension, work-related injuries, unemployment, and maternity). Employers and employees need to contribute their respective portions to the employees’ social insurance funds.

Employees also may receive employee welfare benefits from the employer’s welfare scheme. Employee welfare benefits usually consist of collective living
welfare facilities, cultural and entertainment facilities, and various welfare allowances and subsidies.

An enterprise is required to make contributions to various statutory reserve funds, such as the employee welfare fund and the employee bonus and welfare fund, to supplement employees’ social insurance benefits.

An employer also may offer extra fringe benefits, such as an equity annuity program or equity or profit-sharing schemes. Private or listed companies often adopt share option schemes to attract talents. The terms and conditions of the share option scheme can be in a separate contract or included in the employment contract. Employers also are encouraged to establish supplemental insurance for their employees in line with the enterprise’s actual situation, and employees are encouraged to take out savings-type insurance.

Old Age Insurance

All types of enterprises are required to participate in the basic pension scheme. Old age insurance benefits cover payments for living expenses, payments for specified medical expenses, subsidy for death, and social relief fee for the immediate relative of the deceased. The old age insurance benefits scheme is further divided into basic old age insurance, enterprise supplemental old age insurance, and individual savings-type old age insurance.

Retirement may be in the form of (a) normal retirement; (b) retirement based on illness; (c) early retirement for work underground, at high altitudes, at high temperatures, or for arduous or poisonous work; and (d) retirement based on loss of working ability and total disability arising from work injuries.

The normal retirement age is 60 for males and 55 (in non-labor intensive industries) or 50 (in labor intensive industries) for females. The retirement age can be extended to 65 or older for senior professionals based on the seniority level, subject to approval from the relevant government authority. The retirement age for teachers, doctors, and scientists also may be extended to 65 for males and 60 for females subject to approval from the relevant government authority.

For retirement based on illness, the retirement age is 50 for males and 45 for females if the illness causes the employee’s total disability as verified by the responsible labor verification committee, provided the employee has continuously worked for 10 years.

For early retirement for work underground, at high altitudes, at high temperatures, or for arduous or poisonous work, the retirement age is 55 for males and 45 for females, provided the employee has continuously worked for ten years.

For retirement based on total disability, the disability should arise from a work-related injury and should fall into the category of a Class I to Class IV disability, subject to verification by the labor verification committee.
The basic old age insurance scheme is mandatory. The employer normally contributes no more than 20 per cent of payroll to the basic old age insurance, and the actual percentage is decided by the local government. The insured employee contributes four per cent to eight per cent of his payroll.125

Employees of participating enterprises are entitled to a monthly old age insurance payment comprised of basic old age insurance payment and old age insurance payment from an individual account. However, the employee may not withdraw any portion of his individual old age insurance account before his retirement.

The monthly insurance premium contribution to the old age insurance account should be 11 per cent of the employees’ wages comprising an employee’s entire contribution (eight per cent) to the basic old age insurance scheme, and part of the enterprise’s contribution (three per cent) to the basic old age insurance fees.

The contribution percentage is subject to a new scheme under which the monthly insurance premium contribution rate to an employee’s individual account will be reduced from eleven per cent to eight per cent of the employee’s wages, and premium contributed to the individual account will come from the employee’s contribution alone and the employer’s contribution will be made entirely to the basic old age insurance scheme.

Employers in violation of contribution rules are subject to an order of correction, fines, disciplinary dispositions, criminal penalties, or late payment fee for delaying payment of premiums. Penalties also are imposed on employers who fail to register social insurance accounts, keep relevant accounts and information, or delay payment of social insurance premiums.

The government also encourages enterprises to establish the “enterprise supplemental old age insurance scheme” on a voluntary basis. An enterprise pension may be established if the enterprise satisfies some basic requirements, i.e., participation in the basic old age insurance plan scheme and fulfilling its contribution obligations, economic strength and ability, and establishment of a collective consultation and negotiation mechanism.

After the enterprise pension plan is adopted by collective consultation and negotiations, it should be reported to the local labor bureau above the county level, and comes into effect if the local labor bureau does not raise any objection within 15 days after its receipt.

An enterprise pension plan is funded by contributions from the employer and employees and by the gains from the fund investment. The employee’s individual contribution can be deducted from his salary. The employer’s annual

125 The Ministry of Labor and Social Insurance required those localities where the individual contribution rate is below 8 per cent to implement adjustment plans to increase the rate of 8 per cent; the Circular Concerning Adjustment of Individual Contribution Rate for Basic Old Age Insurance.
contribution does not exceed one-twelfth of the enterprise’s total payroll in the preceding year. Net gains from fund management will be proportionally credited into the employee’s account. After the employee retires, he may withdraw the balance of his account in installments or in a lump sum.

The enterprise has to appoint a trustee to manage the enterprise pension fund. The trustee may be a committee organized by the enterprise or a legally qualified trust institution. If a committee is formed, representatives from the employer and employees should be included as members. Employee representatives should occupy at least one-third of the seats in the committee. The committee also may include professionals or experts.

The trustee may have to appoint a qualified institution to act as manager of the pension accounts and a qualified institution to act as the investment manager of the pension funds. The pension funds should be in the custody of a qualified commercial bank or other professional custodian.

Employees also are encouraged to participate in individual savings-type old age insurance scheme on a voluntary basis, but there are no nationwide rules on the formation and operation of individual savings-type old age insurance schemes.

The local practice is that premiums are collected and managed by social insurance management institutions. Contributions are largely from employees or the employer that contributes on behalf of the employees and deduct contributions from their salaries. A retiring employee can withdraw the balance of his account in a lump sum or in installments. An employee also may consider purchasing commercial (savings) insurance policies from commercial insurance companies as supplemental old age insurance.

Unemployment Insurance

Unemployment insurance is available to those who are able to work but lose their jobs involuntarily. All types of enterprises and their employees are required to participate in the unemployment insurance scheme.

The unemployment insurance fund consists of: (a) the unemployment insurance premium paid by urban enterprises and institutions and by their staff and workers; (b) the interest on the unemployment insurance fund and government finance subsidies; and (c) other funds paid into the unemployment insurance fund according to law.\footnote{State Council’s Unemployment Insurance Regulations (1999), art 5.}

Urban enterprises (or institutions) have to contribute two per cent of the whole enterprise’s total payroll to the unemployment insurance premium while the employee only needs to contribute one per cent of his salaries to the premium. Farmers employed as contract workers do not need to contribute to the premium.

Unemployment insurance funds should be deposited into a dedicated government finance account for social insurance funds opened by the
government finance authorities with a State-owned commercial bank. Payments into and out of the account will be subject to separate administration and will be under the supervision of the government finance authorities.

An unemployed employee may receive payments if he has enrolled in the unemployment insurance program and the premium has been paid on time, if his termination is not of his own volition, and if he has carried out unemployment registration and desires to seek employment.

Upon termination of the labor relationship, the employer is required to issue unemployed employees a certificate to prove that the labor relationship has ended or has been terminated. He also has to inform them of their right to enjoy unemployment insurance benefits, and should submit a list of unemployed employees to the social insurance agency.

The employee has to timely complete the unemployment registration with the social insurance agency, as unemployment insurance payments are calculated from the registration date. The amount of unemployment insurance payments is set by the provincial government and is usually more than the minimum standard of living requirements for urban residents but less than the local minimum wage. The unemployed employee receives unemployment insurance payments on a monthly basis by presenting a voucher (issued by the social insurance agency) to the designated bank.

A medical subsidy may be granted to the unemployed employee if he suffers any illness and undergoes medical treatment during his unemployment. His family may receive a lump sum funeral subsidy and bereavement payment after his death while being unemployed.

The length of time in which he will receive unemployment insurance payments is determined by the aggregate period he and his employer have paid premiums. If the unemployed employee is re-employed, the period for receipt of unemployment insurance payments will be calculated anew. If the employer and his staff misappropriate the unemployment insurance funds, they will be ordered to return the funds, forfeit illegal income, and will be charged with criminal liabilities.

**Medical Insurance**

All urban and township working units and their employees are required to participate in the basic medical insurance system. The employer and employee contribute to the insurance premium at the ratio of six per cent and two per cent

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127 If the employer and employee have paid premiums for at least one year but less than five years, the maximum period for which the unemployed employee receives unemployment insurance payments is 12 months. This period is increased to 24 months if premiums have been paid by the employee and such employer for at least five years but less than 10 years, or for an aggregate period of 10 years or more.
of the total payroll respectively. The basic medical insurance fund is composed of individual accounts and the universal fund.

Approximately three per cent of the employer’s contribution will be deposited into the individual account while the remaining three per cent will be deposited into the universal fund. The employee’s contribution will be deposited into the individual account.

Enterprises in some industries may be allowed to set up supplemental medical insurance. The contribution of premiums below four per cent of the total payroll may be deducted from the employee welfare fund, and the portion of premiums exceeding the allowable fund will be calculated as enterprise expenses. Local re-employment centers are responsible for the basic medical insurance premium at 60 per cent of the average wage of local employees in the preceding year.

Medical insurance should be separately paid from the individual accounts and the universal fund. The payment from the universal fund is at least 10 per cent of the average annual wage of local employees. Medical expenses that are less than the minimum should be paid by the employee or deducted from the individual account.

The maximum payment for medical expenses is around four times the average annual wage of local employees. Medical expenses higher than the maximum can only be covered by the employee or through the commercial medical insurance.

**Maternity Insurance**

Urban enterprises are required to contribute to the maternity insurance premium. Female employees in urban and township enterprises may enjoy living subsidies and medical insurance during and after childbirth and during maternity leave. The funds are solely sourced from the enterprise that is required to contribute one per cent of the total payroll, subject to the local government’s plan.

A female employee who gives birth or who has had an abortion may collect maternity medical fees and maternity subsidies from the social insurance agency after submitting the Certificate of Family Planning (issued by the family planning authorities) and the Certificate of Birth or Abortion (from the hospital).

Maternity insurance payments include maternity subsidies during pregnancy, delivery and nursing, medical expenses, and care expenses. Child-bearing employees also can enjoy maternity leave with monthly maternity subsidies that equal the average wage of the enterprise in the preceding year.

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129 Trial Measures for Maternity Insurance for Enterprise Employees, art 7.
Non-compliance such as late payment of premiums will be charged with a late payment fee. An employer guilty of false reporting and obtaining of maternity subsidy or medical treatment fees will be ordered to return all amounts and is subject to administrative penalties. He also will be ordered to pay the benefits and penalties to the employee if the employee suffers any loss from his refusal to pay or delay in paying the benefits.

Work-Related Injury Insurance

All types of enterprises and individual business operators hiring workers need to participate in the work-related injury insurance program, and employers are required to contribute to the work-related injury premium. When the employee is injured or disabled through his work or suffers work-related illness, he may enjoy social insurance payments. Employees are regarded as suffering work-related injuries when they are:

- Have been injured by accident during working hours, within the working premises, and by reason of work;
- Injured by accident before or after working hours, but within the working premises and by reason of performing work-related preparatory or shift-completion work;
- Unexpectedly injured by violence during working hours, within the working premises, and by reason of performing job duties;
- Suffered occupational diseases;
- Injured by reason of work during a business trip, or their whereabouts become unknown as a result of an accident during a business trip;
- Injured in an automobile accident en route to or from work;
- Caused death as a result of a sudden outbreak of disease or illness during working hours and at work location, or resulting from the failure to save them from the disease or illness within forty-eight hours;
- Injured as a result of activities aimed to protect the public interest;
- Suffered from old injuries as a result of war or performance of public duties during military service prior to the current employment; or
- Afflicted by any other situation provided by applicable laws and regulations.

The work-related injury insurance fund consists of premiums remitted by the enterprises and interest on the premium funds. The rates of premium may differ and may be classified into various levels depending on the use of the work-related injury insurance fund and the frequency of occurrence of work-related injuries.

There are currently three basic classes of industries: first class (low-risk industries), second class (medium-risk industries), and third class (high-risk industries), and their premium rates are 0.5 per cent, one per cent, and two per cent respectively of the total amount of the employees’ wages of a participating
The basic premium rates applicable to the second and third classes may be adjusted up or down within the range of 150 per cent to fifty per cent of the basic rates.

The relevant medical costs for the treatment of the employee’s work-related injury at a medical institution will be paid out of the work-related injury insurance fund. The medical institution should be the one designated by the relevant service agreement.

In case of an emergency, the employee should receive emergency treatment at a nearby medical institution. The medical costs should be within the scope of the work-related injury insurance medical treatment categories, work-related injury medicine categories, and work-related injury insurance in-patient services standards.

During his in-patient medical treatment period, the employee is entitled to a catering subsidy of 70 per cent of the amount applied by the employer for business trips. He also is entitled to his regular salary and employee benefits during the period of suspension of work, which is normally not longer than twelve months.

If the employee is unable to care for himself, he is entitled to a monthly living care fee that can range from 30 per cent to 50 per cent of the average monthly salary for the previous year. The employer has to file an application with the relevant labor department for work-related injury verification within 30 days from the occurrence of the injury or the date of the diagnosis or assessment. The employee, his direct lineal family members, or the labor union may file the application directly within one year from the applicable date if the employer fails to timely file such application.

A further assessment on the employee’s ability to continue working is required when the work-related injury has become relatively stable after medical treatment. The benefits and treatments vary for employees in different grades of disabilities. Employees assessed with grades one to four disabilities can retire from work but need to maintain the employment relationship with their employers. They are entitled to a lump sum disability allowance ranging from 18 to 24 months of their monthly salary, and a monthly disability subsidy ranging from 75 per cent to 90 per cent of their monthly salary.

Employees assessed with grades five and six disabilities still need to work, provided that their employers offer them an appropriate position. They are entitled to a lump sum disability allowance but in different amounts (i.e., 16-month salary for grade five and 14-month salary for grade six). If an appropriate position cannot be offered, they are entitled to a monthly disability subsidy (i.e., 70 per cent of their monthly salary for grade five and 60 per cent for grade six).

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131 This thirty-day period can be extended in special circumstances.
The employment contracts of employees assessed with grades seven to 10 disabilities may be terminated upon expiration or upon their request. They are entitled to a lump sum disability allowance ranging from six to 12 months of their monthly salary, a lump sum of a work-related injury medical treatment allowance, and a disability employment allowance.

The relatives are entitled to compensation if their living was mainly maintained by the deceased employee prior to his death and if they were unable to work. The compensation is calculated at a certain percentage of the deceased’s previous monthly salary.

The direct lineal relative also may be entitled to a funeral allowance amounting to six months of the employee’s average monthly salary for the previous year, and a lump sum amount ranging from 48 to 60 months of his average monthly salary for the previous year.

The employer’s failure to participate in the work-related injury insurance scheme may trigger an order from the local labor bureau for rectification. Non-participation in the scheme does not allow the employer to walk away without any liability if the employee happens to suffer the work-related injury. He is responsible to pay for the work-related injury treatment and the relevant allowances and subsidies.

**Housing Fund**

All types of enterprises and their employees are required to contribute a certain percentage of the employees’ wages to the housing provident fund. The purpose of the housing fund is to assist employees in purchasing, building, and renovating their houses.

Under the housing provident fund program, contributions are calculated at a specified rate of an employee’s average monthly wages during the previous year. The rate may be increased by the provincial government. Contributions made by the employee are deducted from his wages and paid on his behalf by the employer. The employer will deposit the monthly contribution to the special account designated by the management center for the housing provident fund within five days from the payday.

The employee may withdraw the balance from his individual account when he: (a) retires; (b) completely loses his ability to work and has terminated his employment relationship with the employer; (c) purchases, constructs, refurbishes, or renovates his own house; (d) relocates outside China and resides abroad; or (e) repays the principal and interest on earlier loans for purchasing houses.

The employee also may withdraw the balance if his housing rental cost exceeds the stipulated percentage of the family income. When the employee is purchasing, constructing, refurbishing or renovating his own house, he is
qualified to apply for a housing provident fund loan with the housing provident fund management center as long as he has made contributions to the fund.

**Employee Bonus and Welfare Funds**

SOEs are required to make contributions equivalent to 14 per cent of the aggregate amount of an employee’s wages (minus various bonuses) to the employee welfare fund (or welfare fees), which is normally used to cover medical expenses for employees, wages of internal medical staff and medical administrative fees, expenses for travel to receive medical treatment for work-related injuries, and subsidies for needy employees, among others.

Contributions made by the employer and the employee are regarded as costs and expenses, and are thus tax-deductible. For FIEs, part of the after-tax profits has to be allocated to the employee bonus and welfare fund. The allocation amount is determined by the board of directors, but many FIEs allocate 14 per cent.

If the annual aggregate of those payments does not exceed 14 per cent of the total wages of all employees, the FIE may deduct such payments as expenses before taxation. The allocated fund is often used for collective welfare items, such as subsidies for purchase, construction and repair of houses for employees, and non-recurrent bonuses to employees.

Welfare benefits contributed by the employee are exempt from individual income tax. The exemption also is extended to contributions made by the employee and the employer to housing, medical insurance, and basic pension funds. Only the contributed amount that exceeds the statutory contribution ratio is counted as “wages and salaries” income of the employee, and is thus taxable.

**Future Outlook**

As a socialist country, labor and employment issues in China are politically and economically sensitive and important. Along with further marketization and economic growth, the labor scene, labor legislation, and labor practice will undergo further development. The labor relationship and blue-collar-level labor will continue to be heavily regulated and monitored by the labor authorities and State-recognized and highly structured union bodies at all levels.

Along with economic growth, the rise of labor disputes, unrest, strikes, and chaos in China need close attention and reactive measures. Among others, the Foxconn incident signals a high social and economic cost to the employer and community. In mid-2010, the labor strife hit FIEs such as Omron, Toyota, and

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132 Foxconn is a huge electronics contract manufacturer owned by a Taiwanese tycoon, manufacturing iPads and other electronic products. Foxconn has 800,000 Chinese workers working in its factory based in Shenzhen. Foxconn made itself international headlines after a series of suicides in its factory complex, which intensified bad
Honda, which suffered sporadic closures or disruptions, and ran short of parts due to strikes in some cities in southern China.

The Foxconn incident and Omron strike\(^{133}\) may end an era of dirt-cheap labor and may trigger a rethink of China’s growth model, which is not sustainable in the long run. There may be several pragmatic tools to address labor protection and equality.

First, more substantial wage increase can and should be offered to laborers. Currently, Chinese workers only earn 11 per cent of the American wage while output per hour is 21 times of the United States’ level. The pay increase can improve the labor relationship and lower the chances of labor unrests. It also may create a spillover effect into other areas in China or even in Asia. A voluntary pay rise is better than an involuntary pay rise dealing with industrial actions even though this may raises a wider question of whether a seemingly infinite supply of low-cost Chinese labor is now under threat.\(^{134}\)

Second, the government may show a greater tolerance and make good use of unions in collective bargaining. A real trade union (either the more independent ACFTU or an NGO type of union outside the auspices of the ACFTU) going through the collective bargaining procedures is probably the only sensible option to water down more potential strikes. Currently, the government-backed ACFTU seemed unable to interrupt the striking workers’ momentum.\(^{135}\) Some local authorities have started some experiments. For instance, Guangdong province has proposed legislation to allow more labor rights by introducing collective bargaining and worker representation on company boards, which unsurprisingly encountered lobbying and resistance from Hong Kong businesses. However, it is doubtful whether the government will back or tolerate an entirely independent labor union. It has been pointed out by some observers that the only reason that the government has shown tolerance to individual or isolated strikes recently was that these strikes and labor relation activities were not coordinated. In other words, the development of a wide scale organization may surely trigger a clampdown.\(^{136}\)

While China is entering into a new era of enhanced consciousness among workers, it is likely that employees in the low-cost “workshop of the world” will become increasingly ready to fight for wage hikes and better working conditions. However, enforcement still seems to be a problematic area.

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134 This, however, does not necessarily have a visible effect on the consumer at the end of the supply chain as labor only represents only around 5 per cent of the retail price of consumer products. Tom Mitchell, “Strike Force”, Financial Times, 11 June 2010, at p. 9.


If all labor protection standards are rigorously and uniformly enforced, labor costs may be much higher than they are now and the entire investment environment may look much less attractive to foreign investors. In this sense, lax enforcement remains the norm and rests with the labor authorities.

On the other hand, developments in labor protection, human rights, and civil society may require a higher level of enforcement that will benefit the workforce economically and politically, but may harm the economic interests of foreign investors and private sectors. The government and courts may have to adopt a more balanced and pragmatic approach dealing with the labor relationship when such relationship becomes chaotic.

It appears that labor authorities retain a higher level of authority and mandate in the area of labor protection and management. The courts are less constructive and proactive in implementing labor rules and standards. This makes sense in the Chinese context, where the administrative authority is stronger and more influential than the judiciary. While the rule of law is occasionally inhibited by the weak judiciary and legal culture, informal consultations can resolve labor disputes in a more efficient and sensible manner.

Chinese law, legal institutions, and society are continuously undergoing remarkable changes. New issues and problems arising out of China’s extraordinary economic growth will not end. In the next decades, it may be reasonable to anticipate more severe socioeconomic inequalities if the entire society’s income distribution system will continue to deteriorate.

Accordingly, there may be more public demonstrations, protests, riots, or even violent clashes over unresolved claims, which may push for or give rise to a more vibrant civil society and stronger rights-based consciousness, a movement towards liberal constitutionalism, free market, rule of law, and possibly competitive elections.
Introduction

Labor law in Colombia is mandatory, constantly evolving, not as formal as other branches of law, and tends toward internationalization. It is contained in the Constitution, the Labor Code, jurisprudence, custom or usage, national or foreign doctrine, and conventions and recommendations approved by the International Labor Organization (ILO). The general principles governing the interpretation of labor rules are the following:

- The rights or privileges given by labor law are not renounceable, but extralegal benefits agreed upon with the employer or given by him unilaterally may be renounced, modified, or changed for others;
- Labor law is of immediate application;
- In case of doubt in the application or interpretation of several labor rules, the most favorable to the worker will prevail.
- In labor law, the fact is more relevant than the document. This principle is known as the “reality contract theory”, i.e., if the reality is different from what is contained or agreed in a document, the reality should prevail; and
- There should be equal salary for equal work. However, absolute equality is not necessary as jurisprudence has accepted salary differences, taking into account criteria such as education, experience, and seniority.

Labor Contract

There is a labor contract when the following elements are present, without need for further formalities:

- Worker’s personal activity;
- Salary as remuneration for the service; and
- Continued subordination or dependence of the worker vis-à-vis the employer, allowing the latter to demand fulfillment of orders relating to the manner, time, and amount of work.
The labor contract may be classified by form or duration. Although the labor contract is perfected by the accord of the wills of the parties over the subject and payment of the work, some agreements are required to be written, such as:

- An agreement on a trial period, which pertains to the time lapse within which the employer and employee have to determine if they wish to continue with the service;
- An agreement on the fixed term of a contract, setting the duration of the labor relation which may be for a determined period or job. The general rule is that all labor contracts have an indefinite term;
- An agreement on an integral salary, which is a salary mode created by Law Number 50 of 1990 to avoid the formal fringe payment or other surcharges to the worker;
- A learning contract, which is a special labor relationship where one person renders his services to another, while the latter lends technical or specialized education to the former while he remains in service;¹
- The provision on transportation to and from the workplace in a collective hiring arrangement;² and
- An agreement with a foreign employee, who has the same rights and obligations as Colombian employees.

When a foreigner enters into a labor contract in Colombia, both the employer and the employee should meet obligations under administrative procedures during their stay in the country. Companies with more than ten employees should not have more than 10 per cent of common foreign employees or 10 per cent of directive and trust foreign employees, which percentages may be increased in special cases and for certain industries. Labor contracts also may be classified according to duration as follows:

- Fixed-term contract, the duration of which may not be longer than three years but may be extended indefinitely upon agreement of the parties;
- Contract by duration of the work;
- Incidental or transitory contract, the duration of which is up to one month and refers to a job different from the normal activities of the employer; and

1 This form of contract has a special regime regarding minimum wage, work schedule, special obligations for the parties, and duration, among others. If not agreed in writing, the contract will be deemed a common one.

2 This refers to the hiring of more than ten employees at the same time, with equal labor conditions and with transportation from where the employees are located to the workplace. Collective hiring is sometimes used for hiring Colombians working abroad, in which case, an approval or authorization from the corresponding official from the Ministry of Social Protection is needed. The employer also should grant a pledge or bank guaranty in an amount set by the Ministry of Social Protection to cover the expenses needed for relocating the employees.
• Indefinite-term contract, which does not have an agreed term, the duration of which is not determined by the nature of the job, and does not refer to occasional or transitory work.

Obligations of the Employer

The employer is required to pay withholding tax over wages, issue a withholdings certificate, and provide information to the State. He also should pay payroll taxes to family benefit funds, the National Learning Service, the Colombian Institute of Family Welfare, social security systems, and health systems. He should likewise guarantee a union member’s right of association.

To an employee, the employer should provide protection and security in the worksite, provide first aid in case of an accident, pay remuneration according to the conditions agreed upon, respect the employee’s personal dignity, and give him the required licenses.

The employer also should conduct a medical examination when the employee stops working for the company if done since the beginning of his work (or three days after leaving if not so done), issue certificates of service, pay expenses of returning the employee to where he was located when hired, and obey internal rules and maintain order, morality, and respect for laws.

In particular, his monthly obligations to the employee include contributing 11.625 per cent of the payment for the employee’s pension, eight per cent of the payment for health benefits, 0.5 per cent to eight per cent of the payment for professional risk insurance, nine per cent of the total monthly payroll as contributions to family compensation funds, and 25 per cent (for daily schedule) or 75 per cent (for night shift) as overtime surcharge. He also should pay 30 days of wage each year as service bonus, which is paid on a six-month basis, as well as 15 working days of paid rest for a year of service as vacation.

In some cases, he is required to provide footwear and clothes for work three times a year. Where necessary, he should pay severance amounting to 30 days of wage each year, and interests on severance amounting to 12 per cent annually, calculated as of 31 December each year.

3 Law Number 1010 of 23 January 2006 defines, prevents, corrects, and penalizes different forms of aggression, mistreatment and, generally, every offense to human dignity exercised in labor relations. It forced employers to modify internal rules to establish means of preventing labor harassment and an internal, confidential, conciliatory, and effective procedure to overcome such conduct in the workplace.

4 These include maternity license of twelve weeks for every pregnant employee, and paternity license of four working days for a husband or permanent partner that solely contributes to the Social Security System, or eight working days where both the father and mother has made contributions. Finally, it may include mourning license of five working days for the death of the employee’s spouse, permanent partner, or relative up to the second degree of consanguinity or first degree of affinity.
An employer is not allowed to:

- Deduct, hold, or replace wages and fringe payments without previous and written authorization from the employee;
- Make the employee buy goods in places established by the employer;
- Demand or accept money from the employee in order to be hired;
- Limit the association rights of the employee;
- Impose religious or political obligations;
- Authorize or tolerate political propaganda at work;
- Allow raffles, collections, or subscriptions;
- Prevent the employee from working in another company; or
- Allow actions threatening the dignity of the employee.

**Rights and Obligations of the Employee**

**In General**

An employee should carry out the hired job by himself (except if he is a domicile employee), observe internal rules and obey specific instructions, keep to himself information about the company that may cause damage to the employer, and maintain morality in his relations with colleagues and superiors.

He also should preserve and return working tools, communicate observations that may avoid damages, observe preventive and hygiene measures, be diligent in the prevention of accidents and professional diseases, and collaborate in risky situations affecting or threatening people, goods, or the establishment. It is forbidden for an employee to:

- Remove work tools and supplies without authorization;
- Keep weapons in the worksite (except security personnel);
- Be at work drunk or drugged;
- Fail to go to work (except during a strike);
- Decrease or suspend his work intentionally or motivate others to do so;
- Make collections, raffles, and subscriptions;
- Impede the freedom to work and freedom of association; and
- Use work resources for unrelated activities.

An employee has the right to be paid his wage and to be given a rest regime. He also is entitled to receive a surcharge for nightly or overtime work, certain payments (e.g., severance, interest of severance, and service bonus, or what has been agreed in a collective convention), subsidies, aid (e.g., transport, footwear, and uniforms), indemnity upon wrongful termination of contract, and protection for pregnant and non-adult employees.
Types of Employees

Directive, trust, and/or management employees have a higher degree of responsibility than other employees because of their position, and have duties geared towards representing the employer. They are not entitled to overtime surcharges and may not be a part of the board of directors of unions.

Discontinuous or intermittent employees are not required to work every day, and receive a minimum daily wage. Their fringe payments will be calculated according to the total amount paid to them. Foreigners are subject to the national law regardless of nationality of the company employing them, but there are limitations on the number of foreigners to be hired by a company.

Employees may be technical or specialized, of just surveillance, apprentices, household service, of family industry, or domicile employees. A domicile employee does not need to go to the company, may work from home, and may work alone or with the help of his family. If helped by third parties, he is considered a contractor. The employer should keep a registry of such employees.

Certain employees are governed by special regimes. The agreement for employees conducting household service should include the kind and place of work, remuneration, and duration of the contract. Their maximum shift is ten hours, and they are entitled to 15 days’ vacation for every year of work. If their wage is less than two minimum wages, the employer should supply their footwear and clothes for work.

Family service drivers should be employed directly by a member of the family, and should have a maximum shift of ten hours. Construction workers should have a contract that is generally for the duration of the job, and should be provided with collective insurance and security rules specific to their job.

Those who have not reached the legal age require authorization from the Ministry of Work to be able to work, and cannot work in certain jobs. Their daily shift should be four hours if they are 12 to 14 years old, six hours if they are 14 to 14 years old, and eight hours if they are 16 to 18 years old.

Apprentices should be over 14 years old and should have finished primary school. The maximum duration of an apprenticeship contract is three years, with a trial period of three months. The wage of apprentices may not be less than 50 per cent of the minimum wage.

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5 These include jobs related to toxic or hazardous substances, jobs in high temperature or contaminated environments, underground mining jobs, jobs with noise over 80 decibels, jobs manipulating radioactive materials, jobs where high voltage is manipulated, submarine jobs, garbage dump jobs, jobs that requires handling explosive substances, furnace operation, industrial painting with lead, working with sharpening or abrasive machinery, work in big furnaces, brick-making jobs, and other jobs specified by the Ministry of Work.
Employees doing surveillance and security jobs who live in the workplace do not have a right to surcharge for overtime, while those who do not live in the workplace can only be asked to work for eight hours a day, which may be extended to ten hours.

Countryside employees whose employer’s economic activity relates to agriculture, cattle, and the like have a maximum shift of eight hours. They are entitled to footwear and clothes, severance payment, service bonus, and assistance for illness.

**Terms and Conditions of Employment**

**Compensation**

*In General*

An employee’s compensation may be sourced from the labor contract, collective negotiation (i.e., collective labor agreement, pact, or arbitral award), or the law. Compensation may be of different kinds. A “wage” is a broad term corresponding to compensation for rendering services, and is the base for assessing fringe benefits, rest periods, and indemnity.

Non-wage payments include work tools, representation expenses, means of transport, fringe benefits (severance, interest on severance, and service bonus), family subsidy, participation in profits or distribution, indemnities and tips, vacation, occasional travel allowance, occasional sums, and bonuses and supplies in kind agreed as non-wage.

The wage may be classified as ordinary or extraordinary, depending on events or the frequency of accrual. An ordinary wage may be fixed or variable, depending on the way it is assessed and paid. It is fixed when it corresponds to compensation for time units, and variable if it corresponds to a commission or percentage of work done.

While payments for Sundays and holidays are included in a fixed wage, they are not included in a variable wage, thus an additional day should be paid for each Sunday or holiday during the month, taking into account the average of what has been earned or received in the immediately preceding week.

The type of wage also has an effect in the assessment of fringe benefits. A fixed wage is considered as the base for the assessment of fringe benefits, unless it has been varied in the last three months, where the average will be over what has been earned during the year. In a variable wage, what has been earned during the last year of work will be taken into account in determining the base wage for assessing fringe benefits.

In principle, the wage will always be in money, and may be in the national or foreign currency. If it is agreed in a foreign currency, the employer should pay
its total amount at the official exchange rate as of the day of payment.\(^6\) However, it may be paid in kind in some cases, and generally consists of food, clothes, and housing. The wage in kind should be expressed in value in the applicable labor contract, otherwise it should be estimated by an expert, without exceeding 50 per cent of the total wage. If the employee is receiving the minimum legal wage, the value for wage in kind may not exceed 30 per cent.

**Minimum Wage**

The minimum wage is the minimum sum received by an employee for his personal effort,\(^7\) and does not include extra charges for night work, Sundays, or holidays. It may not be seized, except in favor of alimony quotas or debts to cooperative companies or employees' funds.

No employee may earn less than the minimum wage for an ordinary working day. When the government fixes the minimum wage every year, such amount automatically comes into force. No one may earn a retirement or old age pension lower than the minimum wage, thus, pensions are automatically adjusted when the minimum wage is raised. An employer that does not pay his employees the minimum legal or conventional wage is subject to penalties that may be established by:

- The Ministry of Social Protection through its Inspectors, which penalties fluctuate depending on the seriousness of the fault and the frequency of the breach; or
- The labor judge in a trial, when it is proven that the employer did not pay the minimum wage. The penalty will be equal to the amount of the sentence for the non-payment of wage and fringe benefits.

When a part of the wage is agreed in kind, it should not be more than 30 per cent of the minimum wage. To agree on the integral wage, the established minimum legal monthly wage is taken as a base. The integral wage is a new concept established by Law Number 50 of 1990 and its Regulatory Decree Number 1174 of 1991. It is an expanded amount which includes in the agreed wage the cost of fringe benefits, bonuses, and labor benefits as well as other wage elements, such as the payment of overtime, night hours, and service during holidays and Sundays, among others. The employer may agree on an integral wage in writing with an employee who earns an ordinary wage higher than ten minimum legal monthly wages.

The amount of integral wage may be lower than ten legal monthly minimum wages plus the fringe benefit factor\(^8\) that may not be lower than 30 per cent of

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6 Labor Code, art 135.
7 Labor Code, art 145.
8 The fringe benefit factor is the existent relation between the total sum of the paid wage and that of the legal, extralegal, recognized, and paid fringe benefits in the preceding year. It is tax-exempt and is thus not subject to withholding. Regulatory Decree
the said amount. It should be agreed to be annual, and its amount should often be reviewed.

Payment of Wage

The payment of the wage should be done directly to the employee, regardless of age, gender, or social condition, or to the person authorized by him in writing.\(^9\) It should be paid in the workplace and not in saloons, bars, liquor stores, or prostitution establishments, unless the employee renders his services in those places.

The wage should be paid in the agreed terms, which should be not in advance, and should be paid periodically for not more than 30 days.\(^10\) Overtime or extra charges due to night hours or holidays and Sundays should be paid along with the wage of the period to which they correspond.

Equal wages should be paid to employees who exercise the same duties carried out in the same schedules, and have the same position and efficiency conditions. Thus, wage categories due to age, gender, or social condition may not be established.\(^11\)

The wage may not be renounced in any way, as there is no work without economic compensation. It also may not be assigned in whole or in part to third parties. The employer may not agree with the employee that the wage will be paid in merchandise or goods, unless it is housing, food, or clothing and within the frame of wage in kind. Thus, the employer may not sell to his employees merchandise or supplies, but the employee may choose to acquire them.

In general, all goods and services may be seized, except for the minimum legal or conventional wage.\(^12\) The wage may only be seized to the extent of one-fifth in excess of the minimum legal or conventional wage.\(^13\)

When dealing with seizures due to obligations to cooperatives or employees’ funds or derived from alimony trials, up to half of the wage may be seized.\(^14\) If the employee receives variable wages, the seizure is made effective over what is paid to the employee in the pertinent time period.\(^15\)

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\(^9\) Labor Code, art 139.
\(^10\) Labor Code, arts 134 and 138.
\(^11\) Labor Code, art 143.
\(^12\) Law Number 11/84, art 3; Labor Code, art 154.
\(^13\) Law Number 11/84, art 4; Labor Code, art 155.
\(^14\) Labor Code, Article 156.
\(^15\) The employer should assess the commission in each period. If it is lower than the minimum legal salary, the order of seizure may not be applied and will only be
Vacation

A vacation is remunerated rest for 15 working and consecutive days for one year of continuous service.\textsuperscript{16} However, some employees are entitled to 15 consecutive days for every six months of continuous service, while construction employees have 15 days of vacation for each year of service, and proportionally for a fraction thereof when they have worked for at least a month.\textsuperscript{17}

Vacation should be granted unilaterally by the employer or upon the employee’s request after such employee has rendered service for one year.\textsuperscript{18} The employer should inform each employee of the date and time of his vacation 15 days before such date, as well as the date in which he should return to work.

The employer should keep a vacation registry book stating the name of the employee, the commencement of the labor relation, the wages received, the date of availment of vacation, and the date on which it ends.\textsuperscript{19} Failure to keep the registry book would subject the employer to fines.

Vacation term cannot be paid in money, unless a prior authorization requested by the employee is obtained from the Ministry of Social Protection in special events that cause damage to the national economy or industry. Compensation in money only applies up to half of the time.\textsuperscript{20} The payment is valid so long as the employee simultaneously enjoys the real and effective rest corresponding to the days that are not paid when such payment is made.

Vacation also may be paid in money when the employee has not enjoyed the vacation at the termination of the labor contract. When the employee earns an integral salary, the payment of the vacation is made with the total value of the agreed integral salary. It is not feasible to remunerate the vacation with 70 per cent of the integral salary earned.

In principle, vacation term is not cumulative, but the parties may agree to accumulate them up to two consecutive years, with the employee still taking at least six days of vacation every year.\textsuperscript{21} However, highly specialized employees, technicians, those who are in trust and management positions, and foreign employees may accumulate the vacation up to four years.\textsuperscript{22}

\textsuperscript{16} Labor Code, art 186.
\textsuperscript{17} Labor Code, art 130.
\textsuperscript{18} Labor Code, art 187.
\textsuperscript{19} Decree Number 13/67, art 5.
\textsuperscript{20} Labor Code, art 189.
\textsuperscript{21} Labor Code, art 190.
\textsuperscript{22} Decree Number 13 of 1967, art 6.
When taking a vacation, management employees may appoint a replacement during their absence with the prior acceptance of the employer. In this case, they will be responsible for the replacement they recommend.

When collective vacation is granted due to convention or a collective agreement or because the company has arranged it in such a way, the employer may not demand that the employee enjoys them, that he completes a year upon his return, or that he reinstates what he has received when he retires from work before completing the year of service.

Vacation should be availed of three years from the date on which it is due. It is thus important to establish the moment in which the term for the statute of limitation starts, as the enforceability of the right to enjoy the vacation has two crucial moments: (a) the performance of the labor contract, in which event the term starts the following year; and (b) the payment of vacation due upon termination of the labor contract, in which event the term starts from that date, which is also when the labor bond ends.

**Working Day**

An ordinary working day is the one agreed upon by the parties, but should not exceed the legal maximum of eight hours a day and 48 hours per week, except for minors and the special working day (six hours a day and 36 hours per week). The government may reduce the working day in unhealthy or dangerous jobs.

The legal maximum working day is not applicable to directors, management, and trust employees, those who perform discontinuous or intermittent activities, and surveillance employees who reside in the workplace.

The special working day was established in 1991 to enable a company to operate every day in four shifts. Employees with a special working day are not entitled to extra charges for night hours, Sundays, or holidays, but are entitled to a salary similar to that earned by an employee with an eight-hour workday as well as to a day of remunerated rest for each Sunday worked. To avail of this special working day, the employer and the employee should have agreed on such from the start of the contract.

Working in shifts is allowed where the working day may be extended for more than eight hours and more than 48 hours per week, as long as the extension does not imply overtime or supplementary work, and the average of hours worked in three weeks does not exceed the legal maximum. Daytime work is carried out from six o’clock in the morning to six o’clock in the evening, while nighttime work is carried out from six o’clock in the evening to six o’clock in the morning.

Overtime work is performed beyond the ordinary or legal maximum working day, and should be specially remunerated. It should not exceed two hours a day and twelve hours a week. When the working day is increased to ten hours, no overtime is allowed. To be able to work overtime, an authorization from the Ministry of Work is required, and a registry of additional work should be kept.
Remunerated Sunday rest is mandatory as long as the employee has worked every day of the week to which he has committed, or the employee has failed to do so due to a justified cause (i.e., accident, sickness, family emergency, *force majeure*, act of God, guilt, or order from the employer). Its minimum duration is 24 hours.

In principle, no employee may work more than the maximum working day. Otherwise, the employer should request for a prior permit from the Ministry of Social Protection to be allowed to ask his employees to work an additional shift, which may not exceed the working day by two hours in a day or twelve hours in a week.23

The labor contract and the internal rules of the company should state that extra work is not recognized in any way, unless previously authorized in writing. This will avoid discussions with an employee who generally stays in the company after the end of his shift and later claims in a judicial trial that he worked overtime, thus making the employer liable for extra charges.

The ordinary working day is remunerated with the agreed monthly salary. If it exceeds these limits, the employer will have to pay extra work. Extra daytime work is remunerated with an extra 25 per cent charge per hour or a fraction over the regular wage per hour.24 Extra nighttime work is remunerated with an extra charge of 75 per cent over the regular value per hour.

The employer also may establish standard wages for daytime work and nighttime work, when there are activities carried out by work teams that imply successive rotation of daytime and nighttime shifts, as long as the standard wages agreed for both shifts may be compared with identical or similar activities.

Companies may hire new employees to carry out nocturnal activities without necessarily having to pay an extra charge with prior authorization of the Ministry of Social Protection. The labor contracts of such employees may not exceed six months, but may be extended once.

The working day should be from Monday to Saturday, with the employee having the right to a paid rest on Sunday and holidays. When work is related to a job not susceptible of interruption or suspension, the rest days are accumulated in the following week of the end of the trip or it will be paid in money.

**Suspension of the Contract**

The employee’s obligation to render service and the employer’s obligation to pay salary may be interrupted for the following reasons:

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23 Decree Number 13 of 1967, art 1; Law Number 50 of 1990, art 22.
24 Law Number 50/90, art 24.
• By *force majeure* or unforeseen events, which refer to events beyond the will of the parties that prevent the fulfillment of contractual obligations, such as war or flood, lightning, or earthquake that partially destroys the establishment;
• By death or incapacity of the individual employer, including his bankruptcy or judicial interdiction;
• By suspension of activities or temporal closure of the company or establishment within 120 days, for technical or economic reasons beyond the will of the employer, with previous authorization from the Ministry of Social Protection, and with timely notice to the employees;
• By disciplinary suspension contained in the internal rules of the company or by license given to the employee which makes it impossible to render the service, such as a non-remunerated license for studies abroad;
• By the employee being called for duty in the military;
• By preventive detention of the employee or by his arrest for not more than eight days; or
• By a legally declared strike.

**Termination of the Labor Contract**

The contract may be terminated by mutual agreement, by facts beyond the will of the parties, or by decision of one of the parties with or without just cause. Just causes for unilateral termination of the contract by the employer include deceit by the employee, violence, slander, or bad behavior against the employer or other employees, as well as violence, slander, or bad behavior outside work against the employer, other employees, or their families.

It also may include damages caused to work tools or supplies, immoral acts, failure to fulfill obligations without a just cause, poor work performance, ineptitude, being arrested for more than 30 days, revealing technical secrets or reserved matters, and having an acute or contagious disease that is not of professional origin, among others.

Just causes for unilateral termination of the contract by the employee include deceit regarding working conditions, failure of the employer to fulfill obligations or breach of such obligations, damage intentionally caused to the employee, and acts by the employer inducing the employee to act against his religious or political beliefs. They also may include violence, slander, or bad behavior against the employee and his family in or outside the service, among others.

The indemnity for terminating a contract without just cause is specified and cannot be modified except under a collective convention or special pact. An employee who terminated a labor contract without just cause was previously required to indemnify the employer in an amount equal to 30 days of wage. However, this has been modified by Law Number 789 of 2002, such that an
employee may now freely terminate the labor contract without a just or general cause.

An employer who terminates the labor relation without just cause should indemnify the employee by considering the commencement of the contractual relation, the type of contract, and the monthly wage paid. If the contract is for a fixed term, the indemnity is equal to the amount of wages left to complete the hired term but should not be less than 15 days. If the contract is for an indefinite term, the indemnity due is calculated as follows:

- If the employee is paid less than 10 minimum legal wages and the contract has less than one year, the indemnity will be equal to 30 days’ wage. But if the contract ends after the first year, the employer should pay the employee 30 days’ wage for the first year of service and 20 additional days for each subsequent year or proportionally for the time of service.

- If the employee is paid more than 10 minimum legal wages and the contract has less than one year, the indemnity will be equal to 20 days’ wage. But if the contract ends after the first year, the employer should pay the employee 20 days’ wage for the first year of service and 15 additional days for each subsequent year or proportionally for the time of service.

- If the contract has been effective for five years, the employee should receive as indemnity an amount equal to 45 days’ wage for the first year and an additional amount of 15 days’ wage for each subsequent year or proportionally for the time of service.

- If the contract has been effective for five to 10 years, the employee should receive 45 days’ wage for the first year and an additional amount of 20 days’ wage for each subsequent year or proportionally for the time of service.

- If the employee has worked for the employer for more than 10 years, the indemnity will be equal to 45 days’ wage for the first year and an additional amount equal to 40 days’ wage for each subsequent year or proportionally for the time of service.

The law prohibits the layoff of a pregnant or breastfeeding (three months after birth) woman. To do so, an authorization from a work inspector (or mayor of the municipality where there is none) is required. If a just cause for termination is shown, the work inspector or mayor should issue the authorization.

If the employee is laid off without such authorization, the employer should pay her a special indemnity equal to 60 days’ wage, 12 weeks of remunerated rest, and all other applicable indemnities for terminations without just cause.

**Collective Labor Law**

Collective labor law regulates issues related to union organizations, collective hiring, and the defense of common interests of employers and employees in the development of a collective work conflict. Collective labor law is contained in
the Constitution, other laws, international agreements from the ILO, regulatory decrees, the collective work convention, the collective pact, and resolutions from the Ministry of Work and the Ministry of Social Security.

The right of association is a constitutional and legal right that individuals have in a politically organized society for the exercise of common guaranties. The union association right is part of the collective right that regulates the creation and development of union organizations. It is different from the simple association right, as the union right is geared toward a specific objective, while the simple association right tends to protect general freedoms.

There are several kinds of unions, and an employee may not become a member of several unions of the same kind at the same time. A company union is made up of individuals of various professions rendering their services in the same company. An industry union is made up of individuals rendering their services in several companies on the same branch of economic activity.

A profession union is made up of individuals of the same profession, while a various trades union is made up of individuals of different professions in places where there are not enough workers of the same specialty in the number required for a profession union. A mixed union is made up of government officials and official workers.

Unions are fed mainly by quotas from their affiliates. The assembly should determine the money flow through a budget for one year. Any expense in excess of the budget is forbidden unless authorized by the assembly, while any expense over the minimum wage should be approved by the board of directors.

Any expense over four to ten minimum monthly wages requires the ratification of the general assembly if it is not contained in the budget, while expenses over ten minimum monthly wages should be ratified by the assembly even if contained in the budget.

Union quotas may be ordinary (normally generated on a monthly basis) or extraordinary (authorized by the assembly), and are generally retained by the employer. Unions should keep accounting books and surrender a balance sheet.

The union privilege is a guarantee that some workers will not be laid off, impaired in their working conditions, or moved to other establishments of the same company or to a different municipality without just cause previously determined by a labor judge. An employer who breaches union privilege will be sanctioned by reinstatement of the employees who were laid off. The following are the kinds of union privileges:

- Founders and joining privilege, which is given to the founders of a union from its formation until two months after its entry in the union registry, but not exceeding six months;
- Directive privilege or ordinary privilege, which is given for the duration of their position and six months more;
Claimers privilege, which is enjoyed by members of claims commissions for the duration of their position and six months more;

Circumstantial privilege, which is a general guarantee covering unionized or non-unionized workers who are involved in an economic conflict until its resolution, as well as non-unionized workers who submit terms and conditions for a collective pact; and

Conventional privilege, which is given during a collective convention to cover individuals other than those determined by labor law.

However, employees with union privilege may be justly laid off due to liquidation or closure of the company, total or partial suspension of activities for more than 120 days, or because they incur any of the just causes for layoff.

Strike refers to the collective, temporal, peaceful suspension of work conducted by the employees of an establishment or company with economic and professional interests proposed to the employer and complying with set procedures. Its exercise is only legitimate and possible within a collective negotiation process as an option for the employees, and only when they are dependent of a private sector employer that carries out activities not considered by the law as a public service.

25 A collective pact is the sum of individual contracts which may generate anti-union practices for the deterring effect it causes on employees to integrate under a union association. It is not allowed in companies where collective conventions have been signed with unions that gather more than one-third of the employees of the company. It should be in writing and signed in as many originals as there are parties and one more which should be deposited in the relevant office within 15 days after its signature, otherwise the pact is not effective.

26 This generally results from the negotiation of a collective work conflict, and is held between one or several employers or employer associations and one or several unions or workers’ federations to set conditions that should govern labor contracts during its duration. It should be in writing, with various copies for the parties and the administrative authority. The copy for the administrative authority should be deposited within 15 days from its signature to be legally effective.
# Costa Rica

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Introduction

The initial legal framework for the regulation of employment in Costa Rica was influenced by liberalism prevailing in the nineteenth century, limiting the participation of the government to policing the fulfillment of law and order, and leaving production relationships to the free will of the parties.

In 1820, the first coffee exports signaled the establishment of a free trade model in Costa Rica, and the surge of incipient capitalism based on the exportation of agricultural products. Coffee became the country’s most relevant export product, consolidating a legal and institutional organization of liberal and democratic characteristics based on a regimen of individual freedoms. The population at the time was comprised of two unequal sectors — a small group of land owners and a larger group of farmers, most of them also owning land. Very few were employees.

The Civil Code was enacted in 1885. It regulated, among others, the contract for services in the domestic, agricultural, commercial, and industrial sectors. This placed the employer and employee in equal footing, recognizing the autonomy of will as the base of their contract. A series of organizations for farmers, blue collar workers, artisans, and students were established during the era of liberalism. These organizations pioneered in the quest for social rights.

The subsequent establishment of the new railroad linking the central valley with the Atlantic coast and the arrival to Costa Rica of banana-producing companies began a process of social separation, resulting in substantial consequences for the labor sector.

In 1891, Pope Leon XIII issued the encyclical *Rerum Novarum*, promoting the workers’ right to freely organize themselves for their benefit. However, it was not until the twentieth century that the first unions started to appear and introduced relevant changes.

The 1917 Constitution established the obligation to harmonize relationships between employers and employees based on the principles of justice, the protection of workers and improvement of their economic situation, and assistance to workers in case of sickness, aging, or accidents. However, it was
not until the enactment of the Labor Code in 1943 that the legal basis for unions and collective negotiations was established.

The 1949 Constitution contains a chapter on Social Rights and Guaranties, which provides for minimum salaries, limits to day shifts, workdays, and vacations, as well as health and safety conditions at work. It also provides for unionization, collective bargaining, and strikes.

**Legal Relationship of Employer and Employee**

The Labor Code is a legislation of public policy, and its provisions are applicable to all private and public entities. All waivers to the worker’s rights therein established will be null and void.

A labor contract arises whenever an individual consents to render services to another person, under the latter’s permanent direction, directly or delegated, and in consideration for any kind of remuneration.¹ Thus, the elements of a labor relationship in Costa Rica are (a) personal provision of services, (b) remuneration, and (c) subordination. The onus to prove otherwise lies with the employer.

Until 1999, Section 13 of the Labor Code provided that at least ninety-five per cent of an employer’s workers should be Costa Rican, or eighty-five per cent of the total salaries paid by that employer should be to Costa Rican workers. However, the Constitutional Court determined that Section 56 of the Labor Code — establishing equal rights between local and foreign workers — should prevail. Thus, no discriminating limits are currently imposed.

As regards the issue of outsourcing and the existence of a labor relationship, courts have determined that legal subordination (direct dependence creating authority to command) is the key element. The principle of prevailing reality² becomes essential for the determination by courts of the existence of a labor relationship in such cases. The principal elements that are taken into account include the following:

- Monthly fixed remuneration;
- Predetermined day shift;
- Annual vacations and year bonus;
- Remuneration increases following sectorial salary increases;
- Whether the work is performed within the premises of the employer;
- Per diems in hotel or transportation;
- Entry and exit controls;

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¹ Labor Code, s 18.
² This requires a determination based on true factual situations over and above any text in a contract.
• Exclusivity and full availability;
• Provision of uniform or tools; and
• Application of sanctions.

Terms and Conditions of Employment

In General

A labor contract generally has to be in writing. Lack of a written contract is attributable to the employer, who has the burden to demonstrate the specific conditions of the contract. The contract can be for a fixed or indefinite period, not subject to termination without sanctions unless a cause for termination occurs. It also may be individual or collective.

Contracts for a fixed period are allowed only when the type of work requires such term. The maximum term is usually one year, unless specific technical or professional characteristics require a longer time, which should not exceed five years. When the fixed period ends but the labor relationship continues, the contract is considered one for an indefinite period for the benefit of worker, and may be terminated without sanctions only when legal causes for termination exist.

Sections 49–53 of the Labor Code provide for collective working contracts, which are entered into with unions representing the workers. However, such contracts practically do not exist in Costa Rica. Collective bargaining agreements do exist, but mainly in the public sector.

Internal Labor Regulations

Internal labor regulations, issued by the employer and approved by the Ministry of Labor, are not required by the law. If established, they are considered complementary to the labor contract.

There are special provisions in the law for certain types of work, such as household assistants, work performed at sea, and work performed by minors.

Trial Period

The trial period (three months) exists only in permanent labor agreements, and allows the employer to evaluate if an employee has the necessary qualifications

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3 Unless the contract pertains to cattle or agricultural activities, or temporary activities rendered for up to ninety days.
4 The trial period is indirectly provided for in the Labor Code, which states that indemnification of pre-notice and severance pay take effect after three months. The Ministry of Labor has established that such trial period also is in effect when an employee’s change in position takes place, i.e., when an employee is promoted to a
and expertise to perform the tasks required. If the employee is considered unfit for the position by the end of the trial period, he may be dismissed without severance or pre-notice rights. The employer’s sole obligation is to pay the proportional vacation time and year-end bonus accrued by employee, as well as any pending portion of the salary.

During the trial period, the employer and employee are required to observe each other’s rights and obligations under the law. These include social security, minimum wage, professional risks, and right to holidays, among others.

Salary

The salary is composed of the fixed remuneration and other amounts received by the employee, in cash or in kind. This includes consideration for services, bonuses, value of extra work, sales commissions, and profits participation, among others.

“Salary in kind” is additional remuneration granted, such as food, uniforms, and housing. If not specifically determined, it is considered to amount to fifty per cent in excess of the salary actually paid. The salary is freely agreed between the employer and the worker, but should not be less than the national minimum wage set forth in a Decree published every year by the government. The salary also should comply with the constitutionally protected equal pay principle.

The remuneration can be by unit of time (month, week, day, or hours), by unit of work (piece work), or by participation in profits, sales, or collections. Apparel operations usually apply bonus by piece work. Payment of wages should be in legal tender and done at the workplace, generally through company checks.

Pay days are freely established, but cannot be more than every fifteen days for blue collar workers or monthly for white collar or household aides. Effective time over the work hour limits is considered extraordinary overtime and paid with an additional fifty per cent of the prevailing salary. Six hours of night shift should be paid in an amount equivalent to eight hours of day shift.

Where the employer requires the employee to work overtime, the employee should be paid an additional fifty per cent of the wage agreed upon for the ordinary work day. This increased pay should be taken into account vis-à-vis position of greater responsibility with an increase in salary. There will be an additional trial period of three months in such cases.

5 The minimum salary amounts are reviewed every six months by the National Council for Salaries, which is a nine-member board representing the government, the employers, and the workers. The Council establishes minimum salaries for the following categories of workers: (a) untrained worker, (b) semi-trained worker, (c) trained worker, (d) diversified education medium-range technician, (e) specialized worker, (f) higher education technician, (g) higher education graduate, (h) university graduate with bachelor degree, and (i) university career title awardee.
social security contributions, vacations, year-end bonuses, and legal benefits, among others.

**Work Hours**

**In General**

There is a difference in the qualification of ordinary daily shift based on the hours serviced. Day shift is between five o’clock in the morning and seven o’clock in the evening, night shift is between seven o’clock in the evening and five o’clock in the morning, while mixed shift is worked partially at night shift and partially at day shift. However, if more than three hours and thirty minutes of the mixed shift is worked at night shift, it will be classified entirely as night shift.

The maximum work hours is eight hours per day or forty-eight hours per week for a day shift, seven hours per day or forty-two hours per week for a mixed shift, and six hours per day or thirty-six hours per week for a night shift. In determining the maximum work hours, “effective time” has to be taken into account.6

For activities not qualifying as unhealthy or dangerous, a weekly cumulative system is allowed, where hours to be worked within a week can be compressed within five days. This allows the maximum daily work hours to be increased to ten hours for day shift, and to eight hours for mixed shift, but retaining the maximum weekly hours.

However, with the consent (and sometimes, at the request) of workers, companies also have started to use a different system, commonly known as “4x4”. Under this system, a worker will work only four days a week, provided that he works up to 10.5 hours per day during a day shift. A second group of workers, also working the day shift, will take over under the same conditions for the succeeding four days. At the end of the second round, the first group will take over for another four days.

This system allows the workers to have more time off than with the regular working schedule and will keep production running continuously. The Ministry of Labor has issued the corresponding regulation accepting this system.

**Overtime**

The ordinary work day is the maximum number of work hours that the employer may require from the employee to work under normal conditions. The

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6 This is regulated by Section 137 of the Labor Code, which defines effective labor time as the period by which the worker is under the orders of the employer, the period during meals and rest time when he is not supposed to go out of the workplace. The thirty-minute minimum obligatory rest time that should be given to laborers during a continuous journey also is considered effective labor time.
extraordinary work day is that exceptionally performed in excess of the maximum daily limits.

The employer can request the employee to work overtime, but ordinary work day combined with overtime should not be longer than a twelve-hour working day, except in *force majeure* cases.

Overtime is not allowed in unhealthy or dangerous works. Hours used by the employee to repair his own mistakes which happened during his ordinary hours is not considered extraordinary time.

**Rest Period**

Employees may have a compensable rest period for meal time of at least half an hour. When the rest period is less than one hour, the employer should pay for this time since it is assumed that the work day is a continuing period of time. Employees may be required to stay within the employer’s premises.

If the rest period is over one hour, the work day is considered as a fractional shift. In such a case, the rest period does not have to be paid. For a rest period to be non-compensable, employees should be completely relieved of work duties, and should be free to leave the work site whenever possible.

Nevertheless, courts have ruled that the rest period may extend up to one hour without causing a fractional work day, such as where the period will not allow the employee to go home for lunch or dinner, or there are no food facilities close to the workplace. The employer would thus be required to pay for that hour.

Certain employees who, given the nature of their work, may work up to twelve hours in a work day have the right to enjoy a rest period of at least one a half hours.7

The time interval to which mothers in their nursing period are entitled to feed their children is considered as paid work interruption, which should last fifteen minutes every three hours or, if employees prefer, half an hour twice a day. The Labor Code does not mention any coffee breaks. However, as a regular habit in Costa Rica, employees are given two coffee breaks during the work schedule other than the lunch break.

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7 Under Article 143 of the Labor Code, these include managers, administrators, and all employees that work without immediate superior supervision; workers under reliable occupations; commission agents and similar employees that do not fulfill their assignment at the place of the establishment; persons performing discontinuous functions or work that just requires their own presence; and those that accomplish labors that, on account of their unquestionable nature, are not subject to the labor journey.
**Holidays and Vacations**

Employees are not required to work during certain holidays, and are paid whether they work during these holidays or not. Employees who work on statutory holidays are paid double time.

The law requires the employer to grant vacation time to employees after fifty weeks of continuous work from the date they started working or from the last time they had their last vacation period.

When the fifty-week period arrives, the right to vacation time for employees starts. However, this does not mean that employees can demand this right immediately. It is up to the employer to decide the best time for the employee to take vacation time. The employer should notify the employee of such within fifteen weeks following the fifty-week period.

Employees are entitled to a minimum vacation time of two weeks. If any holiday falls upon such vacation period, the relevant holiday will be taken separately and the period for vacation will be extended accordingly. In the event of employment termination, a compensatory indemnity will be paid in lieu of vacation earned but not taken.

**Collective Bargaining**

**In General**

Costa Rica is a member of the International Labor Organization (ILO) and recognizes the ILO Agreements as binding legislation. Section 60 of the Constitution grants the right to unionize to both employers and employees. However, only 4.5 per cent of the total workers in the private sector are unionized.

Unions have to adhere to the democratic principles of majority voting, secret voting, and one vote for each person. Special protection is granted to (a) workers forming a union, for a term of four months; (b) one union leader for every twenty unionized workers, and one for each additional twenty-five, with a maximum of four union leaders; and (c) candidates for the board of the union, such that they cannot be terminated for a term of three months.

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8 The following dates are holidays: 1 January (New Year’s Day), 11 April (Juan Santamaría’s Day), Good Thursday and Good Friday, 1 May (Labor Day), 25 July (Annexation of Nicoya to Costa Rica), 2 August (Virgen de los Angeles’ Day, non-compulsory), 15 August (Mother’s Day), 15 September (Independence Day), 12 October (Columbus Day, non-compulsory), and 25 December (Christmas).

9 However, they may be terminated if the concerned individual (a) commits coercive actions or promotes disorders or violence, (b) acts against the assets of the company, (c) incites for the reduction or interruption of the work, (d) retains undue persons or assets, and (e) incites the destruction or damage of public or private premises.
Collective bargaining agreements are respected with the rank of a law. Their term cannot be less than one year nor more than three years. Automatic renewal is allowed, unless one of the parties opposes at least one month before the termination date.

**Asociaciones Solidaristas**

Asociaciones solidaristas (solidarity employee associations or AS) are social organizations with indefinite terms, organized by company employees. They have their own legal capacity, and their government and management pertain solely to them without any company interference.

The company can appoint its own representative to the general meetings and sessions of the board of directors of the AS, who will have a right to voice but not a right to vote. This representative can be excluded at any time by a simple majority vote.

The resources of the AS consist of the obligatory personal savings of its members (equal to three per cent to five per cent of the total earned wages), of their voluntary savings, and of the monthly contributions that the company delivers to them as advanced employer’s payment of the severance pay (for a maximum of 5.33 per cent over the total wages of member employees).

Any employee who is the employer’s representative, including directors, managers, auditors, administrators, or legal agents, cannot be appointed to the board of directors of the AS.

When an employee is fired with no serious legal justification, the normal estimation\(^{10}\) of his severance pay will be made, but the amount already delivered to the AS by the company as advanced payment will be deducted from the estimation. The AS promotes savings among its members, to whom it grants credits. Other objectives of the AS include procuring justice and peace, employee-employer harmony, and the comprehensive development of its members.

**Termination**

In Costa Rica, the right to terminate the working relationship is given by law to both parties.

The employer may unilaterally terminate the working relationship without responsibility within the trial period, or even thereafter under the following circumstances:

- The worker acts against morality, or if he attacks the employer during working hours, physically or by libel;

\(^{10}\) This is the ratio of accumulated years of service and the total wage earned during the last semester.
• The worker attacks any other worker during working hours, physically or by libel, and such act results in disorder or serious interruption of the work;
• The worker attacks the employer or his representatives outside working hours, physically or by libel, which makes the continuation of the working relationship impossible;
• The worker commits criminal acts, acts against the property of the employer, or damages the machinery, equipment, raw materials, or any other goods related to the operation of the company;
• The worker releases confidential information of the company;
• The worker commits acts endangering security and working conditions;
• Unjustified absence of the worker for two consecutive days, or three or more non-consecutive days; or
• The worker manifests rebellion to instructions or orders.

The worker also has the right to terminate the contract without incurring responsibility under the following circumstances, among others:
• Lack of payment of the salary as agreed;
• Employer’s acts against morality, and physical attacks or libel against the worker during working hours;
• Acts against morality, and physical attacks or libel against the worker during working hours, committed by the employer’s representatives or persons directly connected to him;
• Damage to the tools of the worker, committed by the employer directly or by his relatives or dependents;
• Employer’s acts against morality, and physical attacks or libel against the worker outside working hours, which will make the continuation of the working relationship impossible;
• Contagious ailments on the part of the employer, his relatives, or dependents in the workplace; or
• Dangers to the health or safety of the worker or his family due to the working conditions.

Generally, the employer may terminate an employee with cause, or by paying severance if no cause for termination exists. Thus, the employer may dismiss his employees at any time, provided that he pays them certain labor benefits established by law. This would allow the employee to subsist while he finds a new job.

The employer should recognize the following for the employee: (a) Christmas bonus, (b) vacation time not yet enjoyed, (c) severance pay, and (d) pre-notice. Vacation time and Christmas bonus are considered as vested rights of the employee. On the contrary, pre-notice and severance are considered as legal expectations designed to assist the employee in subsisting when, as a
consequence of unfair reasons or motives unrelated to his will, the employment relationship is terminated.

The number of vacation days that the employee has accrued should be compensated in cash. If dismissal occurs before the fifty-week term is over, a payment of one day for each month worked is due the employee as vacations.

Christmas bonus is the yearly economic benefit to which all employees are entitled, which is equivalent to a month’s salary for each year of service. It is computed from 1 December of one year to 30 November of the immediately following year. If dismissal occurs prior to 30 November, the benefit will be paid in proportion to the number of months the employee has worked during that year.

Pre-notice is the employer’s obligation to advise the employee, with a minimum term of notice, of his decision to terminate the labor relationship to allow the employee to look for another employment. Pre-notice term will depend on the period the employee has worked for the employer, according to the following rules:

- For less than three months’ work, no benefit is recognized;
- From three months to six months’ work, one week pre-notice term;
- From six months to one year work, a fifteen-day pre-notice term; and
- For more than one year work, one month pre-notice term.

During the pre-notice term, the employer should grant the employee one day off per week to find a new job. If, for any reason, the employer prefers not to pre-notify the employee of the imminent dismissal, the employer should compensate the employee in cash for the pre-notice period not advised.

Severance is paid to the employee where a permanent labor agreement is terminated without any legal basis or any fault of the employee, or without the employee wishing to resign. This includes dismissal with the employer’s responsibility, or unilateral termination of the agreement by the employee as a consequence of a serious fault of the employer, among others.

Calculate the amount of severance pay, the average of the ordinary and extraordinary wages (overtime) earned by the employee during the six previous months of effective work (excluding disability periods), or a lesser fraction of time if the employee has not completed that period, should be taken as a base. The calculation is based on the monthly wage effectively worked, in accordance with the following rules:

- For less than three months work, no benefit is recognized;
- For three months to six months work, seven-day severance;
• For six months to one year work, fourteen-day severance; and
• For more than one year, 19.5 to twenty-two-day severance.11

The maximum severance payment is eight months.

Dispute Resolution

In General

The law authorizes four alternatives for dispute resolution: (a) direct agreement, after negotiation between representatives of the company and a committee of workers; (b) administrative conciliation administered by the Ministry of Labor, or labor conciliation or arbitration provided by Law 7727; (c) judicial conciliation; or (d) judicial arbitration.

Institutions

The following agencies, courts, and tribunals deal exclusively with labor matters:

• The Office for the Settlement of Labor Disputes of the Ministry of Labor, which resolves matters before an action is filed in court.

• Juzgados de trabajo (labor courts), which are required by law to be established in each of the cantones (subdivision similar to a county). However, they exist only in the main cantones, and the local civil courts administer labor trials in the smaller cantones.

• Tribunales de trabajo de menor cuantía, which are based in San José and established with a summary procedure for accelerating proceedings in cases of minor consequence.

• Tribunal superior de trabajo, which also is based in San José, and is composed of three judges appointed by the Supreme Court. It acts as a second judicial instance or appeals court.

• Ad hoc tribunals for settlement and arbitration, which may be established by agreement of the parties during trial, and are composed of the labor judge, a representative of the workers, and a representative of the employers.

• The Supreme Court (Corte de Casación), which reviews appeals from the verdicts of the Superior Labor Court, acting as third instance labor appeal court.

11 In particular: (a) for one year work, 19.5-day severance; (b) for two years’ work, twenty-day severance; (c) for three years’ work, 20.5-day severance; (d) for four years’ work, twenty-one-day severance; (e) for five years’ work, 21.24-day severance; (f) for six years’ work, 21.5-day severance; and (g) for seven years’ work and more, twenty-two-day severance.
Proceedings

The proceedings in court are written. Only certain summary trials and hearings are oral. Costa Rica does not have a jury system, and parties have to be represented by an attorney. The workers also can rely on the system of public defenders and the social legal services (graduate students assisted by university professors).

Social Security and Health Care System

In General

All people employed in the public and private sectors are entitled to Social Security System coverage, which includes two different segments: (a) the Social Insurance System, which covers for old age, disability, and death; and (b) medical benefits, which cover for sickness and maternity.

In order to benefit from the social security system, the employee should contribute nine per cent of his monthly earnings. The company deducts this amount directly from the employee’s gross salary. On the other hand, the employer should pay an amount equal to twenty-six per cent of the gross monthly payroll.

As regards work injury, every company should pay a yearly insurance policy to provide employees with medical services in case of a labor accident. Insurance premiums vary according to risk. Such insurance arrangements have to be done through the National Insurance Institute (INS).

Health Insurance

Health insurance is required for the whole economically active population through any of the following modalities: (a) direct, by payroll and dependents; (b) direct, by non-payroll and dependents; (c) direct, pensioner and dependents; or (d) insured by the State, i.e., indigent heads of family and dependents.

Health insurance offers health services and subsidies. Health services include (a) general and specialized medical assistance; (b) hospitalization; and (c) dental care, medicines, and other diagnostic and treatment modalities (medical and non-medical).

Subsidies include (a) maternity benefits corresponding to fifty per cent of the salary reported for the direct payroll insured, before and after delivery, for four months; (b) transportation and lodging expenses in case of emergency or special situations; (c) monetary aid for some medical implements, i.e., eyeglasses or orthopedic implements; (d) fixed amounts for free medical attention; and (e) monetary aid for the funeral of directly insured individuals or their spouses.

An employee who is on sick leave also should be paid at least fifty per cent of his salary for the first four days of sick leave. From the fifth day, the Social
Security Administration (CCSS) pays the fifty per cent, provided that the employee has a medical certificate from a CCSS medical doctor. The employer is not required to pay salary after the fourth day, except for maternity leave, where he pays half of the salary while the CCSS pays the other half for three months.

**Pension Insurance**

The financing of pension insurance comes from specific tripartite contributions by the employer, the employee, and the State, with the employer having the greatest contribution and the State having the least.

All employees covered by the publicly managed social security scheme also should become members of a mandatory private pension scheme. Mandatory private pension schemes are contributions and assets that are accumulated in individual accounts. Covered employees should affiliate themselves with the pension operator (OP) of their choice, without influence of their employer.

If employees do not choose an OP, they will automatically be assigned to the OP of the Popular Community Development Bank (Banco Popular y de Desarrollo Comunal). This pension scheme does not represent any additional contributions from the employer because the resources come from the twenty-six per cent of the monthly payroll paid to social security.

**Social Benefits**

Social benefits include education in health and hygiene, courses and workshops on different topics, health promotion and disease prevention services, as well as preventive clinics for people with hypertension or diabetes, senior citizens, adolescents, and other groups. It also includes social work services oriented to personal and social development and well-being.

**Social Security Rates**

The contributions by the employer as a percentage of the payroll, including all compulsory items, are as follows:

- 9.25 per cent for CCSS-maternity and sickness;
- 4.75 per cent for CCSS-IVM;
- 0.25 per cent as Worker’s Bank contribution and another 0.25 per cent as Worker’s Bank additional contribution;
- 0.5 per cent as contribution to the Social Assistance Institute (IMAS);
- Five per cent as contribution to the Fund for Family Assigned Assistance;
- Three per cent for the Fund for Labor Capitalization;
- 1.5 per cent for the Complementary Pensions system; and
- 1.5 per cent for the National Training Institute.
Paid Leaves

Paid leaves in Costa Rica include sick leave, maternity leave, and time for breastfeeding.

Although the Labor Code does not mention funeral leaves, it is customary that an employee may take up a day or two with or without pay when a death occurs in his immediate family to attend the funeral or to make funeral arrangements.

Maternity leave is a compulsory leave for one month before confinement and three months following confinement. An employee who is pregnant or nursing is entitled to a leave of absence from the beginning of the pregnancy to the end of the nursing period, if she provides the employer with a certificate of a qualified medical practitioner indicating that she is unable to work by reason of the pregnancy or nursing, and indicating the duration of that condition.

Work Force

In General

Costa Rica has a population of approximately 4.4-million inhabitants, and the sixty-two per cent is economically active. Eight per cent of the industrial labor force is between fifteen and forty-four years of age, and twenty per cent of the heads of family have four dependents.

Unemployment

The national unemployment rate in Costa Rica is estimated at 7.2 per cent nationally (5.1 per cent according to the government). Sub-utilization is estimated at 16.8 per cent (8.1 per cent according to the government). These figures are changing.

The government has traditionally absorbed a large amount of workers, but new legislation based on the requirements set by the International Monetary Fund has prohibited the creation of new positions, and has demanded the cancellation of vacant positions. Costa Rica also has received an abnormal amount of immigrants from neighboring countries. Thus, the amount of available hand labor has substantially increased.

Absenteeism and Turnover

Statistics indicate that absenteeism is not generally a problem, unless the company is located at a coffee-producing area, where employees are attracted by a mixture of tradition and well-paid labor in December (the coffee crop picking month). However, they reflect high turnover due to normal attrition.
Training

Surveys conducted by different entities show that the average worker demonstrates the necessary knowledge and capacity to receive special training in unknown skills. The combination of basic education and high living standards has favorably influenced such ability.

This has been the main factor enticing companies in the high technology sector to establish manufacturing operations in Costa Rica, following the experience of Intel, Hewlett-Packard, Abbot Laboratories, Baxter, Hospira, or Ad Astra.

Costa Rica constantly exerts efforts to better its already recognized education system. Education is free and compulsory in primary and high school levels. Public and private universities are servicing with good international ratings, and some have links to United States and European Ivy League institutions. Training institutions, such as the Instituto Nacional de Aprendizaje, have specific programs providing special training to workers.

Implementation and Enforcement of Labor Legislation

Costa Rica has been recognized as a country in which the government has a positive attitude vis-à-vis foreign investment. Article 19 of the Constitution states that foreigners enjoy the same rights and duties as Costa Rican citizens, and this has been implemented accordingly.12

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12 In a survey conducted with a sample of ten companies with foreign-owned capital, nine stated that they had never experienced discrimination from judicial or administrative officers in their relations with such authorities. Labor problems were dealt objectively. Interviews conducted with labor judges and staff of the Ministry of Labor indicated that foreign-owned companies caused less problems in the implementation of labor laws than local companies, making foreign companies generally more responsible towards their employees. The same interview, conducted with ten workers, indicated that workers prefer to work for foreign companies. Five responded with a clear preference, three stated they did not have any particular preference, and two preferred to work for a local-owned company. One “did not like their style”; and the other argued lack of communication with non-Spanish speaking managers.
Cyprus

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Cyprus

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Introduction

Cyprus labor law is an amalgam of common law principles and statutes. The employment relationship is primarily governed by ordinary contract law principles supplemented by statutory rights and obligations where appropriate.

Cyprus was a British colony from 1878 until 1960. As a result, the marks of the English legal system, especially the doctrines of common law and equity, are deeply rooted in Cyprus’ legal tradition.

A number of employment law principles, such as the right to work, the right to belong to trade unions, and the prohibition of discrimination on grounds of race or sex, stem directly from the Constitution. Cyprus also has ratified all the major international conventions of the International Labor Organization (ILO). The harmonization of Cyprus law with the *acquis communautaire* brought substantial changes in many areas of labor law. Some important pieces of legislation that affected domestic law include:

- Law Number 104(I)/2000 (the “Transfer of Undertakings Law”), which harmonized domestic law with the provisions of the Transfer of Undertakings Directive 77/187/EC;
- Law Number 28(I)/2001 (the “Collective Dismissals Law”), which harmonized domestic law with the Collective Dismissals Directive 98/59/EC; and
- Law Number 25(I)/2001 or the Protection of the Rights of Employees in the event of Insolvency of the Employer Law, which harmonized domestic law with Directive 80/987/EC.

Industrial relations also are regulated by Law Number 24 of 1967, as amended (the “Termination of Employment Law”), and Law Number 8 of 1967 (the “Annual Holiday with Payment Law”). The former covers redundancy and
arbitrary dismissal of all employees, including public employees, and was enacted following the recommendations of the ILO.\(^1\)

Industrial relations in Cyprus have been very satisfactory since independence. This is attributed to the responsible attitude of trade unions and employer organizations, which became particularly evident during the period following the Turkish occupation of the northern part of the island.

This also may be attributed to the government’s policy of: (a) seeking the active participation of workers and employers in the formulation and implementation of social and economic policy through tripartite bodies; (b) keeping out of disputes and promoting the idea that labor-management relations are primarily the business of the parties themselves; and (c) effecting procedural agreements for the settlement of disputes. Although the initial attempt for the creation of trade unions in Cyprus dates to 1915, serious efforts to do so were prevalent from 1920 to 1930.

The mining industry rapidly developed from 1932 to 1938 due to the exploitation of workers by foreign companies and the huge underground stocks of copper and iron. The building, alcohol, tobacco, and tanning industries likewise expanded.

Despite the persecution, imprisonment, and discharge of workers by the British colonial regime, the working class continued its attempts to form workers’ organizations. The Nicosia Footwear Trade Union was established in 1931, and was officially recognized in 1932 immediately after the enactment of Law Number 71/1965 (the “Trade Unions Law”).\(^2\) By the end of 1940, sixty-two trade unions were established and recognized.

The young trade union movement had to solve numerous serious problems, such as hours of work, wage rates, organization of workers, recognition of trade unions, and abolition of dictatorial laws and orders of the colonial government.

Unity among the working class and small trade unions had to be maintained to achieve such objectives, which was achieved through the election of a Pancyprian Trade Union Committee (PSE) in November 1941.

The PSE led trade union struggles until the beginning of 1946, when it was declared illegal by the colonial government. The remaining trade union leaders of the PSE established the Pancyprian Federation of Labor (PEO), which

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1 In particular, the Termination of Employment Law Number seeks to enforce the ILO’s Recommendation 119 of June 1963.
2 Its key provisions include the following: (1) no one can be sued for conspiracy if he was acting with another in the furtherance of a trade dispute; (2) inducement for breach of contract in furtherance of a trade dispute is not actionable; (3) no court has jurisdiction to hear a case against a registered trade union for a tort that was allegedly committed by the trade union or any of its officers; and (4) trade unions are required to run a secret ballot when considering strike action.
continued the work of PSE. The Cyprus Workers’ Confederation (SEK) was likewise established in Limassol.

After independence, the trade union movement appeared to be more organized and massive. The labor force has spectacularly increased due to the development of industry, commerce, and services. Conflict between trade unions is very rare.

**Legal Relationship of Employer and Employee**

An “employee” is defined by the Termination of Employment Law Number as any person who works under a contract of service. However, a person may be considered an employee even without a contract if it is determined by a court that an employer-employee relation exists.

An “employer” is any person with whom the employee has entered into a contract or who is deemed by a court to have the status of an employer, including the government. The employment relationship may arise orally or in writing, but employers are now required to provide written terms of employment to their employees. Nevertheless, the most important criterion seems to be control. The employer-employee relationship gives rise to a number of duties, obligations, and rights for both parties which are based on law.

**Terms and Conditions of Employment**

**Remuneration**

“Wage” is defined by law as remuneration paid to an employee in money as a result of his employment. It includes any allowance paid by the employer that is directly or indirectly related to the cost of living, as well as payment made in lieu of notice in the event of dismissal. It excludes commissions and *ex gratia* payments, as well as overtime unless it is worked on a fixed regular basis.

The government has the power to fix minimum wages through Ministerial Orders, but those that have been issued so far cover the minimum wages of office clerks and shop assistants.

**Working Hours**

Most offices observe a forty-hour workweek from Monday to Friday. Office hours are from eight o’clock in the morning to five-thirty in the afternoon with a 1.5-hour lunch during winter. The office hours are extended to seven o’clock in the evening with a three-hour break during the summer.

Government offices operate from seven-thirty in the morning to five-thirty in the afternoon from Monday to Friday. They also open on Thursday afternoons from three o’clock in the afternoon to six o’clock in the evening.

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3 Minimum Wages Law, s 3.
Holidays

Minimum annual holiday entitlement is twenty days for employees with a five-day workweek, and twenty-four days for employees with a six-day workweek. Entitlements that are not taken during the year can either be paid or carried forward up to two years.

The law does not indicate which days in the year are public holidays except for Sunday. Public holidays in the private sector are governed by collective agreements between employers and trade unions, and usually follow the public holidays in the public sector. An employer who is not bound by any collective agreement has the discretion to offer any of the public holidays given in the public sector.

The Annual Holidays with Payment Law Number requires the grant of annual holidays to all persons employed under a contract of service. An employee may be entitled to a period of holiday longer than three weeks by virtue of a provision of law, collective agreement, custom, or otherwise.

Discrimination

Article 28(1) of the Constitution, which corresponds to Article 14 of the European Convention on Human Rights, guarantees equal protection and treatment, while Article 28(2) guarantees non-discrimination in the enjoyment of rights and liberties regardless of community, race, religion, language, sex, political or other conviction, national or social descent, birth, color, wealth, social class, or any other ground.

Protection against sex discrimination also is granted by a number of international conventions that Cyprus has acceded to.

The fundamental rights and liberties enshrined in Part II of the Constitution apply to natives and non-natives alike. Age, disability, and sexual orientation are

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not covered by the Constitution. Anti-discrimination laws cover the private and public sectors and include all fields provided in the Directives. Discrimination is forbidden in employment, access to vocational training, and working conditions.

Discrimination on the ground of racial or ethnic origin also is forbidden in the fields of social protection, medical care, education, and access to goods and services available to the public including housing. The disability law provides for equal treatment in the provision of goods, facilities, and services under certain conditions.

The Ombudsman is the national equality body empowered to combat discrimination and promote equality of rights and opportunity. Victims of discrimination may submit a complaint to the Ombudsman or to the courts. Litigation could be via recourse to the Supreme Court to set aside an administrative act, to the district court or labor tribunal in accordance with the laws transposing the Directives, or to the district court for violation of the Constitutional anti-discrimination provision. However, litigation is hardly ever used by victims of discrimination mainly due to low awareness of anti-discrimination laws, the high cost of litigation, and the length of time involved.

Equal Pay

Every employer should apply the principle of equal pay for work of equal value irrespective of the sex of the worker. Equal work means like work or substantially like work carried out by men and women.

An employee who has complained or given evidence of his employee’s breach of the law should not be dismissed and/or discriminated against. The Industrial Disputes Court has the power to appoint a committee of experts to establish whether the work is work of equal value.

Where the Industrial Disputes Court is satisfied that there exists a discriminatory pay practice, it may: (a) make a declaratory judgment; (b) give directions for the termination of discrimination; and (c) award compensation to cover damages and order the employer to pay the value of the discrimination from the date that the discriminatory practice arose.

Pregnancy

Law Number 100(I) of 1997 (“Protection of Maternity Law”) replaced previous legislation on the protection of pregnant women.⁵ It granted a pregnant worker the right to sixteen weeks’ maternity leave, with nine weeks taken during the period beginning two weeks before the expected date of birth. The sixteen-week period may be extended where there is delay in delivery of the child.

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⁵ Law Number 54 of 1987, as subsequently amended by Law Number 66 of 1988 and Law Number 48(I) of 1994.
Fourteen weeks of maternity leave is granted to women soon after they undertake to adopt and care for a child under five years old.

A female employee cannot be dismissed or given a notice of dismissal because of the fact of pregnancy within three months after the end of her maternity leave. The health and safety of pregnant women also are protected and they do not lose their seniority for purposes of promotion.

The law also grants one hour off per working day for childcare and breastfeeding within six months after delivery. This is considered as normal working time and is thus payable.

The Minister of Labor and Social Security is authorized to appoint an inspector who will supervise and enforce the provisions of the Protection of Maternity Law. Any employer who contravenes the law is penalized in the amount of EUR 1,700.

Collective Bargaining and Worker Participation in Management

The industrial relations system in Cyprus is based on the democratic principles of free speech and tripartite cooperation. “Tripartite cooperation” essentially refers to the constructive cooperation between employer organizations, employee organizations, and the government.

To a large extent, terms and conditions of employment are determined freely through collective bargaining between employers and employees, with a view to signing collective agreements. Still, the need to harmonize legislation with the European Union (EU) acquis led to the enforcement of a number of terms and conditions.

This has not affected the importance of collective agreements, but has assisted in providing for minimum terms and conditions of employment for non-unionized employees and those in enterprises that have not agreed to or signed a collective agreement. Where specific provisions of collective agreements provide for terms less favorable than those in the labor laws, such provisions are amended to reach the legislative minimums.

Collective agreements are not legally enforceable documents, thus disputes arising from their violation cannot be settled in the Labor Disputes Court but are instead dealt with according to the Industrial Relations Code. However, provisions of collective agreements and other existing practices concerning terms and conditions of employment may be relevant during the examination of cases before the Labor Disputes Court. Employers are not required to implement

6 Froso Apostolidou vs. Radio and Television Station ‘O LOGOS’, Case Number 32/93.
7 Protection of Maternity Law, ss 6(1) and 6(2).
8 Protection of Maternity Law, s 7; Caisse nationale d'assurance vieillesse des travailleurs salariés (CNAVTS) vs. Evelyne Thibault, Case C-136/95 (30 April 1998).
worker participation schemes, which remain entirely at the discretion of the employer.

**Health and Safety Protection in the Workplace**

The workers’ right to safe and healthy working conditions is primarily safeguarded by the Law Number 89(I)/96 (“Safety and Health at Work Law”), which is in line with the provisions of ILO Convention Number 155 of 1981 on Occupational Safety and Health and the principles and most of the provisions of EU Directive 89/391/EEC (Framework Directive).

The Safety and Health at Work Law Number covers all branches of economic activity and imposes duties on employers, self-employed persons, and employees, as well as on designers, manufacturers, importers, and suppliers of articles and substances for use at work.

Its scope extends to the protection not only of persons at work but also to persons who may be affected by activities of persons at work. It is enforced by duly qualified inspectors who carry out regular visits to workplaces to ensure continued compliance with its provisions and pertinent regulations.

The Pancyprian Safety and Health Council plays an important role in promoting safety and health at work by advising the Minister of Labor and Social Insurance on measures necessary to ensure safety, health, and welfare at work and to promote work safety consciousness at the national and enterprise levels.

The Training Center on Occupational Safety and Health also is actively involved in organizing and implementing training programs to promote a better understanding of occupational safety and health issues and to create awareness among employers, employees, engineers, managers, instructors, school teachers, and safety representatives, among others.

Following international trends on issues relating to occupational safety and health, the government has implemented legislation for the establishment and operation of Safety Committees at the workplace.

**Workers’ Compensation and Survivors’ Benefits**

**In General**

Since January 1990, a Service for the Care and Rehabilitation of the Disabled operates within the Department of Labor. It deals with issues concerning disabled persons and disabilities and promotes the equalization of the rights and opportunities of disabled persons for their full participation in the economy and society.9

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9 It does this by: (1) providing services and implementing programs for the vocational assessment and guidance, vocational training and retraining, employment placement,
Death benefit is paid to the survivors of an employed person who dies as a result of an employment injury. The benefit includes widow’s (or widower’s) pension, orphan’s benefit, and parent’s allowance.

Widow’s Pension
The widow’s pension (and under certain conditions, the widower’s pension) consists of a basic pension and a supplementary pension. The basic widow’s pension is the same as the basic disability pension for full disability. The supplementary widow’s pension is sixty per cent of the supplementary disability pension which the deceased was or would have been receiving for full disability.

The widow’s pension ceases upon remarriage and a lump sum equal to one year’s pension, excluding any increases for dependents, is paid to the widow.

Orphan’s Benefit
The orphan’s benefit for death caused by employment injury is payable for a minor, as in the case of the ordinary orphan’s benefit.

The basic benefit is the same as the ordinary orphan’s benefit. The supplementary benefit is fifty per cent of the supplementary widow’s pension which was or would have been payable for the death of the parent, but the total of such benefit cannot be higher than the full widow’s supplementary pension where there are more than two orphans.

Parent’s Allowance
The parent’s allowance is payable only if the deceased is not survived by a spouse or orphan. It consists of a basic allowance equal to forty per cent of the basic insurable earnings a week per parent, and of a supplementary allowance equal to thirty per cent of the full supplementary disability pension which was or would have been payable to the deceased.

Dispute Resolution
The Industrial Disputes Court is the primary forum for adjudicating disputes pertaining to the termination of employment. Recourse to the Industrial Disputes Court is principally governed by the Termination of Employment Law. Damages for unfair dismissal are included in the statute and are based on sheltered employment, and self-employment of disabled persons; (2) providing allowances to cover the special needs of severely disabled persons; (3) promoting and coordinating activities for the removal of physical and social barriers to access of disabled persons and for their participation in cultural, religious, sport, and other activities; (4) assisting the provision of technical aid and equipment to facilitate disabled persons’ living and employment; and (5) coordinating all relevant activities in the public sector.
periods of employment. There is a twelve-month limitation for bringing proceedings.

On the other hand, an applicant may initiate proceedings at the District Court if his claim is based on contract and common law principles. Arbitration or mediation also is possible upon agreement of the parties.

**Termination of Employment**

**In General**

Termination of employment is primarily regulated by the Termination of Employment Law, which provides for a statutory right not to be unfairly dismissed.

Termination of employment may be one of two categories: (a) termination for reasons relating to the person of the employee or the employer, such as when an employee resigns, is dismissed, or is forced to resign (constructive dismissal); or (b) termination for reasons independent of the employer’s or employee’s will, such as redundancy or frustration (war, political riots, physical destruction).

**Notice Periods**

Employers are required to give notice to a worker who has been employed continuously for at least 26 to 52 weeks at least one week prior to termination. A two-week notice is required for a worker who has been employed continuously for 52 to 104 weeks, and a four-week notice or over for a worker who has been employed continuously for over 104 weeks.11

No notice is necessary if the employment is terminated before the lapse of 26 weeks from the date of the commencement of employment. Notice time is paid by the employer, who also may require the employee to accept payment in lieu of notice. An employee who gets his pay in lieu of notice and finds another job

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10 The following laws also are relevant in termination of employment: Transfer of Undertakings Law; Collective Dismissals Law; Law Number 25(I)/2001 (Protection of the Rights of Employees in the event of Insolvency of the Employer), which harmonized domestic law with Directive 80/987/EC; Protection of Maternity Law; Law Number 158 of 1989 (Equal Pay Law); Law Number 98(I)/2003 (Fixed-term Contracts Workers Law Number (Prohibition of Discriminatory Treatment)); Law Number 76(I)/2002 (Part-time Employees Law Number (Prohibition of Discriminatory Treatment)); Law Number 58(I)/2004 (Equal Treatment in Employment and Work Law); and Law Number 63(I)/2002 (Organization of Time at Work Law).

11 In particular, a minimum notice period of five weeks is required for a worker who has been employed continuously for 156 to 208 weeks, six weeks for continuous employment of 208 to 259 weeks, seven weeks for continuous employment of 260 to 311 weeks, and eight weeks for continuous employment of 312 weeks or more.
keeps the pay, but he loses the rest of this pay for the period of notice if he leaves for another job while serving out his notice time with the old employer.

An employee who has been continuously employed for twenty-six weeks or more is required to give his employer a minimum notice of one week. However, upon notice from his employer, an employee who wishes to seek other employment may have time off up to five hours a week during usual working hours without loss of pay.

An employer may dismiss an employee without notice if the employee’s behavior is such that continuing the employment relationship is not feasible, i.e., the employee has lied to the employer.

The following are the maximum amounts of statutory compensation in case of unfair dismissal:

- For one to four years’ employment, two weeks for every year;
- For five to ten years’ employment, 2.5 weeks for every year;
- For eleven to fifteen years’ employment, three weeks for every year;
- For sixteen to twenty years’ employment, 3.5 weeks for every year; and
- For twenty-one to twenty-five years’ employment, four weeks for every year.

The Industrial Disputes Court may consider additional factors (i.e., loss of career) when awarding damages, but total compensation cannot exceed two years of salaries. For purposes of calculation, the compensation salary means the last gross salary.

Although compensation for unfair dismissal awarded by the Industrial Disputes Court may exceed one year of salaries, the liability of the employer is only up to one year. The rest is paid by the Redundancy Fund. As the rules governing compensation were passed two decades ago, the amounts of compensation are now considered very low and have to be revised to take into account current conditions.

**Redundancy**

A redundancy dismissal is justified only if (a) the employer has ceased or intends to cease to operate the business where the employee was employed, or (b) the employer has ceased or intends to cease to operate the business at the place where the employee was employed. A redundancy dismissal also is justified for the following reasons that are related to the operation of the business:

- Modernization or any other change in the method of production or organization that necessitates reduction in the number of employees;
- Change in the products, method of production, or expertise required from the employees;
- Abolition of a specific department;
• Credit difficulties;
• Lack of orders or raw materials; or
• Contraction in the volume of work or the business.

The employer has the burden to prove the existence of any of these reasons with regard to a redundancy dismissal. The ordinary redundancy provisions do not apply to: (a) employees over the normal retirement age; (b) apprentices who have reached the end of their apprenticeship contract; and (c) domestic servants who are members of the employer’s immediate family.

When a redundancy is proven, the court will order the Redundancy Fund to pay the employee. The employer will be liable for damages where the dismissal is found to be unfair, with the amount of damages depending on the number of years of employment. The employer should take the following steps in dismissing employees due to redundancy:

• The employee may only be compensated from the Redundancy Fund if he worked for the employer for at least 104 weeks. If the employee reached retirement age before the date of termination, he is not entitled to any payment.
• The employer should notify the Minister of Labor and Social Security about the proposed redundancies at least one month before they occur. The notification should include: (a) the number of employees affected; (b) the specific department or departments of the business where the affected employees work; (c) the specialization, names, and financial obligations of the employees affected; and (d) the reasons for the redundancy.
• Once the letter is sent, the Ministry may contact the employer to see if there is any solution other than laying off personnel. If no other solution is found, the employer may go ahead with the redundancies.

An employee who is dismissed due to redundancy should comply with the following procedure:

• He should file an application to the Redundancy Fund for compensation. The application is filled out by his employer, stating the reasons leading to the termination. If the Redundancy Fund accepts the reasons and pays the employee, then that is the end of the matter.
• If the Fund rejects the application, the employee should file an action with the Industrial Disputes Court against the Redundancy Fund for redundancy compensation and, alternatively, against the employer for damages.

The amounts of statutory compensation for unfair dismissal also apply to redundancy, with the maximum compensation being 75.5 weeks.
Dismissal for Justified Reasons

The general principle is that an employee may be dismissed when he behaves in a way that is considered a serious breach of work rules, or when he repeatedly performs acts or omissions which show that he violates the duty of faith and trust.

Examples of such behavior include: (a) the commission of a serious offense in the execution of the employee’s duties; (b) the commission of a criminal offense; (c) inappropriate behavior (i.e., cursing); and (d) serious and repeated violation of the rules and regulations regarding employment.

The Industrial Dispute Court may order an unfairly dismissed employee to be “reinstated” in his original job or “reengaged”. However, this power is theoretical and there has been no reported case where reinstatement was ordered.

Retirement, Social Security and Healthcare, and Old Age Pensions

Liability for the payment of contributions ceases on the day the insured person reaches the pensionable age of sixty-five years. However, an insured person who reaches the pensionable age and does not satisfy the contribution conditions for old age pension may continue to pay contributions until satisfaction of these conditions. Under no circumstances will contributions be payable after the age of sixty-eight.

Old age pension is payable at the age of sixty-five and is not conditional upon retirement. However, miners who have at least five years of employment in a mine are entitled to old age pension one month earlier than the normal pensionable age for every five months of work in a mine, on the condition that they have retired from mine work, but in no case can they draw pension before the age of fifty-eight.

Sickness benefit is payable to employed and self-employed persons between the ages of sixteen and sixty-three who are incapable to do work. Persons who do not satisfy the contribution conditions for old age pension at sixty-three are allowed to draw benefit up to the date when they satisfy the relevant contribution conditions, but not after the age of sixty-five.

The period for which sickness benefit is payable cannot exceed 156 days for each period of interruption of employment.12 There is a waiting period of three days for employed persons and nine days for self-employed persons wherein the benefit is not payable. Self-employed persons are treated in the same way as employed persons in case of accident or hospitalization. To be entitled to sickness benefit, the person concerned should:

12 The period of interruption of employment refers to (a) any two days of interruption of employment, whether consecutive or not, within six consecutive days, or (b) any two or more of such periods not separated by more than thirteen weeks.
• Have been insured for at least twenty-six weeks and has paid, up to the date of incapacity, contributions on insurable earnings not lower than twenty-six times the weekly amount of the basic insurable earnings; and

• Have paid or been credited with contributions in the previous contribution year on insurable earnings not lower than twenty times the weekly amount of the basic insurable earnings.

To requalify for a benefit (following exhaustion of right), the person concerned should have paid contributions on earnings not lower than twenty-six times the weekly amount of the basic insurable earnings after the date of exhaustion. Thirteen weeks from the date of exhaustion also should have passed. Invalidity pension is payable to persons who have been incapable to do work for at least 156 days and are expected to remain permanently incapable to do work, i.e., they are unable to earn from work which they are reasonably expected to perform.

It amounts to more than one-third of the sum usually earned by a healthy person of the same occupation or category and education in the same area, or more than one-half of such sum in the case of persons between the ages of sixty and sixty-three. To be entitled to invalidity pension, the person concerned should:

• Have paid contributions in at least three years, and his insurable earnings in the lower band are not less than 156 times the weekly amount of the basic insurable earnings;

• Have weekly average insurable earnings (actual or credited) in the lower band, or from the contribution year in which he attained the age of 16 to the last contribution week before invalidation, equal to at least twenty-five per cent of the weekly amount of the basic insurable earnings;

• Have paid or been credited in the last contribution year with contributions corresponding to insurable earnings not lower than twenty times the weekly amount of the basic insurable earnings. This condition also is deemed satisfied if the average of the last two years is not less than twenty times the weekly amount of the basic insurable earnings.

In case of invalidity caused by accident, there is entitlement to invalidity pension if the contribution conditions for sickness benefit are satisfied. Although the contributions considered for entitlement purposes are only those of employed and self-employed persons, voluntary contributions also are taken into account for assessing the rate of pension.

The invalidity pension is comprised of the basic pension and the supplementary pension. In case of full loss of earnings capacity, invalidity pension is full and is assessed based on two criteria: First, the basic weekly pension is sixty per cent of the weekly average of paid and credited insurable earnings in the lower band over the relevant period, increased by one-third for a single dependent, one-half for two dependents, and two-thirds for three dependents.
A married female beneficiary is not entitled to an increase for her husband, except where he is incapable of self-support. The increase for her dependent children or other dependents is one-sixth of the basic pension for each of them, for a maximum of two dependents. Second, the supplementary weekly pension is 1/52 of 1.5 per cent of the total insurable earnings (actual and credited) of the beneficiary in the upper band.

Summary of Social Costs

Social Insurance

In October 1980, a new Social Insurance Scheme (“Scheme”) was put into operation. With some minor exceptions, the Scheme covers all employed and self-employed persons. Non-employed persons may join the Scheme on a voluntary basis under certain conditions. Non-nationals have the same rights and obligations as nationals under the Scheme.

The Scheme provides the following benefits: (a) maternity allowance; (b) sickness benefit; (c) unemployment benefit; (d) old age pension; (e) invalidity pension; (f) widow’s pension; (g) orphan’s benefit; (h) missing person’s allowance; (i) marriage grant; (j) maternity grant; (k) funeral grant; and (l) benefits for employment accidents and occupational diseases (i.e., injury benefit, disability benefit, and death benefit).

The Scheme also grants free medical treatment to invalidity pensioners, as well as to victims of employment accidents and occupational diseases.

Employees are entitled to all these benefits, but self-employed persons are not entitled to unemployment benefit and benefits for employment accidents. Voluntary contributors are not entitled to maternity allowance, sickness benefit, unemployment benefit, invalidity pension, and benefits for employment accidents.

Except for marriage grants, maternity grants, and death grants, all benefits are composed of the basic benefit and the supplementary benefit. The benefits provided under the Scheme are payable outside Cyprus, with the exception of maternity allowance, unemployment benefit, sickness benefit, and injury benefit. The contribution to the Scheme in the case of employees is 16.6 per cent of their earnings, where 6.3 per cent is paid by the employee, 6.3 per cent by the employer, and 4 per cent out of the General Revenue of the Republic (“General Republic”).

The contribution in respect of self-employed persons is 15.6 per cent of their income, with 11.6 per cent paid by them and four per cent out of the General Revenue. In respect of voluntary contributors, the contribution is 13.5 per cent.

13 Law Number 41/80, as amended (Social Insurance Law).
of insurable income, with ten per cent paid by the voluntary contributor and 3.5 per cent out of the General Revenue.

Gross earnings from work are considered in assessing employees’ contributions. However, the law prescribes notional incomes in the case of self-employed persons, which vary according to occupational category. Thus, the contribution of self-employed persons is assessed on the amount of the notional income prescribed. However, if the self-employed person proves that his income is lower than the amount of the notional income prescribed, his contribution is assessed on that income.

Apart from deductions and allowances, the income tax laws do not allow much scope for mitigating tax on employees, as opposed to self-employed persons, for which there is a number of ways of mitigating tax. The most common method used is the granting of fringe benefits instead of salary, but its advantages are limited as most fringe benefits will be taxable.

Non-Cypriots employed by international business companies are not part of the Scheme and are exempt from any contributions. However, they are entitled to import household electrical goods and other household equipment (except furniture), as well as one motor vehicle, completely free of import duty. Alternatively, these items can be purchased in Cyprus duty-free.

**Conclusion**

Although Cyprus has in place the regulatory employment framework and has adopted all European employment directives, there is still a long way to go in terms of effective implementation of laws and regulations in areas such as anti-discrimination and immigrant workers’ protection. The amount of damages for unfair dismissal and the relevant rules for such also should be updated.
Czech Republic

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Czech Republic

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Introduction

In the Czech Republic, issues that arise in employment law are governed primarily by the new Labor Code, which was adopted in 2006, and a number of other laws, some of which are referred to below. The new Labor Code took effect on 1 January 2007 and replaced the outdated old Labor Code of 1965. However, the new Labor Code was so badly drafted that it has been necessary to amend it several times. By mid-2012, it had been amended 25 times. Thus, the implementation of the Labor Code did not bring much legal certainty. Furthermore, the new Labor Code is not an entirely new law, as it contains many of the provisions of the Labor Code 1965.

In addition, all provisions that had been contained before in regulations, side laws, and further legal acts have been incorporated into the Labor Code, but without substantial changes to these provisions.

Systematically, the Labor Code should bring the labor law back to civil law; on the basis of the Labor Code 1965, the labor law had been understood as a completely distinct field of law and completely separate from civil law (governed by the Civil Code of 1964). The decision of the Constitutional Court of 4 March 2008 confirmed that the provisions of the Civil Code of 1964 are applicable in the area of employment law, unless explicitly stated otherwise in the Labor Code. In the meantime, the Civil Code of 1964 was replaced by a

1 Act Number 262/2006, Collection of Laws, Labor Code (as amended); all acts and other legal regulations that are enacted or issued in the Czech Republic are published in the Collection of Laws (šbírka zákonů). All acts of Parliament, decrees of the government and the Ministries, and certain decisions of the Constitutional Courts are numbered, starting anew each year, and everything is published in general chronological order in the Collection of Laws. The quotations refer to the assigned number and the year of the Collection of the Laws.
3 Act Number 40/1964, Collection of Laws, Civil Code (as amended).
4 Published as Number 116/2008, Collection of Laws, it declared several provisions of the Labor Code null and void.
completely new drafted Civil Code in 2012.\(^5\) However, for the relationship between labor law and civil law, nothing changed.

Although the Labor Code contains explicit stipulations on the application of the Civil Code in employment law, the Civil Code is, as a general rule, applicable in employment law. Furthermore, the basic principle under the Labor Code is that anything that is not explicitly forbidden is allowed. This is a remarkable distinction to the principle of the Labor Code of 1965, where only that which was explicitly granted by the Labor Code of 1965 was allowed.

However, there are still many cogent stipulations in the Labor Code, from which the parties of an employment contract cannot derogate; at least, the Czech practice regards them as cogent, although they can be seen surely in many cases as dispositive norms. Thus, the employment law preserved much of its rigid character, at least in the Czech practice.

On the following pages, a short compilation of the Labor Code will be given. However, due to the structure of the Labor Code, such an endeavor is difficult to accomplish. When analyzing the structure of the Labor Code, it will be evident that the old Labor Code of 1965 forms the main corpus of the Labor Code even today. In addition, the various regulations and side laws were incorporated into the Labor Code. Unfortunately, the legislator did not succeed in incorporating all issues in a harmonious way and he did not to draft a systematically coherent law.

**Legal Relationship of Employer and Employee**

**Definition of Employment**

The Labor Code defines dependent work in Section 2, Subsection 4, as the personal performance of work by an employee for the employer within the relationship of the employer’s superiority and the employee’s subordination, according to the employer’s instructions or the instructions given in the employer’s name, for a wage, salary, or other remuneration for work, within working hours (or otherwise determined or agreed time) at the agreed workplace, at the employer’s responsibility.

The Labor Code defines dependent work in Section 2, Subsection 1, as work that is carried out within the relationship of the employer's superiority and his employee's subordination in the employer's name and according to the employer's instructions (orders) and that is performed in person by the employee for his employer. It must be performed for wage, salary, or other remuneration for work done, at the employer's cost and liability, at the employer's workplace or some other agreed place within the working hours (Section 2, Subsection 2). Dependent work may exclusively be carried out in an employment relationship.

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\(^5\) Act Number 89/2012, Collection of Laws (new), Civil Code (not yet amended, but this was expected in 2012).

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that is regulated in the Labor Code, unless there are some other specific statutory provisions.

Of importance for the new Labor Code is in this context the amendment to the Employment Act (Act Number 435/2004 Slg, which entered into force in 1 January 2012). This change governs the definition of illegal work. The definition of illegal work expressly includes now “the performance of work by a natural person outside the employment relationship” according to the Labor Code. According to these changes, the Labor Inspection Authorities are entitled to impose a fine of up to CZK 10-million (but at least CZK 250,000) on companies using the so-called Švarcsystém6 and fine employees up to CZK 100,000. The Labor Code does not distinguish between primary and secondary employment. Therefore, each employment relationship is subject to the same provisions.

As exception from this, a labor relationship may not arise between spouses.7 The employer must ensure the performance of his business tasks primarily with employers being in an employment relationship.8 Beyond an employment relationship, work performance can only be exercised on the basis of a so-called agreement on work performance (dohoda o provedení práce), as provided in Section 75 of the Labor Code, or an agreement on working activity (dohoda o práčovní činnosti), as set out in Section 76 of the Labor Code (Sections 75 et seq. also were changed as of 2012). However, the possibility of ensuring the employer’s business tasks by employees engaged on agreements on work performed outside an employment relationship is restricted.

An agreement of work performance in the sense of Section 75 of the Labor Code may be concluded orally or in writing (the latter is the rule). The scope of work performed on the basis of such an agreement is now extended from 150 to 300 in one calendar year. The average scope of work on the basis of an agreement on working activity is restricted to half of the normal weekly working hours.

An agreement on working activity must be concluded by the employer in writing, otherwise it is void.9 The agreements may be terminated unilaterally with a 15-day notice period starting from the day when the written notice is served to the other party. The provisions about minimum wages apply to compensation of such work performed outside an employment relationship.

**Parties to Employment Relationship**

According to the Labor Code, an employer is a legal or natural person employing an individual in a labor relationship.10 The employer acts in labor

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6 Mr. Švarc was one of the first Czech entrepreneurs in the 1990s who evaded the Labor Code and let his employees work as entrepreneurs; he was sued for this, and spent several years in prison.
7 Labor Code, Section 318.
8 Labor Code, Section 7.
9 Labor Code, Section 76(4).
10 Labor Code, Section 7.
relations in his own name and bears liability ensuing from these relations. Therefore, an investor’s subsidiary may be an employer as well as a Czech branch or even its foreign parent company.

A natural person becomes legally capable to enter into employment relationships as an employee on reaching the age of 15. However, an agreement on liability for entrusted things, materials in stock, or similar values may be concluded when the employee reaches the age of 18. The commencement of work prior to the completion of the mandatory school attendance is prohibited.

Usually, sales representatives are not considered as employees, unless a labor contract pursuant to the Labor Code is explicitly concluded. Managing directors of Czech limited companies (s.r.o.) are not employees, although they are treated like employees for the purposes of social security, pension insurance, and taxes.

The Labor Code further distinguishes managerial employees (vedoucí zaměstnanci). Section 11 of the Labor Code defines managerial employees as those employees who are authorized at individual management levels to determine and to give tasks to subordinate employees, to organize, to manage, and to supervise the employee’s work, and to give them binding instructions. Pursuant to Section 73, Subsection 3, of the Labor Code, managerial posts are positions over which direct control is exercised by the statutory body or by the employer, depending on the fact of whether the employer is a legal entity or a natural person. On the second level, employees directly controlled by managerial employees are regarded as managerial staff in this sense as well.

Managerial employees have the same responsibilities as normal employees. Furthermore, they are obliged to manage, to supervise, and to assess the work performance of their subordinated employees. In addition, managerial employees shall organize the work, create favorable working conditions, ensure the remuneration of the employees, create conditions for upgrading the employees’ vocational level, and make arrangements to protect the employer’s property.11 While labor relationships of managerial employees had been formed by appointment under the old Labor Code of 1965, these relationships are now treated as if agreed by contract.

**Types of Employment**

The following types of employment relationships are known under the Labor Code:

- Permanent employment;
- Fixed-term employment;
- Trial period employment; and
- Part-time employment.

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11 Labor Code, Section 302(1).
An employment relationship lasts for an indefinite period unless a fixed term of duration has been expressly agreed. A fixed-term working contract may be concluded in total for the maximum period of three years (until the end of 2012, two years). There are particular rules concerning chain employment contracts (consecutive fixed-term contracts) and contracts with employment agencies.

If the employer and the employee have agreed on a fixed-term employment relationship without fulfilling the required conditions, the employment relationship is regarded as agreed for an indefinite period if the employee informs his employer prior to the expiration of the agreed term that he insists on being further employed. The same applies to so-called chain employment contracts; Section 39 of the Labor Code was changed in 2011 and took effect on 1 January 2012.

According to the new Section 39, clause 2 of the Labor Code (“Duration of a fixed term employment may reach no more than three years, and from its beginning for an indefinite period, it may extended at a maximum twice”), it is unclear, whether the duration of such fixed-term employment contracts may be extended twice up to a total length of nine years, or whether only a maximum duration of three years including any extensions and repetitions is permitted. Regarding the wording of the provisions in Section 39, clause 2, of the Labor Code, both interpretations are possible. But there are some good arguments against the admissibility of an extension up to nine years.

A length of nine years would de facto lead to an annulment of work on the basis of indefinite working contracts. Furthermore, Article 5 of Directive 1999/70/EC and the jurisdiction of the European Court of Justice (e.g., Judgment C-586/10) require objective reasons that justify the renewal of fixed-term employment. Section 39 does not contain such reasons.

Thus, only a maximum period of three years including two possible extensions should be assumed as possible according to Section 39, clause 2, of the Labor Code. However, the majority of Czech labor lawyers accepts a maximum of nine years, interpreting thereby the Labor Code only superficially.

For the purposes of this three-year period, a previous term is not taken into account if a period of at least three years has expired in the meantime without a labor relationship with the concerned employer.

Therefore, if the consecutive fixed-term contract lasts longer than the allowed total period of three years, the employment relationship is regarded as a labor relationship for an indefinite time. There are a few cases where the restriction in time (two years) will not apply, such as labor contracts with employment agencies.

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12 Labor Code, Section 39(2).
13 Labor Code, Section 39(2), and (5).
14 Labor Code, Section 39(5); other exceptions were abolished as of 1 January 2012.

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Commencement of Employment Relationship

An employment relationship must be based on an employment contract. It commences at the time agreed by contract. The former possibility of forming a labor relationship by election does not longer exist; in some cases, which are regulated in particular statutes, an election is merely a precondition for signing the labor contract.

The formation of an employment relationship by appointment exists in respect of heads of government bodies of the state. Generally, at least an oral contract between the employer and the employee is necessary for a valid employment relationship.

There are two major exceptions to this principle: Section 65, Subsection 2, of the Labor Code stipulates that a regular employment relationship is formed where an employee continues his work performance after the expiration of the agreed term, when the employer is aware of both the fact that the contract expired and the employee continues his work performance.

The second exception is stipulated in Section 338 of the Labor Code concerning the details of the conditions of a transfer by law of the labor relationships in case of a transfer of the employer’s business. The basic principle laid down in Section 338, Subsection 2, is that the rights and duties arising from employment relationships pass in full scope to the new employer to whom the transfer of business activities (or parts of it) or the transfer of the employer’s tasks (or some of them) is affected.

A transfer of business is mainly regarded as a merger, an acquisition, a de-merger, or a spin-off, as well as an asset purchase or the continuation of business in case of death of the employer as a natural person. According to European Union (EU) requirements, there are various duties for the transferor and the transferee to supply information between each other and to the employees. The result of the transfer of the rights and duties of the employment relationship is that a new labor relationship under the former conditions is created which was not agreed directly between the new employer and the employee.

Employment Contracts

The employer must conclude employment contracts in writing. However, this is not a requirement of effectiveness; an employment relationship may exist even if a written contract has not been signed, but an oral contract is not enforceable for the employer. Furthermore, employers have as of 1 January 2012 to issue an employment verification (the zápočtový list) to all employees including those who work under the agreement on performance of work.

15 Labor Code, Section 33(3) and (4).
16 Labor Code, Section 33(1).
17 Labor Code, Section 34(1).
18 Labor Code, Section 34(4).
Article 3(1) of Regulation (EC) 593/2008 of the European Parliament and the Council ("Rome I") allows the free choice of law applicable to the contract. However, such a choice cannot be recommended as there’s not much use of it. A choice of law may not have the result of depriving the employee of the protection granted to him by those Czech provisions that cannot be derogated.

As long as an employee is worse off in comparison to Czech binding provisions because of the chosen foreign law, the more favorable Czech Labor Code governs the employment relationship. In respect of this fact, it is more practicable to agree from the very beginning to avoid a different treatment without any advantage in substance. Pursuant to Section 34, Subsection 1, of the Labor Code, an employment contract must include:

- The type of work the employee will perform;
- The place or places of work where this work will be done; and
- The date as of which the employee will start to work.

If one of these items is missing in a labor contract, the labor contract is invalid. The employment relationship may exist as long as the work has been assigned and performed. Of course, in addition to the mandatory items, other issues may be included in the contract. The employment relationship commences on the day that has been agreed upon in the contract. If the employee fails to start his work on the agreed day without being prevented by an obstacle to work or if he does not inform the employer of this obstacle within a week, the employer may withdraw from the labor contract.

Where a regular workplace has not been agreed in the labor contract, the regular place of work is regarded as the place of work performance as agreed in the contract, and this for the purposes of reimbursement of travel expenses. If the place of work performance is not restricted to one municipality, the regular workplace shall be considered as the place where the employee starts his business trips most often.19 The possibility to agree as the workplace, i.e., a region or the Czech Republic, was abolished as of 1 January 2012.

The employer must give one copy of the written contract to the employee. If the details of the duties and rights of the employee are not included in the contract, the employer may notify the employee thereof in writing within a month of the formation of the employment relationship. Pursuant to Section 37, Subsection 1, of the Labor Code, this information must contain:

- The names of the parties, above all the employer’s designation and seat if it is a legal entity, or the employer’s full name and address if he is an individual;
- The type of work and place of work performance;
- The conditions concerning the annual leave;

19 Labor Code, Section 34(2).
• The notice periods;
• The weekly hours of work and their schedule;
• The wage or salary details; and
• The facts as to collective agreements.

Discrimination Issues

Section 17 of the Labor Code refers to “another Act” for remedies in terms of protection against discrimination in labor relationships. For a long time, this provision had no meaning because such an act did not exist. Eventually, on 1 September 2009, the Antidiscrimination Act took effect after a hard-going legislation process.

Section 1, Subsection 1, of the Antidiscrimination Act establishes the principle of equal treatment and prohibits discrimination in employment relationships, particularly concerning access to employment and remuneration. Pursuant to Section 10 of the Antidiscrimination Act, victims of discrimination (persons who suffered unfair treatment at recruitment or dismissal) can take court action and persons involved in discriminatory practices can be held accountable. Immaterial damages caused by a serious infringement of the reputation or the dignity of a person may be claimed, if otherwise a violation cannot be compensated.

Generally, by adopting the Antidiscrimination Act, the Czech Republic fulfilled its obligation to implement regulations for the prevention of harassment, discrimination, and victimization arising from the EU’s Racial Equality Directive and the Employment Equality Directive.

In the Czech Republic, there is a comprehensive jurisdiction concerning questions which an employer may ask before hiring a person and which he may not ask. For an employer, it is not allowed to require information that is not directly related to the work performance or the employment relationship. In particular, questions concerning pregnancy, family background, financial circumstances, sexual orientation, origin, religion, membership in trade union organizations or political parties, and criminal records are prohibited.

Terms and Conditions of Employment

Working Time and Overtime

Section 78(1) of the Labor Code defines working time (pracovní doba) as a period of time for which an employee is obliged to perform work for the

20 Act Number 198/2009 Collection of Laws (Zákon o rovném zacházení a o právních prostředcích ochrany před diskriminací a o změně některých zákonů), as amended.
21 Labor Code, Section 316(4).
employer or at least is ready to perform work at the workplace according to his employer’s orders.

The length of normal weekly working hours may not exceed 40 hours;\textsuperscript{22} however, there are several exceptions to this rule (e.g., for long distance truckers which are governed by the corresponding European — and equivalent Czech — regulations). If working hours are scheduled evenly to the individual weeks, the length of a shift may not exceed 12 hours.\textsuperscript{23}

The employer must draw up a written weekly work schedule and inform his employee of the schedule or its alteration at latest two weeks before the beginning of the period over which the working hours are distributed and where it concerns a working hours account. Furthermore, the employer shall inform his employee of the schedule at latest one week before the period concerned unless the employer and the employee have agreed on another time limit with regard to providing this information (Section 84).

In addition, the length of normal weekly working hours for employees working on a three-shift or continuous pattern is restricted to 37.5 hours. If the work is performed on a two-shift pattern, the normal weekly working hours are reduced to 38.75 hours.\textsuperscript{24} Employees who are under the age of 18 may not work longer than eight hours per day and, even if they perform work in more than one labor relationship, their normal weekly working hours are restricted to a total of 40 hours.\textsuperscript{25}

After six hours of continuous work, the employer must grant to an employee a work break for rest and food lasting at least 30 minutes. This rest is not regarded as work time unless the employee is entitled to have a break for safety reasons under other statutory provisions. Work on public holidays and on days of the week that are part of the employee’s rest is only permitted in cases stipulated in Section 91, Subsections 3 and 4, of the Labor Code.

For work on public holidays, the employee earns his attained wage and the employer must grant to him compensatory time in the same scope of working hours. When the employee takes this compensatory time off, he gets compensation in the amount of his average earnings. The employer and the employee may agree on a premium in addition to the attained wage and not to grant compensatory time. This premium must be equal at least to the amount of the employee’s average earnings.\textsuperscript{27} For night work (10 p.m. to 6 a.m.), the employee is entitled to a premium of at least 10 per cent of his average earnings.

\textsuperscript{22} Labor Code, Section 79(1).
\textsuperscript{23} Labor Code, Section 83; this was changed as of 1 January 2012; previously, it was nine hours.
\textsuperscript{24} Labor Code, Section 79(2).
\textsuperscript{25} Labor Code, Section 79a.
\textsuperscript{26} Labor Code, Sections 78 and 79.
\textsuperscript{27} Labor Code, Section 115.
in addition to his normal wage, unless this is regulated differently in a collective agreement.

The employer may require standby from his employee if this has been agreed. If the employee performs work during his standby, he earns his regular wage or salary.\(^{28}\) If his work performance is not required — or as long as it is not required — during the time of standby, the employee is entitled to a remuneration of at least 10 per cent of his average earnings. Another agreement may be concluded in a collective agreement.\(^{29}\) A standby during which no work is performed is not regarded as work time. For times of work on Saturday and Sunday, the employee earns in addition to his regular wage a premium of at least 10 per cent of his average earnings.\(^{30}\)

Overtime work may be performed only exceptionally. The employer can demand it only due to serious operational reasons, e.g., if it is required by urgent economic concerns of the employer.\(^{31}\) The amount of ordered overtime may not exceed eight hours within a week or a total of 150 hours within a calendar year. An extended scope of overtime can be ordered if this is mutually agreed.\(^{32}\) However, even in this case, the total amount of overtime work may not exceed an average of eight hours per week calculated over a period of the last 26 weeks. In a collective agreement, a period of 52 consecutive weeks may be agreed.

For the purposes of this calculation, overtime work for which time off was granted may not be considered.\(^{33}\) If no compensatory time off is granted, the employee receives his wage, plus a premium of 25 per cent of his average earnings.\(^{34}\) For employees in the health sector, Section 93a of the Labor Code stipulates particular provisions.

Normally, wages or salaries do not include compensation for overtime. If this is supposed to be the case, this must be agreed in the labor contract. An exception is possible according to Section 114, Subsection 3,\(^{35}\) of the Labor Code. With managerial employees, it may be agreed that their regular remuneration includes overtime. In this case, the managerial employee is entitled neither to a wage nor to compensatory time off as long as he performs overtime work within the mentioned limit of eight hours per week over a period of 26 weeks.

Measures concerning the collective regulation of working hours, overtime, the possibility to order work on days of rest, or night work shall be consulted in advance with regard to safety and health protection at work by the employer.

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\(^{28}\) Labor Code, Section 95.
\(^{29}\) Labor Code, Sections 95(1) and 140.
\(^{30}\) Labor Code, Section 118.
\(^{31}\) Labor Code, Section 93 (1) and (2).
\(^{32}\) Labor Code, Section 93(3).
\(^{33}\) Labor Code, Section 93(4) and (5).
\(^{34}\) Labor Code, Section 114(4).
\(^{35}\) Labor Code, Section 114(3) was changed as of 1 January 2012.

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with the trade union organization. Enterprises with unbalanced workload may use an account of working hours (konto pracovní doby) to manage work peaks.\textsuperscript{37} The account of working hours is regarded as a kind of uneven schedule of work and must be included in a collective agreement or in an internal regulation. The employer may use a working hour account only with the prior consent of the employees concerned.

**Business Trips**

A business trip (pracovní cesta), pursuant to Section 42, Subsection 1, of the Labor Code, is a limited time period for which the employer instructs his employee to work away from his agreed workplace. The employer may send an employee on a business trip for the period that is necessary to accomplish the work if this has been agreed in advance, whether generally by contract or in the particular case.

The employee must be compensated for justified travel expenses.\textsuperscript{38} The employee may obtain reimbursement for fares, fares to visit family members, accommodation expenses, increased meal allowances, and other necessary expenses.\textsuperscript{39}

**Compensation**

An employee is entitled to receive a wage, a salary, or other remuneration (e.g., payments in kind) for his work performance.\textsuperscript{40} As mentioned above, all employees employed by one employer are entitled to receive equal remuneration for the same work or for work of equal value. This principle, governed by the Antidiscrimination Act, is laid down as well in Section 110, Subsection 1, of the Labor Code.

The Labor Code distinguishes between wages (mzda) and salaries (plat). A “wage” is understood as the remuneration for the work in the private sector, but a “salary” is paid for the work performed in the public sector, for example, the work of government employees or teachers in public schools. This classification has relevance for the height of mentioned premiums granted for night work, overtime, and work on public holidays or at the weekend.\textsuperscript{41}

According to the Labor Code, the parties of the employment agreement enjoy wide freedom concerning the arrangement of remuneration. The wage can be agreed in the labor contract, or the employer can set it in an internal directive, or

\textsuperscript{36} Labor Code, Section 99.  
\textsuperscript{37} Labor Code, Sections 86, 87, and 120.  
\textsuperscript{38} Labor Code, Section 152a.  
\textsuperscript{39} Labor Code, Sections 156 et seq.  
\textsuperscript{40} Labor Code, Section 109(1).  
\textsuperscript{41} Labor Code, Sections 113 et seq. and 120 et seq.
in a so-called wage order.\textsuperscript{42} The Labor Code stipulates just common conditions for the payment of employees. The agreed remuneration may not be lower than the minimum wage, which is CZK 8,000 per month (considering a working week of 40 hours) or CZK 48.10 per hour. For the purpose of calculating the minimum wage, the basic income is decisive. No premium payments are taken into account.

Generally, the employee is entitled to receive payments only for the work that he has performed. An exception to this principle is when the employee receives a wage (as a general rule, his average earnings) even without any work performance in the following cases:

- Public holidays;
- Lack of work arising from the employer’s part; and
- Paid leave.

The guaranteed wage (zaručená mzda), according to Section 112 of the Labor Code, is the wage or salary to which the right has arisen to the employee in accordance to the Labor Code, an employment agreement, an internal regulation, or a relevant wage statement. The government determines the minimum wage as the lowest level of a guaranteed wage and the conditions for its payment to those employees whose wage has not been fixed in a collective agreement\textsuperscript{43} or by regulation. If a wage or a salary (without any premiums) does not reach the lowest level of the guaranteed wage, the employer is obliged to pay the difference.

According to Section 143, Subsection 3, of the Labor Code, the wage must be paid in general at the place of work and a written pay-slip must be passed. Other kinds of payment (e.g., bank transfer) can be agreed. The wage must be paid after the performance of work, i.e., at latest in the calendar month following the month the entitlement to the wage arose.\textsuperscript{44}

\textit{Sick Pay}

If the employee is prevented from work attendance due to illness or other incapacity, the employer is obliged to excuse the employee’s absence from work. As of 1 January 2010, the new Sickness Insurance Act\textsuperscript{45} applies and introduces a new system concerning sick payments. New provisions regulating the continuation of payments to sick workers apply.\textsuperscript{46}

In case of a temporary disability for work, a sick employee now is entitled to a sick pay from the sickness insurance from the fifteenth day (or from the twenty-

\textsuperscript{42} Labor Code, Section 113(1).
\textsuperscript{43} Labor Code, Section 112(1) and (2).
\textsuperscript{44} Labor Code, Section 141(1).
\textsuperscript{45} Act Number 187/2006, Collection of Laws, Sickness Insurance Act (as amended).
\textsuperscript{46} Labor Code, Sections 192 \textit{et seq}.  

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second calendar day when it is from 1 January 2012 to 31 December 2013) of his incapacity. The monetary assistance from the sickness insurance is granted for a maximum period of one year, corresponding to 380 days from the day the incapability arose.  

Sickness insurance benefits are calculated from the basis using the appropriate percentage rate. As a basis for calculating sick pay, the average income of a working day during the past 12 months is used, which is limited in the amount by means of three so-called reduction limits (redukční hranice), announced by the Ministry of Labor and Social Affairs in the form of a Communiqué contained in the Collection of Laws. The third reduction limit sets the highest possible amount of the basis at CZK 2,371. In 2010, an employee was entitled to a uniform percentage rate of 60 per cent of the basis for each day of absence. From 1 January 2011, the percentage rate is the following:

- Sixty per cent from the fifteenth day to the thirtieth day of incapability to work;
- Sixty-six per cent from the thirty-first day to the sixtieth day; and
- Seventy-two per cent from the sixty-first day and beyond.

The full basis is only granted if the employee’s incapacity to work is the result of the employee’s community work at an auxiliary fire department, as provided by Section 29 of the Sickness Insurance Act. For the first three days of his inability to work, the employee is not entitled to any continuation payments. From the fourth day to the fourteenth day of his absence, he is entitled to sick pay from the employer, unless he has caused his incapacity to work intentionally.

Sick pay is granted for every day that would have been a working day or public holiday for the employee. The continuation of wage is the amount of 60 per cent of the employee’s average earnings, whereby similar reduction limits will apply for the purposes of calculating this average earnings as well as the insurance’s sick pay. The maximum amount of sick pay is approximately CZK 250 per hour.

**Liability**

*Employee Liability*

An employee is generally liable to his employer for damage he causes because of his own fault when he is carrying out his work. The employee’s liability is proportionally reduced if the damage also is caused by a breach in the duties of

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47 Sickness Insurance Act, Section 26(1).
48 Sickness Insurance Act, Section 29a.
49 Labor Code, Section 192(2).
50 Labor Code, Section 192(2).
51 Labor Code, Section 250(1).
the employer. The burden of proof that the employee is at fault lies with the employer.

If the damage was caused due to negligence, the amount of compensation for damage that must be paid by an individual employee is limited to the maximum, which equals four-and-half times his average monthly earnings. This limit does not apply if the employee was drunk or has abused other addictive substances.52

In the case of intentional damage, the employee is responsible for loss of profit in addition to full compensation of damage.

The employee is obliged to protect the employer’s property. If the employee knowingly breaches this obligation and at least did not warn his superior of some imminent damage, the employee is obliged to settle a part of the damage provided that there would have been the possibility to prevent such damage by adequate measures.

The participation on damage settlement thereby takes into account the circumstances of the case and the fact of whether the damage is compensated otherwise. The employee is not liable for damage caused by him as long as he averted either damage impeding the employer’s property or a hazard to life or health, as provided by Section 251, Subsections 1 and 2, of the Labor Code. The amount of damages is limited to the maximum of triple the employee’s monthly average earnings.53

Where an agreement on liability (dohoda o odpovědnosti) has been concluded in writing, the employee is responsible for the protection of things of value that have been entrusted to him.54 Those things of value include cash, stamps, goods, materials in stocks, and other items that are objects of turnover and circulation. The employer is liable for a shortfall of such values over which he may dispose the whole time he is accountable for them, unless he can prove that the shortfall occurred without his fault. This agreement can only be concluded with an employee who has reached the age of 18. Under certain circumstances, the employee may withdraw in writing from such an agreement of liability.

In addition, the employee (at the age of at least 18) is liable for a loss of tools, personal equipment, or other similar things the employer has entrusted his employee on the basis of a written receipt or confirmation, as per Section 255 of the Labor Code.

However, liability for entrusted things with a value of CZK 50,000 or more may arise only on the basis of an agreement on liability. The employee is relieved of his liability as long as he can prove that the loss of the entrusted thing did not occur at his fault. The employee may withdraw in writing from this agreement if the employer has not created adequate conditions to enable the employee to safeguard the entrusted things against a loss.

52 Labor Code, Section 257(2) and (3).
53 Labor Code, Section 258, clause 2.
54 Labor Code, Section 252.
Employer Liability

The Labor Code differentiates between general liability and liability for particular cases. The basic principle of general liability is that the employer must compensate any damage or harm which arose to the employee in performance of working tasks or in direct connection therewith. This liability arises if the employer breaches his duties or if he violates good morals intentionally. The employer’s liability arises in the following cases, even if the damage is not his fault:

- Liability in connection with averting damages — the employer is liable for material damages that the employee suffered in averting an imminent danger to the employer’s property or an imminent peril for life or health, unless the employee created the danger himself or if he acted in an unreasonable way. The compensation also includes purposeful expenses. The same will apply where the employee averts an imminent peril for life or health, provided the employer would be liable for the damage.

- Liability for damage to an employee’s property — the employer is liable to the damage of things that an employee commonly wears or brings to work and which are stored during work in the designated place. In regard to things that are not commonly taken to work and which are not taken into the employer’s special custody, the compensation is limited to a maximum of CZK 10,000. This limitation is void where it may be ascertained that the damage was caused by another employee. The liability expires if the employee does not inform his employer about the damage within 15 days of the day he noticed the damage.

- Liability for working accidents and occupational diseases — as of 1 January 2013, the employer’s liability for work accidents and occupational diseases is governed by a new law. Transitory provisions are in force until 31 December 2012, according to Section 365 of the Labor Code, the provisions of the Labor Code of 1965 adjacent to Sections 366 of the Labor Code.

Liability for damage caused by a working accident provides that the damage occurred during the performance of working tasks or in direct connection thereby. Concerning occupational diseases, a further precondition is such that the employee was working at the employer’s undertaking under conditions that the employee’s occupational disease arose before it was ascertained. An occupational disease may be only a disease listed in an attachment to a particular

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55 Labor Code, Section 265.
56 Labor Code, Sections 266 et seq.
57 Labor Code, Section 266.
58 Labor Code, Sections 267 and 268.
59 Labor Code, Sections 365 et seq.
60 Act Number 266/2006, Collection of Laws, Law concerning the accident insurance of employees.
Compensation in case of a work accident can be required from the employer in the following scope:

- Loss of earnings;
- Damages for pain and suffering and the loss of social reputation;
- Costs of a purposeful medical treatment; and
- Material damage (but not the loss of right to a pension).

Vocational Training

Pursuant to Section 227 of the Labor Code, the employer must provide for his employees’ vocational development. For this purpose, the Labor Code describes two types of qualification arrangements between an employer and an employee, namely:

- Improving (or deepening) of qualification (prohlubování kvalifikace); and
- Upgrading qualification (zvýšení kvalifikace).

These two types of arrangements differ according to whether the relevant vocational training concerns the type of work the employee is actually performing or another type of work. The improvement of qualification according to Section 230 of the Labor Code leads to a deepening of the employee’s abilities as a training in the field in which the trainee is already working. By means of an upgrading of qualifications, the trainee acquires qualification for a new type of work, e.g., a higher-level education or a qualification in another field of work.

As the employee is obliged to improve his working skills, an attendance at an instructional training or other improvement measure is considered as regular working time and the employer shall bear the costs of his employee’s improvement. Only where an employee is requesting an improvement of qualification of a more financially demanding form may he be responsible for assisting with costs.

Where an employee upgrades his qualification, the employer is obliged to grant him time off with a compensatory wage — if not agreed otherwise — for the necessary time of attendance for courses or for the preparation of closing examinations in the scope stipulated in Section 232, Subsection 1, of the Labor Code.

The Labor Code allows the employer to agree with his employee in written form for the purposes of upgrading the employee’s qualification. For improving the employee’s skills, an agreement may be concluded if the costs of the improvement training exceed CZK 75,000. On the basis of such a qualification

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61 Act Number 290/1995, Collection of Laws (from 1 January 2013, Act Number 266/2006 Coll.).
agreement, the employer is obliged to enable the employee to realize his qualification measures and to bear the costs in the agreed volume.

Conversely, the employee may be obliged to remain in an employment relationship with the employer for an agreed time not exceeding five years from the end of the relevant qualification training. If the employee quits his job prior to the expiration of the agreed term, he may be obliged to reimburse the employer’s expenses in full or partly, depending on the period of time he remained with the employer after the end of the relevant vocational training. A qualification agreement must contain the following items:

- The type of qualification and the form of its upgrading or improvement;
- The period of time for which the employee is obliged to stay in an employment relationship with the employer; and
- The type of expenses and the maximum amount which the employee is obliged to reimburse in case of breach of his obligation to remain in employment with the employer for the agreed period.

**Change of Type of Work and Location**

Generally, the employer’s managerial authority allows instructing the employee to perform work on the workplace agreed in the labor contract. Of course, the employer and the employee can agree by amending the labor contract that the employee changes his type or place of work. In this case, the employer’s obligation to inform the employee of the new content of his employment relationship pursuant to Section 37 of the Labor Code may arise again.

In some other cases, the employer has the right or the obligation to instruct the employee to perform different work, even if the employee does not agree. The employer may transfer the employee to alternative work, if the employee has been given notice, and if:

- The employee does not fit the requirements of a statutory provision for the performance of the agreed work;
- The employee doesn’t meet the requirements to perform his work properly, and if this happens without the employer’s fault;
- The employee fails to perform his work in a satisfactory manner;
- There are reasons for an immediate termination of the employment relationship; or
- The employee breaches the duties of the employment relationship in a serious manner.\(^6\)

In addition, transfer to another workplace may be ordered if criminal proceedings have been initiated against the employee on suspicion of a willful violation of a statutory provision.

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\(^6\) Labor Code, Section 42(2).
criminal offence in direct connection with the work performance. The same applies as long as it is inevitable and necessary to avert an extraordinary accident or some imminent breakdown. For a maximum of 30 working days, a transfer may be instructed if the employee temporarily lost the prerequisites for his job laid down in the statutory provisions.

If an employee is not able to perform his work due to the weather conditions or due to shutdown, he may only be instructed to do other work than agreed with his prior consent. Pursuant to Section 41 of the Labor Code, the employer is even obliged to transfer an employee to another workplace if the employee is not able (or allowed) to perform the former work due to his state of health or due to pregnancy or if a final ruling of the court or the administration orders the transfer.

Besides the possibility to transfer the employee to another workplace, employees also may be temporarily assigned to other employers. As of 1 January 2012, not only the employment agency, but any employer may temporarily relocate their employees to another employer, provided that the agreement on temporary assignment is not concluded earlier than after the expiry of six months from the commencement of the employment relationship. 63 Also recommendable is an agreement between the employers, which governs, e.g., liability issues, information about violation of work discipline, and evidence of work hours. The prerequisites for an agreement on temporary assignment are:64

- The name of the employer to whom the employee is temporarily assigned;
- The date as of which the temporary assignment will commence;
- The place of work performance;
- The type of work;
- The period for which the temporary assignment is agreed; and
- The regular workplace for the purposes of reimbursement of travel expenses (optional).

Both sides can terminate the agreement observing a 15-day notification period at any time without giving reasons. 65 For the period of temporary assignment, an employer who has temporarily assigned an employee to another employer shall pay this employee wage or salary and, where relevant, reimbursement of travel expenses. 66 The working and wage or salary conditions (terms) of an employee temporarily assigned to another employer may not be worse than those of a comparable employee of the employer to whom the employee is temporarily assigned. 67

63 Labor Code, Section 43a(1).
64 Labor Code, Section 43a(3).
65 Labor Code, Section 43a(7).
66 Labor Code, Section 43a(5).
67 Labor Code, Section 43a(6).
The employee must be given working tasks and thereto relating binding instructions, in the name of his employer, by the employer to whom he is transferred, and his work shall be organized, controlled, and supervised by the said employer. But this employer may not make any legal acts in relation to the employee.\textsuperscript{68} It is not allowed to provide remuneration for temporary assignment of an employee to another employer.\textsuperscript{69} Compensatory wages and reimbursement of travel expenses are not subject of the value added tax.

**Vacation**

An employee who has worked uninterruptedly for the same employer for at least 60 days in a calendar year is entitled to an annual vacation. If the employment has not lasted the whole year without interruption, the employer must grant a proportionate part thereof to the employee, as provided by Section 212, Subsection 1, of the Labor Code.

The length of annual leave must be at least four weeks, corresponding to 20 working days in a five-day workweek.\textsuperscript{70} Pursuant to Section 215 of the Labor Code, employees who carry out work that may be harmful are entitled to supplementary leave. In the time of vacation, under Section 222 of the Labor Code, the employee is entitled to his wage in the amount of his average earnings.

The time when vacation is taken is determined by the employer according to a schedule of leave that has been agreed with the relevant trade union organization.\textsuperscript{71} The employer must take into account the employee’s justified interests when he prepares the schedule. He must order the employee’s leave taking in the length of at least four weeks in the calendar year in which the employee’s entitlement to the leave has arisen.

If, for urgent operational reasons or obstacles on the employer’s part, the employer is prevented from determining the employee’s leave, the employer is obliged to schedule the leave in a manner so that it is taken by the end of the following year at the latest.

If the employer fails to determine the leave of the last year until 31 October of the subsequent year, the leave is determined by law to be taken as of the next working day. If the employee fails to take his leave by the end of that subsequent year, his entitlement to this leave expires without any compensation. Only if there is no possibility to grant or take leave because of urgent operational reasons or an obstacle on the employer’s part may the leave be transferred to the next year with the employee’s written consent. Monetary

\textsuperscript{68} Labor Code, Section 43a(4).
\textsuperscript{69} Labor Code, Section 43a(2).
\textsuperscript{70} Labor Code, Section 213(1).
\textsuperscript{71} Labor Code, Section 218(1).
compensation instead of leave is only possible if the employment relationship is
terminated.

Maternity leave is granted from 28 to 37 weeks, depending on whether one child
is born or more children are born. A mother or a father may request parental
leave that must be granted in the desired scope, but not longer than until the day
the child reaches the age of three years.72 For times of maternity or parental
leave, the employee is not entitled to any remuneration. When an employee
returns to work after maternity leave, she has the right to work at her former
post. This guarantee does not apply if an employee returns from his paternal
leave.

Non-Competition

The Labor Code allows agreement between employer and employee on non-
competition clauses prohibiting the employee to compete with the employer in
the same business area. Such agreements may be concluded as well for the
period of the employment and after its termination.

An employee is free to have a second job, but Section 301 of the Labor Code
obliges the employee not to act contrary to his employer’s interests. Thus, he
may only have a second job in a business activity identical with that of the
employer’s if he has prior written consent. However, in fields of scientific,
pedagogical, publicity, literary, and artistic activities, no restrictions may apply.
Consent may be withdrawn by the employer in writing with a statement of the
reasons.

Section 310 of the Labor Code governs non-competition clauses after the
termination of the employment. Such an after-contractual restraint in
competition is allowed to a maximum length of one year after the termination of
the employment, provided the clause refers to a field where the employee would
compete with the employer’s business activities and provided the employee is
adequately monetarily compensated. The minimum level of compensation has
been reduced. Now the employer has to pay only half the average monthly pay
for each month of the duration of the non-competition clause.73

This competition clause must be agreed in writing and may only be concluded
under the precondition that such restraint can be required from the employee
with regard to the knowledge and the know-how he acquires at work. An after-
contractual competition clause first may be closed after the expiration of the trial
period. The employer may withdraw from the clause as long as the employment
relationship exists. In contrast, the employee can only withdraw if the employer
fails to settle the compensation within 15 days of the maturity day. Section 311
of the Labor Code excludes some branches from such clauses, e.g., pedagogical
employees of schools and social services.

72 Labor Code, Sections 195 et seq.
73 Labor Code, Section 310(1); the clause was revised as of 1 January 2012.

(Release 1 – 2012)
Termination of Employment

In General

The Labor Code regulates in detail the conditions for the termination of an employment relationship. In general, an employment relationship ends if the employer or the employee terminate their employment relationship by mutual agreement, if there is a lapse of time, if one party gives a notice of termination (dismissal or resignation), or if one party gives an instant dismissal or a termination within the trial period.

To be valid, any notice must be in writing and must be delivered as a registered letter to the other party, as provided by Section 334, Subsection 1, of the Labor Code. Once a notice of termination has been served to the other party, it may only be withdrawn with the consent of the other party, whereby both the withdrawal and the consent must be in writing to continue the employment relationship.

Notices Distinguished

In General

The Labor Code distinguishes notices given by the employer (dismissals) and by the employee (resignation). The notice period must be the same for both the employer and the employee and is at least two months. The only exception of this rule is contained in the new Section 51a.

For a notice of termination served by an employee in connection with the transfer of rights and obligations arising from the labor relation, the notice period is dependent on the day when the transfer of rights and obligations becomes effective. The Labor Code further distinguishes a proper notice of termination and a termination without notice (immediate termination). In both cases, several securities of tenure are stipulated.

Mutual Agreement

The mutual consent between the employer and the employee terminates the labor relationship at the time agreed or, if no time has been agreed, immediately. The written form is binding for the agreement of the termination of the labor contract and the reasons for the termination must be stated if the employee so requests.

Lapse of Time

An employment relationship may be terminated by the lapse of time, as per Section 48, Subsection 2, of the Labor Code. If the employee continues to work

74 Labor Code, Section 51(1).
75 Labor Code, Section 51a (effective as of 1 January 2012).
after the expiration of the agreed term, however, the employment relationship changes into an employment relationship for an unlimited period of time, if the employer is aware of this fact.76

Death

Since the employment relationship is characterized by the personal performance of work, it is terminated upon the time of the death of the employee. Under Section 342, Subsection 1, of the Labor Code, the same applies — with some exceptions — to the death of an employer who is a natural person.

Termination within Trial Period

During the trial period, both the employer and the employee may terminate the employment relationship at any time for any reason. Neither the employer nor the employee is obliged to state a reason. However, this communication must be in writing.77

If the employee is temporarily incapable to work during the trial period, the employer can terminate the employment relationship only as of the fifteenth day (respectively, as of the twenty-second day in a period from 1 January 2012 to 31 December 2013) of his incapability. This restriction has the sense that an employer cannot exclude his duty to grant a sick pay in the first 14, respectively 21, days of the employee’s incapability to work.

Section 66(2) stipulates that the employment relationship comes to an end on the day when the written notice is delivered unless a later date is stated therein. Thus, the previous unclear wording of Section 66(2) has been changed.78 However, neither the written form nor the attention to the three-day-period is a condition for effectiveness of a given notice. During the trial period, notice may be given without any restrictions in time, but the notice must be in writing.

Dismissals

In General

The Labor Code stipulates several duties of participation for the employer before a notice may be given. A notice of termination or an immediate termination must be consulted with the trade union organization in advance. A consultation is sufficient and in general no permissions are required for an individual termination.

Only where a certain member of a trade union at the employer’s undertaking is concerned must the employer ask for the prior consent of the trade union

76 Labor Code, Section 65(2).
77 Labor Code, Section 66(2).
78 Labor Code, Section 66(2). Until 31 December 2011, there was a three-day notification period; however, it was unclear what happened if it was not followed.
organization. If the union body refuses to grant approval, any subsequent termination of members of trade union bodies is unlawful. Disabled persons are especially protected by a statutory code.79

Notice of Termination

The employer may give a notice of termination to his employee only for one of the reasons stated in the Labor Code, Section 50, Subsection 2. The notification period is two months.80 The reason for the termination must be explicitly specified in the written notice so that it cannot be confused with another reason.

A subsequent change of the stated reason is not allowed. The stated reason may influence the severance payments, according to Section 67 of the Labor Code, which must be paid to the employee. Under Section 52 of the Labor Code, a notice of termination to an employee is valid for the following reasons:

• The employer’s business or a part of it is closed down or relocated;
• The employee becomes redundant due to operational business reasons;
• The employee is not capable of performing the work due to his state of health for a longer term;
• The employee does not meet the conditions prescribed in statutory provisions for the performance of the agreed work;
• The employee does not fulfill his working tasks without the fault of the employer;
• If a reason is given for an immediate termination; or
• The substantial gross violation of duties by a temporarily incapacitated employee based on a breach of the medical regime, i.e., the duty to remain at the place of residence and to comply with the schedule and extent of permitted leave under the Act on health insurance.81

In the case of unsatisfactory work performance, the employer must have urged the employee in writing to eliminate his deficiencies within the last 12 months prior to a dismissal. There are reasons for which the employer can immediately terminate the employment relationship, e.g., because of a serious breach of the duties of the employee. There are less serious breaches of the duties of the employee arising from his employment relationship, and the employer has warned the employee in the last six months of the possibility of a dismissal.

A notice of termination is prohibited because of particular reasons stipulated in Section 53 of the Labor Code, mainly during the employee’s inability to work

80 Labor Code, Section 1(1).
81 This reason to give a notice of termination has been added to the Labor Code as of 1 January 2012.
due to health reasons, during pregnancy, maternity, or paternity leave of the employee, during times of military service, and assignment to a public post.

If an employee has been given notice before the start of such a protected period, the notice period is interrupted as long as the protection lasts. Section 54 of the Labor Code stipulates several exceptions from this protection, i.e., not all of the protected periods refer to each reason for a dismissal. For example, if the notice is given for reasons of organizational business changes, no protection is granted, while protection against a dismissal because of a reason of immediate termination will apply only in case of pregnancy or maternity or parental leave.

A notice is not possible if the reason for termination is older than two months after the time when the employer has learned of the circumstances that might justify termination. In the case of a breach of duties abroad, the period starts when the employee returns, but ends at the latest one year after the day the reason had arisen. If, during this two-month period, the employee’s conduct becomes an object of investigation, e.g., by the office of the general prosecutor, the employer also may give notice to the employee within two months after the day when he has learned of the results of the investigation.82

Immediate Termination of the Employer

Under Section 55, Subsection 1, of the Labor Code, the employer can terminate an employment relationship with immediate effect, provided the actual reason is stated, if:

- The employee has been sentenced for a willful criminal offence to a term of unconditional imprisonment of over one year or he is sentenced for a willful offence committed in direct connection to the performance of his work tasks; and
- The employee has grossly breached some duty arising from his employment relationship.

However, an immediate termination is not possible during the employee’s pregnancy, maternity, or parental leave.83 Concerning the term “gross breach of duties”, a comprehensive jurisdiction has evolved and, therefore, several case groups may be classified. The provisions concern the deadline of giving a notice within two months from the day the employer learns of the reason of a dismissal apply as well on immediate termination.

Immediate Termination of Employee

An employee who immediately terminates employment in accordance with Section 56 of the Labor Code is entitled to compensatory wages or salary amounting to the average earnings for the period equivalent to the notice period.

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82 Labor Code, Section 58.
83 Labor Code, Section 55(2).
Resignation

The Labor Code governs the employee’s possibility to terminate the employment relationship. The employee has the possibility to give the employer a proper notice of termination or an immediate termination. Because of the Labor Code’s primary purpose to protect the employee, it grants great latitude to the employee to terminate his employment. Therefore, the complex system of prohibition and exception as stipulated for dismissals given by the employer is not laid down for a resignation, i.e., a termination by an employee.

Section 50, Subsection 1, of the Labor Code requires that a written notification by the employee. Apart from that, the employee must pay attention to the notice period of at least two months. A resignation with immediate effect is possible if the employee has not been paid his entitled wage or salary completely within 15 days after the maturity day. The employee can demand severance payment.

A further reason for immediate termination is given if the employee can no longer perform his work due to his state of health without a serious threat of his health, provided the employer has not transferred him to a suitable alternative workplace. The immediate resignation must be carried out within two months from the day the employee has learned of the reason, but at the latest one year after the reason has arisen. If the employee respects the notice period of two months, no reason for his resignation must be stated. Thus, an employee can give notice of termination for any reason or without a reason.

Severance Payments

The employee’s right to claim severance payment according to the Labor Code arises in some cases if he was dismissed by the employer, if the employer and the employee have mutually terminated the employment, or if he has terminated the employment himself. The reasons for a termination must be stated in the agreement if the employee so wishes.

Pursuant to Section 67, Subsection 1, of the Labor Code, an employee whose employment relationship is terminated by notice given by his employer or by agreement is entitled to a severance pay depending on the length of the employment relationship if the termination is the result of one of the following reasons:

- The employer closes or relocates his business or a part of it; or
- The employee becomes redundant due to operational business reasons, e.g. reorganization.

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84 Labor Code, Section 51(1).
85 Labor Code, Section 67(1).
86 Labor Code, Section 56.
87 Labor Code, Section 53(3).
The general rule that a severance payment amounts to a triple of the employee’s monthly average earnings was changed as of 1 January 2012.\footnote{Labor Code, Section 67(1)–(4), new wording as of 1 January 2012.} After these changes, an employee is entitled to receive severance pay as follows:

- Less than one year of employment, at least one average monthly earning;
- At least one year and less than two years of employment, at least two average monthly earnings;
- At least two years of employment, at least four average monthly earnings; and
- Triple the employee’s average earnings and the amounts mentioned above where the employment relationship is terminated in a period when the employee is subject to a working hours’ account and to the procedure pursuant to Section 86(4).

The same applies if the employee terminates the employment relationship immediately, if the employer fails to pay the wage in time according to Section 56, Subsection 1, of the Labor Code, or if the employer refuses to transfer a health-impaired employee to a suitable workplace.

If the employment relationship is terminated because of the reason that the employee suffered damage from a labor-related accident or that the employee has some occupational disease, the employee is entitled to a payment in the amount of at least 12-times his average earnings. However, this entitlement may be excluded if the employer is not liable for the employee’s impairment.\footnote{Labor Code, Section 67(2).}

**Legal Consequences of Void Termination**

Where a dismissal is void, the employment relationship continues if the employee informs the employer without due delay that he insists on being further employed. In this case, the employee is further entitled to his wage. The compensation equals the amount of the employee’s average earnings and must be paid from the day the employee insists on his further employment to the day the employee returns to his work or to the day when the employment is terminated in a valid manner.\footnote{Labor Code, Section 69(1).} Where the employee does not insist on further employment though the termination is void, the employment relationship will terminate as if it had been agreed upon.\footnote{Labor Code, Section 69(3).}

If the employee terminates the employment relationship in an invalid manner, the employment continues if the employer requests the employee in writing and without due delay to perform his work. If the employer does not insist on the continuation, it also is the case that the labor relationship has come to end by agreement.\footnote{Labor Code, Section 69(3).} Only if the employee refuses to continue the work after a
corresponding request is the employer entitled to damages because of the employee’s invalid resignation.

**Juridical Remedies**

Both the employer and the employee may claim that the termination of an employment relationship is void — this applies as well to a termination in the trial period. The lawsuit must be filed within two months after the day when the employment relationship in question was intended to be terminated.93

In the Czech Republic, there are no specialized labor courts. The competent court of first instance is the County Court (*krajský soud*) in Prague and the City Court (*městský soud*) in Brno; special senates deal exclusively with labor law matters.

**Collective Dismissals**

Section 62 of the Labor Code defines what will be understood as a “collective dismissal” (*hromadné propouštění*). A collective dismissal is given where an employer gives notice of termination to a particular number of employees within 30 days for one of the reasons laid down in Section 52a-c of the Labor Code, i.e., if the employees are dismissed because of a (partial) shutdown or relocation of the employer’s business or because a part of the employer’s staff becomes redundant due to operational business reasons.

If the employer dismisses 30 employees within the 30-day period, a collective dismissal is given. If an employer employs 20 to 100 employees, a number of at least 10 dismissed employees is sufficient, and if the employer employs 101 to 300 employees, the employer’s obligations concerning a collective dismissal arise where at least 10 per cent of the employees are dismissed.

This means that the obligations arising from a collective dismissal may be avoided if the employer dismisses a lower number of employees over a longer period. The obligations for the employer arising from a collective dismissal are the following:

- The employer must inform his employees in advance of the planned dismissals, whereby 30 days in advance is generally sufficient;
- If a trade union organization is active, the employer must report at least 30 days in advance of the planned dismissals and later he must consult with the trade organization;
- If there is no active trade union organization, the employer must inform the work council; and
- The employer must inform the competent Labor Office.

93 Labor Code, Section 72.
The employment relationships of collectively dismissed employees are terminated not before the expiration of a period of 30 days from the day the employer has notified the Labor Office in writing, unless the individual employee states that he does not insist on an extension of his employment.\(^9\)

**Collective Labor Law**

*In General*

The term “collective labor law” has a long tradition in the Czech Republic although, before 1989, it was used with a different meaning. Even today, its influence or weight is not as considerable as in the old states of the EU.

In the Czech Republic, only a few industrial sectors have collective bargaining agreements, strikes are not very common and, in general, the public is not very interested in bargaining issues. The origin of any collective labor provision is the constitutionally guaranteed freedom of association of trade union organizations, which may exist independently from the state.\(^5\) Details are governed by the Labor Code and the Collective Bargaining Act.\(^6\) In the course of the accession negotiations with the EU, the right of co-determination was implemented. The right of co-determination is affected by the following general conditions:

- The employees have the right of information and consultation concerning the particular business problems;\(^7\) and
- The trade union organization, if active in an undertaking, is the only competent body to exercise the rights of co-determination.

The formation of a work council is only possible where 25 or more persons are employed. Corresponding to the trade union organization’s monopoly position, the task of a work council expires where a trade union organization has been set up in the relevant undertaking and started its activity. The Labor Code allows the formation of a European Work Council.\(^8\)

*Role of Trade Unions*

According to Section 22 of the Labor Code, only trade union organizations have the right to conclude collective bargaining agreements, thus, only trade unions can participate in the development of the employment relationships. The trade union organization fills out consulting tasks and negotiates the collective agreements. The breach of obligation to consult the competent body of the trade union organization does not affect the validity of the relevant measure, but a fine may be issued on the employer.

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\(^9\) Labor Code, Section 62(7).
\(^5\) Constitution, Bill of Rights, art 27.
\(^7\) Labor Code, Section 276(1).
\(^8\) Labor Code, Section 294.
This applies especially in the following cases:

- Scheduling work time and rests;
- Fixing the start of work;
- Allocating shifts;
- Fixing the order of work performance on rest days; and
- Determining the volume of overtime concerning the several operation units and the extension of performed overtime.

In addition, the consent of the trade union body is necessary as a precondition in the following cases:

- The issuance of work regulations;
- The determination of whether an employee is absent with valid excuse;
- The scheduling of night work for women; and
- The issuance of provisions concerning safety and health protection.99

Furthermore, trade union organizations have comprehensive rights to monitor the employers, e.g., concerning adherence to working and wage provisions, compliance with collective bargaining agreements, and standards for work safety and health protection.

**Work Councils**

As mentioned, a work council may represent the employees’ interests where no trade union organization is active. In this case, the work council exercises the employee’s rights of information and consulting. The possibility of building a work council exists where more than 25 persons are employed. The work council consists of an odd number of members, at a minimum of three and a maximum of 15 members elected for three years. A chairman is elected from the members.

Elections must take place where at least one-third of the employees sign a written proposal. An election commission is assembled with the consent of the employer. The election commission is in charge of the procedure of the elections, for which detailed provisions are stipulated in Section 283, Subsection 3, of the Labor Code.

The number of the members of the work council is fixed in consent with the employer; a problem may arise where the election committee and the employer cannot agree on a certain number of members because there are no provisions

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99 A comprehensive collection of offences in the field of labor relationships is stipulated in the Labor Inspection Act 251/2005 Collection of Laws (as amended). The mentioned offences are mainly listed in Section 15 of the Labor Inspection Act.
for solving this situation. Furthermore, one or more representatives concerned with occupational safety and health protection may be elected where more than 10 persons are employed.

The provisions concerning the formation of a European Work Council are implemented in the Labor Code in Sections 288 et seq. A written agreement is necessary to establish a European Work Council. The members are appointed by the employees’ representatives at their joint meeting from among the employees.

**Collective Bargaining Agreements**

Section 23, Subsection 4, of the Labor Code specifies two types of collective agreements, i.e., agreements concerning the employees of one undertaking (kolektivní podniková smlouva) and “agreements on a higher level” (kolektivní smlouva vyššího stupně) concerning several companies. The procedure of concluding a collective agreement is governed by the Collective Bargaining Act. Parties to a “collective contract of an undertaking” can be the employer and the competent trade union organization body; and parties of an “agreement on higher level” can be, on one side, the trade union organization and, on the other side, the employers’ association.

The content of a collective agreement regulates wage and salary rights as well as the other rights and duties of the parties. Section 23, Subsection 1, of the Labor Code stipulates that a bargaining agreement may not impose duties on individual employees. However, by a collective agreement, the duties of the employees may be regulated in a general manner. It is obvious that the duties of one particular employee are not subject to the regulations of collective agreements. Corporate agreements (“on higher level”) may be declared to be generally binding for the respective branch by the Ministry of Labor. Such collective agreements are published in the Collection of Laws. Permanent and fixed-term collective agreements may be concluded. Notice may be given within a period of six months.

The trade union organizations may conclude collective agreements on behalf of employees who are not members of the trade union.100 Section 24, Subsection 2, of the Labor Code contains a particular provision for when there are several competent trade union organizations that cannot agree on a common procedure. In this case, the employer is entitled to conclude a collective agreement with one or more trade union organizations with the largest membership among his employees.

Further details concerning the conclusion of a collective agreement or the choice of a mediator or arbitrator are governed by the Collective Bargaining Act, while the binding force, the period of validity, and the possibilities of termination of a collective agreement are subject to Section 25 of the Labor Code.

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100 Labor Code, Section 24(1).

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Section 8, Subsection 4, of the Collective Bargaining Act establishes the obligation to commence negotiations on a new collective bargaining agreement at least 60 days prior to the termination of the prior agreement. Disputes arising under collective bargaining agreements must be settled by a mediator or, failing that, by an arbitrator.

Strikes and Stoppages

The right to strike is regarded as one of the basic principles of economic freedom. The Bill of Rights guarantees this right in principle and delegates further regulations to ordinary laws. Article 27(4) of the Bill of Rights denies the right to strike to judges, prosecutors, and members of security and military forces.

The right to strike and the possibility to order a stoppage is governed by the Collective Bargaining Act. The right to strike is only given in the case of a dispute concerning the conclusion of a collective bargaining agreement. Employees may go on strike if all attempts to settle a dispute arising out of a collective bargaining by a mediator fail. Exceptionally, strikes are allowed to attain amendments to a collective bargaining agreement where the agreement is expressly subject to change. In such cases, the strike is allowed; thus, the employer is not entitled to compensation for damages and lost profits.

A strike is called by the competent trade union organization where at least half of the employees concerned by the collective bargaining agreement demand so. The competent trade union organization body is obliged to announce three days in advance the start of the strike, the reasons and the aims of the walkout, and the list of spokespersons that represent the members of the strike. In case of a strike, the employer, the employers’ association, or even the prosecutor may address the competent County Court (krajský soud) to declare the strike unlawful. Where the strike is declared unlawful, the employer is entitled to compensation.

The instrument of stoppage may be used by an employer as ultima ratio and can be regarded as the employer’s counterpart to a strike. Section 27 of the Collective Bargaining Act describes a stoppage as partly or fully cessation of work by the employer. In accordance with the regulations concerning a strike, the employer is allowed to lock out his employees only if a collective bargaining agreement has not been agreed after the failure of mediation, provided the disputing parties have not called the arbitration tribunal.

Again, the concerned trade union organization or a prosecutor may take legal action at the County Court to declare the stoppage unlawful. Where the employee cannot perform his work because of a lockout, his absence is treated as if there would be a lack of work arising from the employer’s part; thus, the employee is entitled to his enumeration in the amount of his average earnings. However, if the stoppage is lawful, he is just compensated in the amount of half of his average earnings.
Dominican Republic

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Dominican Republic

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Introduction

Prior to 1930, there was no law regulating subordinated work in the Dominican Republic, mainly because all residents worked as farmers, and subordinated work was only executed in small industries dedicated to sugarcane and alcohol production.

The dictatorship of Rafael Trujillo changed the economy into a more capitalist one, with his incursion in industries, insurance, and banking. The growing economy gave rise to the first laws that regulated the nationalization of work, working day, vacation, minimum salary, employment contracts, and strikes.

To mitigate internal social turmoil and foreign criticism, Trujillo approved the Labor Code in 1951, which was drafted on the basis that the dictator owned all industries and production sources in the country.

On 9 October 1990, and after several minor amendments to the Labor Code, a Committee was appointed to review and modernize the Labor Code. A new Labor Code was presented after three months of intensive work.

The new Labor Code simplified in a sole coherent legal document all of the different labor laws, decisions of the Supreme Court of Justice, Resolutions of the Ministry of Labor, and recommendations of the International Labor Organization (ILO). It entered into force on 29 May 1992 when it was officially published as Law 16-92. The major innovations introduced by the new Labor Code are the following:

- Employees are allowed to offer their services to more than one employer during different working shifts;
- The concept of an economic group is introduced for the employee’s benefit;
- The shifting of the burden of proof from the employee to the employer in relation to all work-related issues that should be documented by the employer;
- Employers may only take the following disciplinary measures: (a) warning; and (b) making note of errors committed by the employee and the seriousness of those errors;
- Sexual harassment is taken into consideration;
• The employer should cover all medical expenses and any related compensation in the event of accident or illness due to the employer’s direct fault if the employee is not insured;
• During the period of pre-notice, other obligations under the labor agreement remain in effect;
• The number of Dominican employees that should be hired by a company is increased to 80 per cent, but this limit is not applicable to employees performing technical, administrative, or managerial tasks that may be performed by foreigners;
• The weekly free-time period is increased to 36 hours;
• When the employee decides to work during the weekend, he may choose to receive either a 100 per cent increase in his salary for that time, or a free-time period equal to that to which he is entitled;
• Employees’ contributions to the pension plan are introduced;
• There is a new approach to the protection of maternity, child labor, and domestic employees; and
• All termination benefits and other indemnifications owed to the employee in the event of unjust termination by the employer of the labor contract are increased.

In the past two years, the employees’ vacation period has been extended and domestic employees have been granted benefits such as vacations and Christmas salary.

Legal Relationship between Employer and Employee

Concept of Employment

The relationship between employer and employee is determined by the existence of an employment contract. The employment contract is the means by which a person obligates him/herself to render a personal service to another person, under the dependency and immediate or delegated direction of the latter and with compensation.

An employment relationship between two parties is thus determined by the existence of a bond of legal subordination between them. The Supreme Court of Justice has characterized the concept of subordination in this context as a situation where the employer has the power to direct the personal activity of the employee by dictating standards, instructions, and orders for everything concerning the execution of his/her work.¹

It is not absolutely necessary that the employer or its delegate constantly exercises its power of giving orders and dispositions to the employee. It is sufficient that the nature of the work has established at the outset what the

¹ Court Precedent as of 2 August 1956, B1 541, at p. 1598.
employee should do to fulfill his mission by means of a general directive, and that the employer always keeps the power to order and dispose.\(^2\)

**Parties to Labor Contract**

*In General*

The employer is any person or company to whom a subordinated service is rendered, while an employee is any person who renders a material or intellectual service pursuant to an employment contract.

The determination of the existence of subordination is the key element for distinguishing controversial labor notions such as intermediaries, commission merchants, shareholders, and independent contractors, among others.

Principle IX of the Labor Code establishes that all contracts by means of which the parties have tried to evade the application of labor laws will be considered null and void and will be governed by labor laws. In the event of doubt about the scope of the law or its interpretation, the judge is required to decide in the most favorable way for the employee.

**Foreign Employees**

Although Articles 135 to 145 of the Labor Code do refer to the “nationalization of labor”, no work permit is required for a foreigner desiring to work in the Dominican Republic. Still, a Visa for Labor Purposes or Provisional/Permanent Residence is mandatory.

Eighty per cent of the personnel of a corporation and the salaries or its payroll should be paid to Dominican citizens, but these restrictions are not absolute, and certain types of employees (e.g., technicians and directors) are excluded from the percentage.

There is no special treatment or legal status for foreign employees, since once a foreigner becomes an employee of a corporation operating in the Dominican Republic, he is entitled to the normal labor benefits and obligations established by law.

**Labor Contract**

*Substantive Requirements*

Substantive requirements for the valid execution of employment contracts are the same as those applicable under civil legislation, namely:

- Consent, such that the contracting parties should act freely and voluntarily when they agree on the execution of an employment contract.
- Capacity, which refers to the state of discernment, reason, and age with which each contracting party in an employment contract should act. The legal age is

\(^2\) Court Precedent as of 30 May 1956, BM Number 550, at p. 1102.
16, so that the hiring of individuals below 16 years of age (and over 14 years of age) should be authorized by the parent and the Ministry of Labor, and should be limited to daytime work and to certain areas of art and culture. Women have full capacity to execute an employment contract.

- Particular purpose, which constitutes the service to be rendered by the employee, and which should be clear, precise, and determined. Nevertheless, the employer may ask the employee to render certain services in specific situations if necessary.
- Licit cause, such that the rendering of the service should be permitted by law.

**Formal Requirements**

Under Article 25 of the Labor Code, employment contracts may be classified as those for regular personnel or personnel “for an indefinite time” and those for mobile personnel, which can be “for a certain or particular time” or “for a particular work or service”.

An employment contract for an indefinite time is executed when the work is permanent in nature and its continuity is extended indefinitely. All employment contracts are presumed to be made for an indefinite time period.3

Employment contracts may be oral or written, and they may be proven by any type of evidence. A written contract should be made in four originals, one for each party and two to be remitted to the Ministry of Labor or to the local authority that exercises this function for registration and filing within three days from the execution date.4

Employment contracts for an indefinite time terminate by mutual contract, acts of God, or *force majeure*, without further liabilities to any of the parties, except for the right of the employee to vacation compensation, profit-sharing bonus, and/or Christmas bonus.5

However, employment contracts for an indefinite time will terminate with liability to any of the parties by: (a) dismissal without cause (*desahucio*) by the employer; (b) dismissal with cause undertaken either by the employer or the employee (*despido/dimision*); and (c) dismissal without cause undertaken by the employee; that is, resignation of the employee (*desahucio-renuncia*).

Employment contracts are considered to be temporary when they have been agreed for a limited time. The law establishes the following strict formalities for the execution of a temporary employment contract:

- It should be made in writing, which implies that it: (a) should be executed in four originals, one for each party and two to be remitted to the Ministry of Labor for registration and filing within three days from the execution date;

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3 Labor Code, art 34.
4 Labor Code, art 22.
5 Labor Code, arts 177, 219, and 223.

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and (b) should include several essential elements, particularly the term of the contract; and

- It can only be performed if: (a) it is according to the nature of the service to be provided; (b) its purpose is the provisional substitution of an employee in case of leave, vacation, or any other temporary impeachment; and (c) it is convenient to the employee’s interests.

A temporary employment contract terminates without liability for the parties upon the expiration of the term, except for the right to vacation compensation (if the employment contract extends beyond five months) and/or Christmas bonus. However, temporary employees are entitled to severance when their contracts exceed three months.

If the temporary employee continues providing the same services with the knowledge of the employer, his/her employment contract derives in an indefinite term employment contract and will be deemed to have that nature since the beginning of the employment relationship.

The Labor Code also provides the possibility of executing seasonal employment contracts, which must be drafted in writing and should be executed in four originals, one for each party and two to be remitted to the Ministry of Labor for registration and filing within three days from the execution date. If such seasonal employment contracts extend beyond four months, the employee shall be entitled to receive the economic aid compensation established in Article 82 of the Labor Code.

An employment contract for a specific work and service necessarily terminates when the service is provided or the work agreed upon has been terminated. The law imposes the following strict formalities for the execution of an employment contract for specific work or service:

- It should be made in writing, thus it: (a) should be made in four originals, one for each party and two to be submitted to the Ministry of Labor for registration and filing within three days from the execution date; and (b) should include several essential elements, particularly the work or service that is the object of the contract; and
- It can only be executed for a specific work or service if it is required by the nature of the work, which should necessarily be of a transitory or occasional nature.

The employment contract for a specific work or service terminates without liability for the parties with the conclusion of the service or the agreed work, except for the right of the employee to a vacation compensation and/or Christmas bonus.

In case of “successive labor”, such as where the employee goes back to work for the same employer within two months after the termination of the first work or where the employee continues working for the same employer after the
conclusion of the specific work or service which was the object of the agreement, the contract would be considered as having an indefinite term character and deemed as such from the beginning of the employment relationship.

The formalities required by law are mandatory for temporary employment contracts and those for a specific work or service. Any of these contracts that do not fulfill such requirements will be considered as one for an indefinite time and will be deemed as such since the beginning of the employment relationship.

Special Labor Contracts

Women

The Labor Code establishes the following standards for the protection of women:

- The equality of rights and obligations for men and women;\(^6\)
- The employer may not terminate at will the employment contracts of pregnant employees throughout pregnancy and up to three months after giving birth;\(^7\)
- Pregnant women are protected against justified dismissal throughout their pregnancy and up to six months after giving birth;\(^8\)
- Protection of the health of the pregnant woman and her child;
- The grant of a maternity leave prior to and after giving birth.\(^9\)
- During the breastfeeding period, the grant of three paid breaks in the workplace of 20 minutes each, at the minimum, for breastfeeding her child; and
- During the child’s first year, the grant of a half day each month for taking the child to the pediatrician.

Minors

The Labor Code, its Application Regulation, and Resolution Number 4-58 of the Ministry of Labor, expanded by Resolution Number 36-91, establish the following standards and requirements for minors:

- The legal age for entering into an employment contract is 16, but any person between 14 to 16 years of age may enter into a labor contract with the authorization of his parent or guardian and the Ministry of Labor;
- No child younger than 14 years of age may be employed, unless he has a special and individual permit from the Ministry of Labor and he is employed

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6 Labor Code, art 231.
7 Labor Code, art 232.
8 Labor Code, art 223.
9 Labor Code, arts 236 and 237.
in areas relating to the arts and sciences, provided that his employer does not interrupt his education; 10

• Minor employees have the same rights and obligations as other employees, and may be members of unions and of their boards of directors;

• Minors may not end work after eight o’clock in the evening nor commence before six o’clock in the morning; 11

• Minors are prohibited from working overtime, and their daily shift is limited to six daytime hours and 36 hours per week; 12 and

• Minors may not work in ambulatory labor and centers that dispense alcoholic beverages.

Domestic Servants

Domestic laborers are those who are dedicated exclusively, habitually, and continuously to cooking, assistance, and other labors proper to a household. In principle, the compensation of domestic labor, besides payments in money, also includes lodging and food of normal quality which are considered 50 per cent of the total payment received.

Although domestic employees are not governed by the Labor Code, they enjoy the following benefits: (a) uninterrupted rest of nine hours between workdays; (b) two weeks of compensated vacation for every year of service; (c) necessary permits from the employer to attend school, as long as it is compatible with the domestic employee’s workday; and (d) Christmas bonus.

Field Labor

Field employees perform proper and ordinary labors of agricultural, cattle, or forestry enterprises. They are protected by the Labor Code, except as regards the workday and the closing of establishments. In any case, their workday may not exceed 10 hours per day.

Transfer of Business

Article 63 of the Labor Code provides that the termination of a company, a branch, or other dependency of the same, or the transfer of an employee to any other company, transfers to the acquirer all the rights and obligations arising from the employment contracts corresponding to the transferred establishment and related to the transferred employee. In any event, the transfer does not terminate the rights acquired by the employee without prejudice to the employer terminating the employment contract with cause.

Such employee transfer should be notified by the employer to the union, the employees, and the Ministry of Labor or the local authority exercising that

10 Labor Code, art 245.
11 Labor Code, art 246.
12 Labor Code, arts 225 and 228.
function within 72 hours after the date of the termination of the business or the transfer, otherwise the new and the former employer will both be liable.

Terms and Conditions of Employment

Remuneration

Salary

A salary consists of all amounts paid by the employer to the employee by virtue of the rendering of a service. According to Article 192 of the Labor Code, it is made up of cash money which should be paid by hour, by day, by week, by two-week period, or by month to the employee, and of any other benefit which he obtains throughout his work.

The payment of the salary is rigorously regulated by Articles 192 to 212 of the Labor Code and by ILO Convention Number 95 on Salary Protection dated 1 July 1949 to guarantee its punctuality and effectiveness, and to provide the necessary safeguards to ensure that payment is made in complete form.

The salary is determined and paid integrally in legal currency\(^\text{13}\) on the date agreed upon by the parties, and also may include any other remuneration of whatever nature. It may be paid per unit of time, per unit of work, per commission, by piecework or lump, or a combination of any of these methods.\(^\text{14}\)

The payment of the salary should be made personally to the employee on a working day and within an hour following the end of the workday at the latest. It is made in the place where the employee renders services, except if otherwise agreed.

Such payment will be in full, except for authorized deductions. In case of illness or duly justified absence, the payment may be made to a duly authorized representative of the employee. Payment of salary through scrip, vouchers, cards, certificates, or other forms is prohibited.\(^\text{15}\)

The salary may not be paid for periods greater than one month. Employees who earn hourly or daily salaries should be paid weekly, unless otherwise agreed.

The National Salaries Committee determines the minimum wage for private and public sector employees, which is to be periodically reviewed and adjusted accordingly.

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\(^{13}\) Payment instruments (e.g., checks) may substitute cash of legal currency when they are of current use, when established by a collective bargaining agreement, or when the interested employee renders his express consent. However, the opinion of the Ministry of Labor and some authors is that the payment in coin is not essential for the concept of salary in money, and it is sufficient that there be payment by letter of exchange, check, or bank transfer.

\(^{14}\) Labor Code, art 195.

\(^{15}\) Labor Code, art 196.
Other Compensation

Under Article 177 of the Labor Code, employers are required to give each employee who has completed one year of continuous work 14 working days’ paid vacation according to the following scale: (a) 14 days of ordinary salary for continuous work from one to five years; and (b) 18 days of ordinary salary for continuous work of no less than five years.

If the contract terminates before completing the year of service, it should be compensated or indemnified according to a special scale: (a) six days of ordinary salary for continuous work for five months; (b) seven days for six months; (c) eight days for seven months; (d) nine days for eight months; (e) ten days for nine months; (f) 11 days for ten months; and (g) 12 days for 11 months.

Pursuant to Article 219 of the Labor Code, the employer should pay the employee a twelfth of the ordinary salary he has earned during the calendar year, notwithstanding company practice. This salary, which is not computed for purposes of termination notice, severance payments, and economical assistance provided for in the Labor Code, should be made by 20 December. It is not subject to any tax, embargo, transfer, or sale.

Share in Company Benefits

Generally known as Bonificación, Article 223 of the Labor Code requires every company to grant a participation equivalent to ten per cent of the net annual profits or benefits to all of its employees for an indefinite time. It enjoys the same privileges, guarantees, and exemptions as the salary.

The payment of the employees’ participation will be made by the company at the latest between 90 and 120 days after the closing of each fiscal year.

Exceptions to the payment of the profit-sharing salary include: (a) agricultural, agro-industrial, industrial, forestry, and mining companies during three years of operations, except by agreement to the contrary; (b) agricultural companies whose capital does not exceed DOP 1-million; and (c) industrial free zone companies.

Working Hours

Article 146 of the Labor Code defines the working day as all the time that the employee cannot use freely due to being at the exclusive disposition of his employer. The daily shift cannot exceed eight hours per day, while the weekly shift should not exceed 44 hours.

This limit is not cumulative, thus if the employee works more than eight hours daily, he/she will be paid overtime although his/her working hours do not exceed the 44 hour weekly limit. Nevertheless, the limit does not apply to the following:

• Employees who act as representatives or agents of the employer, such as managers and directors;

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• Employees who fill positions of direction or inspection, such as supervisors;
• Employees of small rural establishments operated by members of the same family or by only one person;
• Corporations carrying out continuous operations, where employees should be shifted every eight working hours, in which case the working day could be extended one more hour but the working-week period may not exceed 50 hours, and hours above the 44 hours must be paid as overtime; and
• Employees executing intermittent work or those that simply require the presence of the employee in the workplace. Pursuant to Resolution Number 4/93 of 12 January 1993, these include concierges, elevator and lift attendants, watchmen or security guards, barbers, waitresses, tailors, and manicurists. Employees of intermittent work cannot be more than 10 hours in the workplace.

The eight-hour daily shift can be exceeded upon authorization by the Ministry of Labor in the following situations: (a) accidents happening or about to happen; (b) unavoidable work on machines or instruments, whose stoppage could cause serious loss; (c) work where interruption may cause serious damage; and (d) *force majeure*. The regular shift may also be extraordinarily increased to allow the employer to afford extraordinary work increase, in which case such extraordinary hours cannot exceed 80 hours on a quarterly basis.16

The eight-hour working day also has been decreased to six hours daily and 36 hours weekly for underage employees and employees who carry out dangerous or unhealthy work. Working hours rendered in excess of the normal working day or week should be paid to the employees except for employees of small rural establishments operated by members of the same family or by only one person, in the following manner:

• For each hour or fraction of an hour worked from 44 to 68 hours per week, with an increase of no less than 35 per cent over the value of the normal hour; and
• For each hour or fraction of an hour worked in excess of 68 hours per week, with an increase of no less than 100 per cent over the value of the normal hour.

Every employee is entitled to an uninterrupted weekly rest of 36 hours. In case of a lack of express agreement at the commencement of such period, it is understood that it will begin on Saturday at noon.17

If the employee renders services through his/her weekly rest period, he/she may choose between receiving his/her ordinary salary increased by 100 percent or enjoying a compensatory free time equal to each day worked during the weekly resting period.

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16 Labor Code, art 153.
17 Labor Code, art 163.

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Two opinions have arisen as regards the calculation of the hours worked from Saturday afternoon in excess of a 44-hour working week. Most labor scholars consider that such hours should be calculated as overtime, and thus paid with a 35 per cent increase, while others (i.e., Ministry of Labor) understand those hours to be work or service performed in the weekly rest and should be paid with a 100 per cent increase.

The only Court Precedent on this issue states that it will be decided on a per-case basis by free interpretation of the appointed labor court. In addition to the weekly rest and vacation periods, employees are entitled to specific holidays per year. These days are subject to change pursuant to Law Number 139-97. Employees also are entitled to the following paid leaves of absence:

- Five days' leave in case of wedding;
- Three days’ leave in case of death of immediate relative or of spouse or companion;
- Two days' leave in the event that the duly recorded wife or companion gives birth;
- Maternity leave, which consists in six weeks preceding the probable date of birth of a child (prenatal leave) and six weeks following the birth of a child (postnatal leave);
- Leave due to duly documented illnesses.

Health Care Coverage

A new Law on Social Security was enacted as of 2001, requiring all employers to affiliate all their personnel to a family health insurance plan that includes the promotion of health, disease prevention and treatment, rehabilitation, and pregnancy.

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18 In this sense, Rafael Albuquerque, one of the country’s most renowned labor scholars who is a former Minister of Labor, opines that since the Labor Code does not clearly establish any criteria on how to determine whether overtime or extraordinary services should be paid in each case, the employer is bound to apply the legal provision that is most favorable to the employee, pursuant to Principle VIII of the Labor Code.

19 These are: (a) New Year's Day (1 January); (b) Three Kings' Day (6 January); (c) Day of the Virgin of Altaragracia (21 January); (d) Birthday of Juan Pablo Duarte (26 January); (e) Independence Day (27 February); (f) Labor Day (1 May); (g) Anniversary of the Restoration of Independence (16 August); (h) Day of the Virgin of Mercedes (24 September); (i) Constitution Day (6 November); (j) Christmas Day (25 December); (k) Good Friday; and (l) Thursday of Corpus Christi.

20 Where the female employee does not make use of all of the prenatal rest, the unused time is accumulated for the period of postnatal rest. Together, the period should not be less than 12 weeks.

21 It does not cover treatment as a result of traffic accidents, work-related accidents, or occupational diseases, which are provided for by Law Number 4117 on Mandatory Insurance for Motor Vehicles and Law 87-01 on Occupational Hazard Insurance.
A basic health plan should be implemented in a gradual and progressive manner and may include the following services:

- Promotion of health and preventive medicine, in accordance with the list to be provided by the Social Security National Council (CNSS);
- Primary health services, including emergencies, ambulance services, house calls, maternal childcare, and pharmaceutical benefits, in accordance with the list to be provided by the CNSS;
- Specialized services and complex treatment upon referral, including emergencies, ambulance services, hospitalization, medicines, and surgical attention, in accordance with the list to be provided by the CNSS;
- Diagnostic examinations, both biomedical and radiology, as long as they are prescribed by an authorized professional and fall within the list to be provided by the CNSS;
- Pediatric dentistry and preventive services, in accordance with the list to be provided by the CNSS;
- Physiotherapy and rehabilitation when they are prescribed by a specialist and according to the criteria established by the CNSS; and
- Complementary benefits, including equipment, medical prostheses, and technical assistance to the disabled, according to the list to be provided by the CNSS.

Conditions and minimum hospitalization services included in the plan will be defined by complementary norms. Services not covered by the basic health plan may be covered by the employee or the employer, depending on what they have agreed. Such plans will be regulated by the CNSS to avoid excessive payments.

When an employment agreement has been terminated, the employee may request an evaluation of his situation to determine under which of the other regimes he may qualify. Within 60 days following termination, he and his dependents retain the right to health services in kind but not in currency.

**Vocational Training**

The employer can establish his own plan for professional training or follow the plans and programs prepared by the Institute for Technical Professional Training (INFOTEP). The INFOTEP has the power to establish and maintain a national learning system intended to train and promote the country’s future labor force.

The training of young employees can be done through a contract whose principles, methods, and provisions are regulated by INFOTEP and submitted for subsequent approval to the Ministry of Labor. The compensation should not be less than the legally established minimum wage.
Discrimination

In General

The Constitution promotes the equality of all citizens. Article 9 of Law Number 24-97 provides that any distinction made between individuals based on their origin, age, gender, family situation, health condition, disability, custom, political opinion, union activities, occupation, ethnicity, national origin, race, or religion constitutes discrimination.

Any person who commits such discrimination through any of the following activities is punished with two years of imprisonment and fined DOP 50,000: (a) refusal to hire, sanction, or dismiss an employee; and (b) to condition a job offer to at least one of the elements of discrimination.

The Dominican Republic ratified Convention 111 of the International Labor Organization (ILO) concerning discrimination in matters of employment and occupation. For purposes of the Convention, the term “discrimination” includes, among others:

- Any distinction, exclusion, or preference based on race, color, gender, religion, political opinion, national origin, or social origin; or
- Any other distinction, exclusion, or preference, which intends to frustrate or to disturb the equality of opportunities and treatment in the workplace.

Any distinction made by the employer among his employees other than the ones arising from the qualifications required for each position is considered as discrimination. Consequently, the Labor Code equally applies to all employees regardless of nationality when the work is performed in Dominican territory.22

Article 194 of the Labor Code provides that the same salary should correspond to the same job, in identical conditions of capacity, efficiency, or seniority, regardless of the person that performs it.

This principle is applied not only to the basic or minimum salary but also to any other retribution or compensation in money or in kind.

However, employment law allows differences in treatment and inequality of salary based on ability, efficiency, or seniority as far as they are applied bona fide.

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22 The Supreme Court of Justice has decided that the provisions of Article 16 of the Civil Code concerning the obligation of the foreigner plaintiff to provide a bond to cover the payment of legal costs and damages arising from litigation, when he does not own real property in the Dominican Republic that could ensure payment, are not applicable in labor matters, otherwise a discriminatory treatment would be given to the plaintiff employee due to his condition as a foreigner.
**Discrimination Based on Gender**

*In General*

A female employee has the same rights and obligations as a male employee. A woman, regardless of her marital status, may enter into an employment contract without the authorization or consent of her spouse, and may enjoy the same rights which the law grants to employees without discrimination of gender.

The only exception to the Principle of Equality between employees, without distinction of gender, is the special regime for maternity protection.

*Protection against Sexual Harassment*

Employers are prohibited from performing actions against the employee which could be regarded as sexual harassment, or supporting or failing to intervene when said actions are committed by his representatives. Sexual harassment is defined as any order, threat, constraint, or offer destined to obtain favors of a sexual nature, made by a person who abuses the authority granted to him by his functions.

Sexual harassment is punished with one year of imprisonment and a fine of DOP 5,000 to DOP 10,000. Sexual harassment in the workplace gives rise to dismissal with cause by the employee.

The victim of sexual harassment is entitled to initiate actions under labor law (i.e., dismissal with cause) and any other action or claim that may proceed, such as claims for damages or criminal prosecution entailing penalties of a correctional nature.

*Maternity Protection*

As prior indicated, the protection regime granted to pregnant employees and female employees who have just given birth is contained in Articles 231 to 243 of the Labor Code. Among the main protections are:

- The prohibition of dismissal without cause undertaken by the employer during the pregnancy of the female employee and up to three months after giving birth;
- A female employee cannot be dismissed for being pregnant, thus all dismissals with cause due to pregnancy are void;
- Dismissals with cause brought against a pregnant employee or within six months after giving birth should be submitted in advance to the Ministry of

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23 Labor Code, Basic Principle IX.
24 Labor Code, art 18.
25 Labor Code, art 47(9).
26 Law Number 24-97, art 8.
27 Labor Code, art 232.
28 Labor Code, art 233.

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Labor or to the local authority that exercises that function, to determine whether the same was due to the pregnancy or the birth;\(^{29}\)

- During her pregnancy, a female employee cannot be required to perform jobs that require physical strength incompatible with her pregnant condition;\(^{30}\) and
- If, as a result of pregnancy or birth, the work performed by a female employee is harmful to her health or to her child, and if attested to by a certificate issued by her doctor, the employer should change as soon as possible the job of such employee.\(^{31}\)

Although the employer is deprived of the right to undertake dismissal at will or dismissal with cause during the pregnancy, this protection is not extended to other causes of termination or to cases where the female employee has incurred a serious fault.

Nevertheless, the employer has to comply with certain formalities such as having to submit his decision to the prior approval of the administrative labor authorities, indicating the cause on which he intends to base the dismissal and the date on which the fault alleged as just cause was committed.

A dismissal with cause should be exercised within 15 days of the commission of the fault or at least of the employer having become aware of such, and the Ministry of Labor should order an investigation to determine whether such dismissal is due to the pregnancy or birth.

Any employer who fires a female employee without complying with these formalities should pay her, apart from severance payments and other compensations, an indemnity equivalent to five months of ordinary salary.\(^{32}\)

Where these formalities have been complied with, but the Labor Court declares the dismissal to have been made without cause, the female employee will not be entitled to such an indemnity but only to the payment of salaries for the prenatal and postnatal leave periods.

To enjoy the protection regime, the female employee should notify her employer of her pregnancy through any appropriate means and, if the case so merits, she should prove that she has complied with her obligation.

The protection covers the entire period of the pregnancy, regardless of the fact that the pregnancy has begun during the “trial” period, i.e., the first three months after the initiation of work. This protection disappears if the female employee decides to interrupt her pregnancy.

The Supreme Court of Justice has determined that the termination of the labor contract of a pregnant woman by mutual consent seeks to avoid the protection of maternity.

\(^{29}\) Labor Code, art 233(II).
\(^{30}\) Labor Code, art 234.
\(^{31}\) Labor Code, art 235.
\(^{32}\) Labor Code, art 233.
As prior indicated, pregnant female employees are entitled to a mandatory leave of absence of six weeks before the eventual date of birth and six weeks thereafter. If the female employee does not use all of her pre-maternity leave, the remaining time is added to the post-maternity leave.

When taken together, maternity leaves may not be less than 12 weeks. The female employee will retain her job with all of the consequent rights during this period. Maternity leaves are paid on the basis of the ordinary salary earned by the female employee. During the period of breastfeeding, the female employee is entitled to three paid leaves of absence of at least 20 minutes each during her workday to breastfeed her child at the workplace. In practice, some employers allow their female employees to accumulate these periods and take another hour for lunch or leave an hour earlier for such purposes.

During the first year after birth, the female employee is entitled to a monthly paid leave of half a day each at her convenience to take the child to the doctor. The employer should grant an employee a two-day leave with full salary when his duly registered wife or companion gives birth.

**Discrimination Based on Age**

Any employee who has been discriminated against due to his age, either through unequal treatment under similar conditions or unjustified dismissal, should rely on the same general rights granted to all employees to fight discrimination since the Labor Code does not grant elderly employees any special remedy.

A Law on the Protection of Elder Persons was recently passed. Article 8 of this law grants elderly people the right to work and condemns all discrimination due to age. Article 19 provides for the adjustment of the working environment and schedules to the needs of aging employees, and for the employer’s medical personnel to be trained on specialized medicine. The entity in charge of supervising compliance with the provisions of this law is the National Council of Elder Persons.

**Discrimination Based on Physical or Mental Handicap**

Law Number 21-91 of 15 September 1991 on Rights and Obligations of Persons with Physical, Mental, and/or Sensorial Limitations recognizes the rights and duties of persons with physical, sensorial, and/or mental limitations.

It redefined the National Council for the Prevention, Rehabilitation, Education, and Social Integration of Handicapped Persons, which was established: (a) to promote the development of activities and services for the handicapped in

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33 Labor Code, art 239.
34 Labor Code, art 240.
35 Labor Code, art 243.
36 Labor Code, art 54.
different areas such as medical care, professional rehabilitation, and remunerated labor, among others; and (b) to draft national plans for research, prevention, and the rehabilitation of handicapped individuals.

Handicapped or disabled persons are defined by Article 314 of the Labor Code as persons with congenital or acquired bodily defects which entail a reduction in the normal capacity of their work.

In the execution of the authorization under Article 316 of the Labor Code, a Presidential Decree has acknowledged the principle of equal opportunities and labor rights to persons with physical, mental, and sensorial limitations.

The General Directorate of Employment and Human Resources of the Ministry of Labor is tasked to carry out employment programs for the handicapped, while the INFOTEP and rehabilitation institutions are tasked with coordinating permanent plans and programs for disabled people to improve their skills in productive activities.

Employers are responsible for providing all relevant security measures within the working area to prevent accidents involving disabled employees. The employer also should assign disabled employees duties compatible with their limitations or transfer them to positions receiving equal remuneration, provided that their disability does not prevent them from fully complying with their functions or that their new duties do not threaten their physical safety.

Employees infected with HIV or AIDS are granted Right to Work which forbids any working discrimination to patients with HIV or AIDS, including requesting HIV tests to obtain an employment or to be kept in the same or to get a promotion. In addition, these employees are entitled to be changed in their position if the health conditions so requests. When the health conditions do not let the employee continue working, a disability pension must be granted under the provisions of Law 87-01 on Social Security.

Both the dismissal with or without cause are prohibited because of this particular health condition or because of the refusal of the employee to be subject to HIV tests.

HIV-positive or AIDS employees are not required to report to their employers about their physical condition. In case that the employee does report such condition to the employer, the latter have a confidentiality obligation with regards to that information.

An employee is entitled to economical assistance if he/she is unable to attend work for one year as a result of his/her illness. This economical assistance

37 Law Number 135-11 as of 7 June 2011, which substituted Law Number 55-93 as of 31 December 1993.
38 Law Number 135-11 as of 7 June 2011, which substituted Law Number 55-93 as of 31 December 1993.
39 Law Number 135-11 as of 7 June 2011, which substituted Law Number 55-93 as of 31 December 1993.
consists of: (a) five days of ordinary salary after continuous work of three
months to six months; (b) ten days of ordinary salary after continuous work of
six months to one year; and (c) fifteen days of ordinary salary for each year of
service rendered after one year of continuous work.

In addition, the employee may have right to a disability pension under the
provisions of Law 87-01 on Social Security.

**Discrimination Based on Race or National Origin**

*In General*

The Dominican Republic is a signatory to the United Nations International
Convention on the Elimination of all Forms of Racial Discrimination of 1966,
which seeks to obtain for all individuals equal protection under the law against
all discrimination and any incitement to discrimination and to prevent
discrimination for reasons of race, color, or ethnic origin.

The Labor Code, together with Basic Principle VII on non-discrimination,
establishes in Principle IV the territoriality of labor laws and that they should be
applied to Dominicans and foreigners alike. Nevertheless, the Labor Code
contains measures intended to protect Dominican employees.

**Composition of Personnel**

At least 80 per cent of the total number of the company’s employees should be
Dominican citizens. However, this rule does not apply to:

- Employees who are exclusively in management or administration posts;
- Technical personnel, provided that the Ministry of Labor is of the opinion that
  there are no unemployed Dominicans able to replace them; and
- Married foreigners or foreigners that have children with Dominicans, with at
  least three or five years, respectively, of continuous residence in the country.

**Minimum Mandatory Percentage of Salary**

The salaries earned by Dominican employees should amount to eighty per cent
of the total value of the salaries of all personnel of the company. However, this
does not include salaries earned by employees who perform technical or
managerial functions.

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40 Where the number of employees is less than 1, the rule is applied in the following
manner: (a) if there are nine employees, six should be Dominicans; (b) if there are
eight or seven employees, five should be Dominicans; (c) if there are six employees,
four should be Dominicans; (d) if there are five or four employees, three should be
Dominicans; (e) if there are three employees, two should be Dominicans; (f) if there
are two employees, one should be Dominican; and (g) if there is a single employee,
he should be Dominican.
Nationalization of Certain Positions

The Labor Code distinguishes between certain positions that should preferably be performed by Dominicans (e.g., administrators, managers, directors, and other persons who perform administrative or director duties) and other positions that should be exclusively performed by Dominicans (e.g., superintendents, foremen, supervisors, and other employees who perform agricultural labor).

When a Dominican employee substitutes a foreigner in any of these positions, the local employee should enjoy the same rights, privileges, and conditions as the substituted foreigner.

Discrimination Based on Religion

The Constitution recognizes freedom of conscience and religion as a basic right, subject to public order and good customs. However, Article 45-6 of the Labor Code prohibits an employee from performing any type of religious or political propaganda in his/her workplace, otherwise he/she may be dismissed for cause.

On the other hand, Article 47-6 of the Labor Code forbids the employer from exercising pressure or trying to influence the political ideology or religious beliefs of its employees.

Enforcement of Liability for Discrimination

Apart from the special protection of maternity, the Labor Code does not provide specific procedures or remedies on behalf of employees who have been victims of discrimination.

Nevertheless, employees who have suffered discrimination may claim damages from the employer for breach to Basic Principle VII of the Labor Code. Furthermore, the employer also may be liable under criminal law pursuant to Law 24-97.

Collective Bargaining Agreements and Employee Participation in Management

Unions

The freedom of unionization is expressly recognized as a constitutional and a universal right. Article 317 of the Labor Code defines a “union” as any association of employees or employers created or incorporated in accordance with the Labor Code for the study, improvement, and defense of its members’ common interests. Book V of the Labor Code regulates labor unions, and contains the following main provisions:

41 Constitution, art 62(3) and art 62(4).
42 Universal Declaration of Human Rights, art 23(IV); ILO Convention Number 87 concerning “Freedom to Unionize and Protection of Right of Unionization”.

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• Public authorities should refrain from limiting the freedom to unionize.
  Unions should be independent from political parties and religious entities.
• Employees’ unions may not have less than 20 members.
• Directors, managers, or administrators of a company may not be members of a
  labor union.
• The registration of labor unions grants them legal character.
• Unions always have an indefinite duration.
• The registration of unions may be cancelled by a ruling of the labor courts
  when they have carried out activities that go against, or are not related to, their
  legal purposes.
• The dismissal of any employee protected by the union privilege should be
  previously submitted to the Labor Court.
• The termination of employees protected by the union privilege does not
  produce any effect.

Collective Bargaining Agreement

Collective bargaining is an agreement which, with the participation of the most
representative agencies of the employers and the employees, can be made
between one or more labor unions and one or more employers or employer
associations to establish the conditions to which the employment contracts of
one or more companies should be subject.\footnote{Labor Code, art 103.} The amount of wages, the length of
the workday, free time periods, vacations, and other working conditions can be
regulated by collective bargaining agreement.

However, the inclusion of any of the following clauses in a collective agreement
would be illegal: (a) accepting only union members as employees; (b) preferring
to contract only with union members; (c) dismissing a employee who ceases to
be a member of a union; or (d) carrying out sanctions pronounced against
employees by the union they belong to.

The union is authorized to represent the professional interests of all employees
in a company, as long as it has among its members an absolute majority of such
employees. Employees occupying positions of supervision or inspection are not
considered to determine majority in this sense.

The union is authorized to negotiate and execute a collective bargaining
agreement on working conditions for a specific trade if it represents an absolute
majority of the employees hired in the type of trade in question. To be effective,
a collective bargaining agreement should be made in writing in as many
originals as there are parties with distinct interests, plus two originals for the
Ministry of Labor.

The specified term of a collective bargaining agreement may not be less than
one year nor more than three years. If the term is not specified, the collective

\footnote{Labor Code, art 103.}
The agreement will be in effect for one year. It will be automatically renewed for a period established by law, unless one of the parties announces its termination at least two months before its date of expiration. In such a case, a copy of the statement should be filed with the Ministry of Labor within 48 hours.

Employment contracts made by a company before the enforcement of a collective bargaining agreement will be automatically modified in accordance with the conditions agreed upon in the collective bargaining agreement, as long as they grant favorable conditions to the employee.

The collective bargaining agreement ends by: (a) termination of all the employment contracts of the company or any of the companies that have executed it; (b) mutual consent; (c) causes established in the same agreement; and (d) the extinction of the union or any of the unions that have executed it.

If not provided otherwise, the simple termination of the collective bargaining agreement does not modify the conditions of the employment contracts made in execution thereof, but the parties remain authorized to modify these conditions within the capacity recognized by the Labor Code.

The conditions and/or benefits provided in a collective bargaining agreement are considered as included in all employment contracts of the company, even if the employee is not unionized.

**Health and Safety Protection in Workplace**

Article 46 of the Labor Code requires the employer to:

- Maintain the factories, workshops, offices, and other places where work is to be carried out in the condition required by sanitary provisions;
- Distribute freely among the employees any preventive medicines indicated by the sanitary authorities in the case of epidemic disease;
- Apply adequate measures for the prevention of accidents whenever machinery, instruments, and work materials are used;
- Install at least one first aid kit for the use of the employees;
- Timely provide employees with the materials they will use and, where they have not agreed to work with their own tools, with the equipment and instruments necessary for the performance of the work agreed upon, without requiring any payment for them;
- Keep a secure place for the storage of the instruments and equipment of the employee when he uses his own tools, and these should remain at the place where service is provided;
- Pay the employee the salary corresponding to loss of time when he is unable to work due to the fault of the employer;
- Treat employees with due consideration; and
- Offer preparation, training, updating, and improvement for his employees.
Minors under 16 years of age may not be employed in dangerous or unhealthy work, as determined by the Ministry of Labor.

**Employees’ Compensation and Survivors’ Benefits**

A workplace accident is any bodily injury, permanent or temporary, which the employee suffers while performing the work or as a result thereof. The employer is liable for damages suffered by the employee due to a work accident.

Occupational hazard insurance seeks to prevent and provide coverage for accidents occurring in the workplace and/or occupational diseases. It includes any corporal injury and any disease suffered by an employee as a consequence of his work on account of a third party. It also includes injury caused in traffic accidents during working hours and/or on the way to or from the workplace.

Occupational hazard insurance is fully financed by the employer at an average contribution of 1.2 per cent of the relevant wages, composed of: (a) a fixed base rate of one per cent to be applied evenly to all employers; and (b) a variable rate of up to 0.6 per cent established by agreement and based on the field of activity and risk factor for each enterprise.

Occupational hazard insurance provides for benefits in kind (e.g., medical care and dental assistance, and prostheses, glasses, and orthopedic fixtures and their repair) and monetary benefits (e.g., temporary disability allowance, disability compensation, and disability pension).

Compensation varies according to the level of disability suffered by the employee. A disability can be classified as: (a) permanent or partial, total, or absolute disability; or (b) a major disability. An employee who is not satisfied with the classification of the accident or illness may file an appeal.

For calculating compensation, the base wage will be the average remuneration subject to contributions during the past six months prior to the accident or appearance of the disease. The employee may claim compensation within five years from the day after the event which led to the payment of such compensation took place.

The employer is required to register his employees for occupational hazard insurance, make notifications of the effective wages and their changes, and deliver contributions to the relevant institution.

**Dispute Resolution**

**In General**

Economic conflicts and strikes are mechanisms of dispute resolution permitted to employees for improving the conditions of their labor contracts. Only unions may exercise economic conflicts and strikes.

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44 Labor Code, art 726.
Under Dominican legislation, there is no specific mechanism for the individual solution of conflicts, which should be achieved by mutual agreement between the parties. In the absence of an agreement, the employee may unilaterally terminate the labor contract with liability for the employer if any of the causes justifying such termination has been proven to exist (resignation).

**Economic Conflicts**

An economic conflict arises between one or more employees’ unions and one or more employers or one or more employers’ unions for establishing new working conditions or modifying the ones in effect.45

Conflicts are resolved by direct approach, by administrative conciliation, and by arbitration.

In direct approach, the representatives of the parties meet to negotiate and to discuss the conflicts that have arisen.

When a conflict has not been resolved by direct approach, notice should be given to the Ministry of Labor, which should designate a mediator within forty-eight hours. The mediator notifies his appointment to the representative of each party and initiates conciliation procedures. Minutes of the agreement reached between the parties will be drafted, otherwise a certification of non-agreement will be issued to the interested party.

In the event that the parties do not resolve their conflict through administrative conciliation, they should proceed to arbitration. The arbitration procedure is initiated by the parties’ designation of three judges from the date of notification of the strike or work stoppage. The arbitrators may be designated:

- Directly and freely by the parties; or
- By the judge presiding over the Labor Court in the following cases: (a) when the parties or one of them have not designated arbitrators within three days after the mediation; (b) when the party or one of them has not timely notified the designation of the arbitrators to the competent authority; (c) when one of the parties has threatened to resort to strike or work stoppage; and (d) after the ruling of qualification of the strike or work stoppage and within 48 hours after notification to the parties.

Once the arbitrators have been appointed, the parties should provide them with their respective written arguments within three days after their appointment. The arbitrators will subsequently notify the parties and begin the conciliation. The arbitrators will draft a conciliation agreement where conciliation is successful. Otherwise, the parties will proceed to restate their claims.

The arbitrators may investigate the case within ten days, for which they may be advised by a commission of employers and a commission of employees. After

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45 Labor Code, art 395.
the investigation and the last hearing, the arbitrators have eight days to issue the ruling that will be executed by act of the president of the labor court of the jurisdiction where the company is located. The award produces the effects of collective bargaining, i.e., it regulates the labor relationship in a particular area.

**Strikes**

A strike is the voluntary suspension of work agreed upon and performed collectively by the employees in defense of their common interests.\(^{46}\) Despite the fact that the right to strike is recognized, it is limited in the following aspects:

- The strike should be limited only to the suspension of work.
- The strike should be peaceful. Acts of coercion or physical or moral violence against individuals, or of physical force against things, or any other act intended to promote disorder or deprive the strike of its peaceful nature are forbidden.
- Strikes are not permitted in essential services, the interruption of which is likely to endanger the life, health, or safety of the population. Essential services include communications, supply of water, gas, electricity for illumination and domestic use, pharmaceuticals, hospitals, and others of similar nature.
- Strikes should not affect national security, public order, or the rights and freedoms of others.
- Strikes may not continue for more than 72 hours after the period for the renewal of the work as ordered by a competent judge has expired.

For purposes of declaring a strike, the employees should notify the Ministry of Labor in writing, indicating that:

- The strike is intended to resolve an economic conflict or conflict of right which affects the collective interests of the employees of a company;
- There is proof that the conflict has not been solved through direct approach or administrative conciliation, and that it has not been possible to initiate arbitration proceedings;
- It has been voted on by more than 51 per cent of the employees of the company; and
- The services comprised in the strike are not essential services.

The strike may not be declared until ten days after notification. The Ministry of Labor should give notice thereof to the employer within 48 hours of receiving the same. A strike that is held without complying with formalities is classified as illegal and terminates, without liability for the employer, the labor contracts executed with the employees who have participated therein.

\(^{46}\) Labor Code, art 401.
Termination of Employment

Termination without Liability for Either Party

Employment contracts may terminate without liability for the parties by mutual consent, completion of the employment contract (either by the completion of the relevant work or of the promised service), and the impossibility of execution of the employment contract.

Termination by mutual consent should be made before the Labor Department or local authority exercising its functions, or a Notary Public.

Impossibility of execution refers to series of events obstructing or interfering with the continuation of the employment contract, by preventing the regular and usual operation of an enterprise or an employee’s attendance at the workplace.47

Termination with Liability for One Party

In General

Under Article 69 of the Labor Code, the employment contract terminates with liability for one of the parties in the following cases: (a) termination at will (desahucio); (b) dismissal undertaken by the employer (despido); and (c) dismissal undertaken by the employee (dimisión).

Termination at Will by Employer

The employer, by means of prior notice to the other and without invoking any cause, may exercise the right to terminate an indefinite employment contract. The employee should be notified in writing and, within the next forty-eight hours from the occurrence of the termination, the employer shall notice the termination to the Labor Ministry or local authority exercising its functions. However, this type of termination may not be carried out in the following circumstances:

• During the time in which the employer has guaranteed the employee that he will use his services;
• While the effects of the employment contract have been suspended, if the suspension is caused by a fact inherent to the person of the employee;
• During the period of vacation of the employee;
• During the pregnancy and up to three months after the birth; and
• With employees protected by the union privilege.

The employer that exercises the right of termination should notify the employee of its decision to terminate the employment contract to avoid any damages that may result to the other party from the sudden termination. The period of prior

47 Labor Code, art 72.
notice will vary according to the duration of the employment relationship being terminated, as follows:

- After continuous work of three months to six months, the minimum notice period is seven days;
- After continuous work of more than six months to one year, the minimum notice period is 14 days; and
- After one year of continuous work, the minimum notice period is 28 days.

If the employer fails to give all or part of the prior notice to the employee, it should pay a compensation equivalent to the salaries that would be earned by the employee during the prior notice period. In addition, the employer who terminates an employee without cause should pay severance in the following amounts:

- After continuous work of three months to six months, a sum equal to six days of ordinary salary;
- After continuous work of more than six months to one year, a sum equal to 13 times the ordinary salary;
- After continuous work of one year to five years, a sum equal to 21 days of ordinary salary for each year of service rendered; and
- After continuous work of five years or more, a sum equal to 23 days of ordinary salary for each year of service rendered.

The employee also is entitled to vacation compensation, Christmas salary, and yearly bonus. The amounts corresponding to prior notice and severance assistance are calculated on the basis of the average salary earned by the employee during the last year or fraction of a year of work, and are not subject to income tax, foreclosure, lien, set-off, transfer, or sale except for loans granted by the employer or obligations that have arisen under special laws.

These indemnifications should be paid to the employee within 10 days after the termination of the contract, otherwise the employer should pay an additional sum equal to one day of salary earned for each day of delay.

**Termination with Cause by the Employer**

Termination of the employment contract by the unilateral will of the employer based on a serious or inexcusable fault by the employee is justified when the employer proves the existence of a just cause as provided in the Labor Code. Under Article 88 of the Labor Code, the following reasons may give rise to the dismissal of the employee:

- The employee influencing the employer to commit an error by claiming to have indispensable conditions or knowledge that he does not possess or giving personal references or certificates whose falsity is proved later;
- Performing the job in a form that shows his incapacity and inefficiency. This cause ceases to have effect after the employee has provided service for three months;
- The employee incurring during his work a lack of probity or honesty in acts or attempted acts of violence, insults, or mistreatment against the employer or relatives of the latter that depend on him;
- The employee committing against any of his co-employees any of the acts listed in the previous article if the order of the workplace is disturbed;
- The employee committing, outside of the job, against the employer or his relatives that depend on him or against the executives of the company, any of the acts referred to in number 3 of this article:
- The employee causing, intentionally, material damage during the performance of the job, or by reason of the same, in the buildings, works, machinery, tools, raw materials, products, and any other objects related to the job;
- The employee causing serious damage mentioned in the previous section, unintentionally, but with negligence or lack of judgment of such a nature as to be the cause of the damage;
- The employee committing dishonest acts in the workshop, establishment, or workplace;
- The employee revealing the secrets of manufacture or making public matters of a private nature in damage to the company;
- The employee compromising through inexcusable lack of judgment or carelessness the security of the workshop, office, or other place of the company or the people found there;
- The absence of the employee from his job during two consecutive days or two days in the same month without the permission of the employer or the one who represents him or without notifying the just cause for the absence in the period set in article 58;
- The absence, without advance notice of just cause, of an employee who has in his care any job or machine whose inactivity or stoppage necessarily implies a disruption for the company;
- The employee leaving during working tours without the permission of the employer or the one who represents him and without having given said employer or his representative advance notice of the just cause for leaving work;
- The disobedience of the employee to the employer or his representatives, whenever dealing with contracted work;
- The employee refusing to adopt preventive measures or follow the procedures indicated by the law, the competent authorities, or the employers to avoid accidents or sickness;
• The employee violating any of the prohibitions foreseen in numbers 1, 2, 5, and 6 of article 45;
• The employee violating any of the prohibitions foreseen in numbers 3 and 4 of article 45 after the Labor Department or the local authority exercising that function has warned him for the same infraction on the request of the employer;
• The employee having been sentenced to a penalty restricting his liberty through an irrevocable court decision; and
• A lack of dedication to the labor contracted or any other serious violation of the obligations imposed on the employee by the contract.

The employer’s right to dismiss the employee expires after fifteen days from the date on which the employee has acquired knowledge of the employee’s fault. If the employer undertakes its right to terminate within this period, the employer does not incur any liability. Within forty-eight hours of executing the dismissal, the employer should give notice thereof to the labor authorities.48

The employer also may apply disciplinary measures, which solely are a verbal or written warning or a note of the faults with an evaluation of their seriousness, without necessarily terminating the work agreement.

When applying disciplinary measures and when dismissing an employee in the event of fault, the employer should draft written reports with documentation or may even request an inspection from the Ministry of Labor so that the fault may be proven if necessary before the Labor Court.

Dismissal with Cause Undertaken by Employee

Termination of the employment contract by the unilateral will of the employee based on the employer’s fault is justified if the employee proves the existence of any of the just causes set forth in the Labor Code.49 The employee does not incur any liability if the cause is proven. Pursuant to Article 97 of the Labor Code, the employee may terminate the employment contract for any of the following causes:
• Error induced by the employer regarding the conditions of the employment contract;
• The employer’s lack of payment of the complete salary in the manner and place agreed upon or as determined by law;
• The employer’s refusal to pay the salary or to resume work in the event of an illegal suspension of the effects of the labor contract;
• The execution in the workplace, by the employer or by others with his consent, of acts violating the integrity or honor of, or of violence, injuries, or mistreatment against, the employee or his relatives;

48 Labor Code, art 91.
49 Labor Code, art 96.
• The same persons, as in the above item, committing the same acts outside the workplace if they are of such seriousness as to make the compliance with the contract impossible;
• The employer’s (himself or through another person) intentional hiding, rendering useless, or destruction of, the work tools or equipment of the employee;
• The employer’s illegal reduction of the employee’s salary;
• The employer requiring the performance of a job different from that stated in the contract, except when dealing with a temporary change to a lower position in an emergency but with the same salary;
• The employer requiring the provision of services in conditions that make the employee change his residence, unless the change has been foreseen in the contract, is a natural result of the work or practice, or is justifiable and not the cause of harm to the employee;
• Contagious disease of the employer, his relatives, representatives, or other employees if the employee should remain in direct immediate contact with such individuals;
• Serious danger to the employee’s safety or health because of breach to the preventive and safety measures established by law;
• The employer’s serious lack of judgment or carelessness compromising the safety of the workshop, office, or work center, or the individuals found therein;
• The employer’s violation of any of the provisions of Article 47; and
• The employer has failed to comply with a substantial obligation.

The right of the employee to terminate the employment contract by means of dismissal with cause expires 15 days after the date that the right has arisen. Within 48 hours following the dismissal with cause, the employee should give notice (indicating the cause) thereof to the employer and to the Ministry of Labor or the local authority exercising such function. Otherwise, the dismissal with cause would be regarded as lacking just cause.

The employee does not have to fulfill this obligation if the dismissal claim is made directly before the corresponding labor authority. However, if the employee cannot prove the existence of a just cause of resignation, the Labor Court will declare the dismissal as unjustified and will terminate the work contract based on the fault of the employee and condemn him to indemnify the employer.

Retirement, Social Security, Healthcare, and Pensions

Social Security

In General
Law Number 87-01 of 14 May 2001 created the Social Security System (SDSS) to regulate and develop the mutual rights and duties of the State and its citizens.
as regards financing the protection of the population against the risks of old age, disability, survival, illness, maternity, infancy, and occupational hazards.

The SDSS is a mixed system, since insurance for old age, disability, and survivorship provides that contributions from affiliates are credited to their own exclusive and individual accounts. At the same time, the SDSS allows affiliates to make extraordinary contributions. It also provides for contributions to a Social Solidarity Fund with the same characteristics as an allotment system.

There are two groups of social security institutions created by Law 87-01. One group is tasked with managing, regulating, financing, and monitoring the system, while the other is tasked with risk management and service delivery. The important ruling principles of the SDSS are the following:

- Universality, such that the SDSS should protect all Dominicans and every resident in the country;
- Mandatory affiliation for all citizens and institutions; and
- Freedom of choice, such that affiliates have the right to choose any credited manager and provider of services, as well as to change when they consider it convenient, in accordance with the conditions established by law.

**Financing Systems**

The SDSS is composed of the three financing systems, i.e., the Contributive System, the Subsidized System, and the Subsidized Contributive System.

The Contributive System includes those working in the employ of a third party, i.e., subject to employment contracts. It is financed with contributions from employees and employers, and includes public and private salaried employees and employers.

The contributive regime covers the following benefits: (a) old age, disability, and survivorship insurance; (b) family health insurance; and (c) occupational hazard insurance, covering work-related accidents and professional illnesses.

The Subsidized System includes self-employed people with unstable income below the national minimum wage, as well as unemployed, disabled, and indigent people. It is basically funded with contributions from the government.

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50 This group is composed of the Social Security National Council (CNSS), Social Security Treasury, Pension Superintendence, Health and Occupational Hazard Superintendence, and Directorate of Information and Protection of Affiliates.

51 This group of composed of the Pension Fund Administrators (AFPs), Health Risk Administrators (ARSSs), Health Service Providers (PSSs), Public Pension Fund Administrators, National Health Insurance (SNS), Institute of Social Security (IDSS), State Secretariat of Public Health and Social Assistance (SESPAS), National Council for the Elderly, National Council for Childcare Facilities, and pension and insurance funds instituted by special laws for specific sectors or created through agreement between private institutions.

(Release 1 – 2012)
The Subsidized Contributive System includes independent professionals and technicians, as well as self-employed employees with an average income equal to or greater than the minimum national wage. It is financed by contributions from affiliates and from the government, whose contributions make up for the absence of an employer.

The beneficiaries of the subsidized and subsidized contributive regimes receive the following benefits: (a) old age, disability, and survivorship insurance; and (b) family health insurance.

System Affiliation

The following people should enter the system:

- Every citizen working under a contract of employment in the public or private sectors;
- Every person performing productive work on his own account;
- Employers receiving regular income from their enterprise as employees, managers, or owners;
- Dominican citizens residing abroad; and
- Foreign citizens with legal and permanent residence in the Dominican Republic.

Such affiliation is unique, permanent, and mandatory, regardless of whether the person is active or not, has two or more jobs simultaneously, is working in an informal sector, or migrates out of the country, or changes Pension Fund Administrators (AFPs). No one can affiliate to more than one AFP or Health Risk Administrator (ARS), even if he has more than one employer or is performing other productive activities.

If an employee fails to affiliate with the contributive system within the period stated by the law, the employer is required to register him with the AFP and the ARS to which the majority of the employees have registered within 10 days from the expiration of the established date. Contributions to social security and to the reserves and profits of the investment generated from pension funds of affiliates are exempt from taxes or any direct or indirect charges.

Affiliates working for more than one employer and/or receiving income for independent activities should declare such income for accumulation purposes in their personal account.

When an employee is working for more than one employer, he should choose one of them and inform the others of his affiliation number so that they can deliver the appropriate contributions to the same account.

Those who are able to contribute to two of the financing systems provided by law will have to choose the financing system with the highest contribution. The basis of the contributions of employed employees under the contributive system will be their ordinary wages.

(Release 1 – 2012)
Sanctions for Non-Compliance

The employer’s non-compliance with social security obligations is punishable by imprisonment and/or fines, in addition to the five per cent cumulative monthly surcharge on the amount wrongfully retained, when the violation relates to lack of registration of the affiliate or lack of payment of contributions within the period stated by law. The penalty will increase by 50 per cent for a repeat offense.

The power to impose sanctions lasts for three years for family health insurance and occupational hazard insurance and five years for old age, disability, and survivorship insurance. In every case, the power to impose sanctions lasts for five years after the sentence or resolution.

Each of the Superintendences created under the law hears and decides at first instance disputes that arise in their areas of interest between insured employees, employers, and ARSs, Health Service Providers (PSSs), or AFPs. The General Manager of the CNSS is responsible for trying, at first instance, disagreements between insured employees and their employers on the application of social security laws and guidelines.

The CNSS hears appeals from the decisions of its General Manager, the Superintendence, and the Treasurer. The Health and Occupational Hazard Superintendence will act as arbitrator in disagreements between ARSs, the SNS, and PSSs.

Medical Insurance

In General

The peculiarity of the family health insurance part of the contributive system is that it not only provides for the physical illnesses of its affiliates, but also their mental illnesses, which are not usually provided for in private health insurance policies.

The maximum wage contribution for family health insurance is the equivalent of ten minimum wages. Currently, the employees’ contribution to the family health insurance is 3.04 per cent, while the employer’s contribution is 7.09 per cent. The following are considered family members of the affiliate:

- Spouse or partner; and
- Children under 18 years of age, or under 21 years of age if they remain as students, or of any age if they are disabled and dependent upon their parents, who are not affiliated with the SDSS.

Benefits under the family health insurance part of the contributive system can be paid in kind or as money.
**Benefits in Kind**

The basic health plan covers primary healthcare, including: (a) emergencies, specialized care, and complex treatment; (b) hospitalization; (c) surgical assistance; (d) diagnostic tests; (e) dental care; and (f) pharmaceutical products (the beneficiary should only contribute thirty percent of the retail price) and complementary products, such as medical prostheses.

Childcare facilities are being developed to provide care for the children of affiliates from 45 days after their birth up to five years of age.

**Monetary Benefits**

In case of a non-occupational disease of an affiliate who has been contributing for the past 12 months, an illness grant will be paid from the fourth day of illness until the 26th week, and is the equivalent to 60 per cent of the applicable wages for the past six months if medical assistance is provided, and 40 per cent if hospitalized.

A maternity grant equivalent to three months of applicable wages also is available to an affiliate who has contributed for at least eight months during the past 12 months prior to the birth date.

This grant exempts the company from the wage payment established by Article 239 of the Labor Code up to ten quotable salaries to the SDSS. If the female employee’s salary exceeds this limit, the employer will be required to pay the remaining due proportion of such salary.

The affiliate may contribute to complementary health plans to cover services which are not provided by the basic health plan, but the exercise of such option will not imply a double contribution, which is expressly prohibited by Article 141 of Law 87-01.

**Retirement and Pension Funds**

*In General*

Affiliates who are older than 45 years who join the SDSS and wish to compensate for late affiliation can make extraordinary contributions up to three times the amount of regular contributions.

Each affiliate has an individual account where the funds for his eventual pension are deposited. This account is for his sole benefit and will be managed by an AFP, which is in turn monitored and regulated by the Pension Superintendence.

Individuals who are affiliated to previously existing pension plans may remain under those plans subject to being guaranteed an equal or larger pension, and their benefits are assured in the event that they change jobs and/or activity. Such

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52 The current quotable salary is DOP 6,481.
plans also should comply with the provisions of Law Number 87-01 and its complementary norms.

Currently, the employee’s contribution to the pension fund is 2.87 per cent, while the employer’s contribution is 7.10 per cent. The limit of contribution to the pension fund is 20 quotable salaries. For old age, disability, and survival insurance, the maximum wage applicable is the equivalent of 20 minimum wages.

**Old-Age Pension**

Old-age pension applies to affiliates over 60 years of age who have made their contributions for at least 360 months or who are 55 years old and have accumulated enough funds to allow them to enjoy a retirement annuity above 55 per cent of the minimum pension.

**Disability Pension**

In the case of complete disability (i.e., productive capacity being reduced by two-thirds), the affiliate will receive 60 per cent of the applicable base wage. If productive capacity is reduced between one-half and two-thirds, he will receive thirty per cent of the applicable base wage. In any case, the affiliate is required to have exhausted his right to every benefit provided for occupational disease or occupational hazard.

**Severance Pension Due to Old Age**

The affiliate will be entitled to a minimum pension in case of severance due to old age when he is deprived of a salaried job, is 57 years old, and has contributed for at least 300 months.

An unemployed affiliate who is over 57 years of age and has not contributed for at least 300 months will be granted a pension based on the funds accumulated or may continue contributing until the minimum number of contributions has been met to qualify for the minimum severance pension. A severance pension may not exceed the last salary received by the beneficiary.

**Survivor Pension**

Fifty per cent of the survivor pension benefits are paid to the surviving spouse and the remaining 50 per cent goes to other beneficiaries. The following are considered to be beneficiaries:

- Single children under 18 years of age;
- Single children over 18 and under 21 years of age who can prove to have been studying on a regular basis for at least six months prior to the affiliate’s death;
- Disabled children of any age;
- The surviving spouse, as long as he remains unmarried, does not maintain a new *de facto* relationship, and is not receiving a minimum pension provided
by the Social Solidarity Fund. If he is under 50 years of age, he will receive a pension for 60 months. If he is 50 to 55 years of age, he will receive a pension for 72 months. Finally, if he is over 55 years of age, he is entitled to a pension for life. At the time of retirement, the affiliate may choose any of the following options:

- A pension under a retirement plan, keeping his funds with an AFP, in which case he retains ownership of the same and takes the risk of longevity and future profitability; and

- A pension under a life annuity plan, in which case the affiliate gives up full ownership of his personal account to the insurance company in exchange for the insurance company assuming the longevity risk and profitability, guaranteeing the affiliate the life annuity agreed upon.

The right to an old age, disability, and survivorship pension under the contributive system releases the employer from paying the indemnity established in the Labor Code with respect to retirement severance.

**Conclusion**

The Labor Code simplified into a single legal document the labor legislation contained in the various laws, Supreme Court of Justice decisions, resolutions of the Ministry of Labor, and ILO recommendations.

Nevertheless, 20 years have passed and globalization mandates its review to make the Dominican Republic a more attractive choice for foreign investment. In particular, globalization may decrease national production, which might close some opportunities to employees.

Under these circumstances, it is important that the social security and labor legislation become more effective and less “paternal” and centralized. Currently, a labor reform is being promoted, but unions are opposed since they consider that their acquired rights may be diminished.
Introduction

The Guild System

In Egypt, formal employment or labor legislation was unknown until the end of the nineteenth century. Labor matters were previously regulated by the guild system, which was based on every trade having its own guild. Guilds were made up of senior members who were employers with their own establishments, workers who worked for the senior members, and apprentices.

The head of the guild determined the rules, regulations, and penalties that would apply to the trade and its members. He resolved all disputes between the guild members and those with whom they transacted. He also had the right to determine wages and terms of employment.

Advancement to another position was by way of examinations supervised by the guild leader. Any worker wishing to leave a senior member and work for another member had to obtain the senior member’s approval.

The guild system was abolished in 1890 due to the guilds’ dwindling numbers and deteriorating leadership. Everyone became free to conduct his trade and perform his skills in any manner he chose. Employment relationships were governed by the provisions of the Civil Code of 1883 dealing with labor contracts (contracts for leasing individuals).

It was not until the beginning of the twentieth century that legislators saw the need to regulate employment relationships, protect workers from exploitative wages and working conditions, and restrict the employment of juveniles. The development of employment legislation since this period has been influenced by political and economic changes.

First Stage: 1909 – 1952

The legislator’s interest in employment law during this stage was directly linked to the industrial revolution in Egypt. Law Number 14 of 1909 was the first worker’s law promulgated in Egypt and governed the employment of juveniles in cotton spinning plants. The law was extended to cigarette and tobacco factories in 1924.
With the expansion of industries and the growth of the juvenile and female workforce, further legislation was introduced in the early 1930s specifically addressing the terms of employment of juveniles and women in the trade and industry sectors. These were followed by laws on work-related injuries and maximum working hours in some industries.

The first law on the individual employment contract (Law Number 41) was issued in 1944, serving as the first comprehensive piece of legislation organizing every aspect of the employer-employee relationship including terms and conditions of the contract, provisions on wage protection, entitlement to annual and sick leave, and rules on termination of the contract.

The Civil Code of 1948 dealt with general principles applicable to the employment relationship and contract but left details up to separate labor and trade laws. The capitalist and feudal framework prevailed during this period. None of the employment laws addressed peasant workers and farmers or dealt with the problem of job security and unjustified dismissal.

Second Stage: 1952 – 1961

Immediately following the 1952 revolution, Law Number 41 of 1944 was replaced by Law Number 317 of 1952, which abolished discrimination and abuse of the rights of peasants and agricultural workers. It also increased end-of-service entitlements, healthcare coverage, annual leave and holidays, and secured rights in the event of an employer’s insolvency, sale, or merger. Law Number 318 of 1952 on dispute resolution, Law Number 319 of 1952 regarding labor unions, and Law Number 419 of 1955 (Social Insurance System) also were introduced.

After the union of Egypt and Syria was declared in 1958, it was necessary to unify the two States’ employment laws. The Unified Employment Law Number 91 of 1959 combined provisions of several employment laws, including those on individual and group employment contracts, training and apprenticeship, rehabilitation of disabled and unemployed workers, minimum wage, working hours, and women and child labor.

Stage Three: July 1961 – 2003

In 1961, the issuance of Egypt’s socialist laws led to the nationalization of all major industries and means of production. The most important developments in employment law dealt with:

- Providing worker participation in profits and management;¹
- Reducing of working hours in manufacturing industries to forty-two hours a week with no reduction in wages;²

¹ Law Number 111 of 1961 and Law Number 114 of 1961.
² Law Number 133 of 1961.
Doubling the minimum wage for industrial workers and setting the minimum wage for workers in the private sector;\(^3\)

Providing family member entitlement to funeral expenses and other benefits upon the death of an employee;\(^4\)

Issuing of the first independent legislation on labor unions;\(^5\) granting unions and other labor organizations more freedom and a larger role in representing the labor force and influencing socioeconomic policies and goals;

Giving further attention to the rehabilitation of disabled individuals;\(^6\) and

Issuing of a new social insurance law in 1977 which provided for four different types of social insurance (i.e., work-related injury, health, unemployment, and old age and death).

Twenty years after the passage of the Unified Labor Law of 1959, its practical shortcomings had become quite evident. Social and economic trends were changing in the early 1980s, the “open door” trade policy was introduced, and disillusionment with the socialist ideology was slowly setting in. The Labor Law (Law Number 137) of 1981 was thus enacted.

The Labor Law of 1981 added certain provisions not contained in the old law, such as those setting minimum wage rates for workers of the private sector, certain regular and seasonal bonuses, specific employee obligations, procedures and guidelines for disciplining employees, more comprehensive workplace health and safety provisions, and more specific health and social services to be provided by the employer.

Other modifications were introduced to ensure compliance with regional and international treaties and accords to which Egypt had become a signatory, especially resolutions and recommendations of the Arab Labor Organization.

The new Labor Law Number 12 of 2003 (“Labor Law”) was subsequently passed. It amended a considerable number of provisions of the previous law and has recognized, for the first time, the right to peaceful strike organized by unions. It also came up with a new mechanism for resolving labor disputes.

**Legal Relationship of Employer and Employee**

**In General**

Employment is an agreement where one of the contracting parties undertakes to work in the service and under the supervision or control of the other, in

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3 Law Number 102 of 1962 and Law Number 24 of 1972.
4 Law Number 24 of 1974.
5 Law Number 35 of 1976.
6 Law Number 39 of 1975 collected all previous provisions from various laws to create a single law dealing with the rehabilitation of disabled workers.
consideration of a remuneration which the other party undertakes to pay. Thus, employment involves a relationship of dependence and supervision between employer and employee. The elements which make up the employment contract are no different than with any other contract, namely:

- Consent between the parties;
- Object of the contract; and
- Cause (consideration).

Although the individual employment contract is considered the foundation of the employment relationship, it is not the only basis upon which such a relationship can exist. An employment relationship may be created through a direct order by the President with a decree ordering certain work to be performed, or a court sentencing a numbers of hours of a particular service of labor.

Apprenticeships and training agreements give rise to an employment relationship, but legal authors and academics in Egypt are nearly unanimous in the opinion that these do not constitute an employment contract.

The importance of making a distinction between the employment relationship arising out of an employment contract and that which does not lies in the fact that the first is governed entirely by the provisions of the Labor Law while the latter is only governed by some of those provisions. There also is a difference in the competent jurisdiction for dispute resolution on obligations arising out of contractual relationships and non-contractual ones.

**Definition of Employee**

An employee is defined as an individual working in consideration of or for a wage, for and under the supervision and management of an employer. It is thus clear that the Labor Law applies to both male and female employees performing any type of work, be it manual, mental, technical, or a combination thereof in connection with commercial, industrial, or agricultural work.

It also is clear that only natural persons are intended to be subject to the Labor Law since legal entities hired by an employer to perform a certain job would be considered a contractor or agent.

The definition of an employee is not subject to the mode of payment of wages, which can be paid in cash or in kind on a daily, weekly, or monthly basis. The size or type of establishment also is not a determining factor. What is essential in an employment relationship is supervision. Courts are consistent in ruling that a contract that lacks the element of supervision will be considered an independent contractor’s relationship.

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7 Labor Law, art 1.
Certain categories of employees\(^8\) are specifically excluded from the application of the Labor Law because of the public nature of their jobs, or because of family relationships existing between the employer and the employee who exempts the employer from some of his obligations.

There are other groups of workers who are subject to laws specifically addressing them and are thus not subject to the Labor Law. These include employees of public sector companies who are subject to Law Number 48 of 1978, sailors and workers on ships who are subject to commercial maritime law, and miners and quarry workers in the private or public sector who, because of the nature of their work, are governed by Law Number 27 of 1981.

**Contract of Employment**

*In General*

The employment contract is not considered valid unless all its required elements are valid and legally sound. It also is assumed that the parties are competent to enter into the contract and are of sound mind.

If any of these elements are not present, the contract would be void. The contract of employment is required to be in writing in the Arabic language and should be drafted with three copies.\(^9\) In the absence of a written contract, the employee may establish the employment relationship using any means of proof.

Consent to the contract can be explicit or implied. Explicit consent can take the form of a written or oral contract, while implied consent can be inferred from the employee actually beginning work under the employer’s supervision.

**Types of Individual Contracts**

Individual contracts may be of the following types:

- Contract for a definite term (limited-term contract), which defines the exact duration of the employment relationship and can be specified by certain dates or linked to a specific event, such as the completion of a project.\(^10\)
- Indefinite employment contract (permanent employment), which does not specify a term or duration, and is in effect a permanent employment contract which can only be terminated by very limited and specific grounds.

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\(^8\) Under article 4 of the Labor Law, these are (1) those working for the government administration, local government, and public authorities, (2) domestic servants, help, and those in similar positions, and (3) dependent family members of the employer.

\(^9\) Labor Law, art 32.

\(^10\) This type of contract is not renewable for another limited period, i.e., if the contract is not terminated upon expiration, then the employee is considered indefinitely employed by law. Accordingly, if the term is extended by even a single day, such extension gives rise to an indefinite employment contract by operation of law. Such an extension need not be express.
• Temporary work contract, which pertains to employees hired for specific jobs, assignments, or projects where the term of the employment relationship is tied to the lifetime of the assignment or project and not a date or particular time period. Like the limited period contract, any explicit or implied extension of the employment beyond the completion of the specified work automatically renders the employment permanent.

• Casual work contract, which usually involves work which is by nature different to the usual work offered by the employer. Casual work is not a regular continuous job and usually needs to be performed only once or on sporadic occasions.

• Seasonal work contract, which pertains to another form of temporary work that is linked to particular seasons and is only required for a certain period of the year (such as during harvest seasons). Like all forms of temporary work, the relationship would become permanent employment if employment is extended beyond the end of the season.

Parties to the Contract

The parties to an employment contract are the employee and the employer. An employer is defined as a legal personality or entity which the employee is bound to obey through the contract, provide the employment services to, and which is responsible for the compensation of such services.

Dependency in the employment relationship is both legal and economic. The employer’s role in the contract is to manage, direct, and supervise the employee in the job being performed and the employee, because of this dependence on and subordination to the employer, should follow and accept the employer’s supervision.

Just as employees accept subordination and are dependent on the employer, they bear no responsibility for the effects of their work and are entitled to wages and benefits. It is precisely because of the dependent nature of employment that lawmakers saw the need to regulate employment relationships to prevent exploitation of the employee and to ensure that their rights are being protected and upheld.

Capacity of the Parties

The age of contractual majority in Egyptian law is twenty-one, but children from seven years of age may enter into agreements from which they will only benefit and which do not impose any obligation on their part. The employment or training of children under the age of twelve is expressly prohibited.11

Accordingly, juvenile employment contracts are not considered valid unless entered into after the age of twelve. Even then, they are subject to nullification by the minor’s guardian or custodian if the terms of the contract are not in the

11 Labor Law, art 99.
minor’s best interest. In any event, the employer is required to abide by all the legal provisions concerning the employment of juveniles.

As with all contracts under Egyptian law, the parties to an employment contract should be of sound mind. Any contract entered into by an insane or feeble-minded person is considered null and void.\textsuperscript{12}

In the event employees or employers (if individuals) lose their sound mental capacity at any time during the term of the contract, the contract is considered automatically terminated.\textsuperscript{13} This is because the affected party will, through no fault of his own, be unable to perform the obligations.

Other types of “mental weakness” such as foolishness, insolence, or a short attention span may impair emotional or management skills but not necessarily render the affected individual unable to perform his contractual duties.\textsuperscript{14}

\textit{Employment of Foreigners}

An employer’s right to hire foreigners is restricted by law regardless of the employer’s nationality, the type of establishment, or the job to be performed, as long as employment takes place in Egypt.

The employment of non-Egyptians is prohibited unless certain conditions are met by both the employer and employee.\textsuperscript{15} Foreigners in Egypt should obtain work permits issued by the Ministry of Manpower and Training. Foreigners who are employed by non-Egyptian investors whom the General Authority for Investment (GAFI) has already approved for projects in Egypt should obtain their work permits from the permits department of GAFI.

Applicants for work permits should already have valid residency permits which should last for the duration of an employment permit. Reciprocal treatment by the foreigner’s own country also is a condition for granting the work permit and for its validity once issued. The Ministry of Manpower and Training’s Decree Number 700 of 2006 contains all the requirements for obtaining a work permit for foreigners.\textsuperscript{16} Among these are:

\begin{itemize}
  \item A consideration for potential competition between foreign and local manpower;
\end{itemize}

\textsuperscript{12} Civil Code, art 109.
\textsuperscript{13} Civil Code, arts 373 and 159.
\textsuperscript{14} Civil Code, art 322.
\textsuperscript{15} Labor Law, arts 27 and 30.
\textsuperscript{16} These requirements do not apply to the following: (1) members of the diplomatic corps and foreign service recognized by the State, provided that they are working for the country they represent and do not overstep the bounds of their official positions; (2) foreigners who, by international treaty to which Egypt is a signatory, have been exempted from employment requirements and conditions; and (3) administrative employees of diplomatic missions, consulates, foreign commercial representative offices, and the organization and agencies of the United Nations.
• The economic needs of the country;
• The employer’s real need for such foreign labor;
• The foreign employee’s qualifications and experience;
• Compliance with citizenship salary ratio requirements;
• That the work permit is obtained in accordance with existing laws and regulations, specifically those related to professions requiring accreditation;
• That employers are authorized to employ foreigners appoint and train one Egyptian counterpart of similar qualifications for every foreigner working for the same employer; and
• Priority in the employment of foreigners to those born in Egypt or who have lived in Egypt for long periods of time.

There is a citizenship ratio required by Egyptian Law 159 of 1981, i.e., a minimum Egyptian employment rate of ninety per cent in companies subject to this law. Furthermore, total salaries for Egyptian employees should make up at least eighty per cent of total salaries paid by the company.

The Ministry of Manpower and Training’s Decree Number 83 of 1982 also requires all Egyptian businesses and establishments to maintain a minimum rate of ninety per cent Egyptian employment.

Egyptian joint-stock companies are required to maintain a minimum of seventy-five per cent of Egyptian employees occupying technical and management positions, and their total salaries should represent seventy per cent of total salaries for employees occupying those positions. This also is required for limited-liability companies with capital in excess of EGP 50,000.

**Apprentices and Trainees**

Articles 141-44 of the Labor Law recognize apprenticeship and training contracts and regulate their terms and conditions. Such contracts should clearly provide for the duration of each level of training or apprenticeship and the wages to be paid for each stage. The wages for the final stage of training should not be less than the minimum wage prescribed by law for that profession or trade.

The employer may terminate the contract of training or apprenticeship prematurely should the apprentice or trainee prove unfit or unwilling to learn the job or skill for which he is training. The employee also may terminate such contract prematurely, with either party giving the other three days’ notice.

**Transfer of Business by Sale or Merger**

The employment relationship survives even after the sale or merger of the establishment. Terms and conditions of employment remain the same and the
employer’s obligations pass on to the successors-in-interest.\textsuperscript{17} The new owners of the business should follow the strict procedures associated with termination of employees or elimination of positions.

Eliminating positions as part of a downsizing program or because segments of the business operation will be “contracted out” is not an easy matter under the law. Approval for such terminations by a special government committee is required and should be based on strong justifications. The employer’s financial and other internal records could be subject to government inspection, and he may be imprisoned for up to one year should he fail to comply with requirements and procedures in this regard.

\textbf{Terms and Conditions of Employment}

\textbf{Remuneration}

Wages pertain to any amount received by the employee in exchange for work performed in addition to any allowances or bonuses of any kind, specifically:

- Mixed salary;
- Regular allowances;
- Allowances dispensed for increased cost of living and familial responsibilities;
- Commissions paid to traveling salesmen, and sales and commercial agents;
- Benefits in-kind;
- Bonuses awarded to employees for outstanding performance, honesty, and efficiency, bonuses specified in the employment contract, and those which have become traditional or customary (such as those given at religious feasts and holidays); and
- Tips received by employees working in public stores, if it is the custom and such tips can be specified as the service charges applied at restaurants or tourist establishments.

Bonuses or allowances given to an employee on a regular basis or consistently on certain occasions are considered as part of his wage entitlement. The minimum wage is determined by the “national council for salaries” using the “reasonable cost of living” as the benchmark. This council also is in charge of determining the annual increase which should not be less than seven per cent of the basic salary.\textsuperscript{18}

\textsuperscript{17} Labor Law, art 9.
\textsuperscript{18} Labor Law, art 34.
Hours of Work

Maximum Working Hours

The law provides for a forty-eight-hour workweek not to exceed eight hours per working day, excluding meals and break times. Maximum working hours for industrial workers may not exceed forty-two hours per week or seven hours per day. The working day should include meals and other breaks totaling one hour and should not entail more than five continuous hours of work without such rest periods.

Juvenile workers between the ages of fourteen and eighteen may not work for more than six hours a day or for more than four hours at a time without breaks. In any event, they may not work between seven o’clock in the evening and seven o’clock in the morning.

An employer employing juveniles is required to post the work schedule applying to juvenile employees including exact hours, breaks, and days off. The Minister for National Manpower and Training is allowed to issue decrees ordering a decrease in working hours (down to seven hours per day) for certain categories of workers or for certain industries.

Overtime

The employer may depart from the rule on maximum working hours in certain exceptional circumstances to meet some unforeseen or unexpected work needs. Employers are required to compensate employees for overtime at a rate equal to normal wages for the number of overtime hours, in addition to not less than thirty-five per cent of the total amount for daytime overtime and seventy per cent for nighttime overtime. The compensation is double the normal wage for work performed on the weekly rest day if that day is not made up during the following week (weekend). In all cases, working hours may not exceed ten hours in one day.

Employers should post working hours, breaks, and regular holidays at the entrance of the workplace in plain view of all employees and provide the local Labor Office with a copy. Working hours are considered a matter of public order because of their direct effect on the health and productivity of workers and their impact on the economy. Accordingly, increasing working hours under any circumstances (except under the conditions specified by law), even with the consent of the employee, is prohibited.

Rest Periods

In addition to meal and rest periods, employers are required to grant all employees at least one full day of rest at full pay at the end of each six-day

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19 Labor Law, art 80.
20 Law Number 133 of 1961.
working period. Employers are not required to give all employees the weekly day off on the same day of the week. Weekly days off for up to eight weeks may be accumulated to be taken at one time for jobs which require continuous operation or which are located in remote locations.

Night Work

The only restrictions on nighttime work are related to women and juveniles or underage workers. Women are prohibited from working between seven o’clock in the evening and seven o’clock in the morning except in the following instances:

- Working in hotels, public places of entertainment, theaters, cinemas, music halls, passenger transport businesses, airlines, airports, broadcasting and journalism, hospitals, clinics, and healthcare and pharmaceutical institutions;
- During certain holidays, occasions, and seasonal events;
- In certain commercial shops at ports which might be open at night to receive passengers during pilgrimage season;
- Particular professional occupations which are highly specialized;
- In certain key industries up to ten o’clock in the evening where male labor is unavailable; and
- Any other jobs or occasions specified by the Minister of Manpower and Training in official decrees.

Leaves and Holidays

An employee’s right to annual paid leave is considered an entitlement and a matter of public order which may not be limited or restricted by any contract or agreement. An employee is entitled to annual paid leave for twenty-one days for each full year after the first year of employment.

Employees who have been employed for less than one year are entitled to a number of days in pro rata of their duration of service, provided they have worked at least six months.

The annual paid leave for employees with ten consecutive years of service or for employees over fifty years of age is one month. The timing of a leave depends on each individual work situation, but all workers are entitled to at least six days of uninterrupted leave or casual absence21 per year with a maximum of two days per leave. These six days, if used, are deducted from the employee’s annual leave. Continued unapproved absence may result in the employee’s dismissal.

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21 This is defined as days the employee takes off without prior approval by the employer or supervisor.
Unused leave may be carried forward to subsequent years, provided that the employee gets at least six consecutive days of leave in each year and that the unused balance is settled every three years.

Employees who have completed five or more years of employment are entitled, once during employment, to one month’s leave at full pay to perform the holy rites of pilgrimage to either Mecca or Jerusalem.22

Employees are entitled to paid leave on all public national holidays and religious holidays as declared by the Minister of Manpower and Training, provided that such holidays do not exceed thirteen days a year. An employee who has to work on a public holiday is entitled to double wages for that day calculated according to his salary.

Every employee is entitled to sick leave, if such illness can be established. The law differentiates between workers of industrial and non-industrial sectors with respect to length and compensation of sick leave.

Industrial sector employees are entitled to 100 per cent pay for the first month of sick leave, seventy-five per cent for the next eight months, and no pay for the three months thereafter.23 All other employees are entitled to seventy-five per cent pay for the first ninety days of sick leave and eighty-five per cent for the next ninety days, if taken during the same year.

An illness may be established through a medical certificate issued by a registered health professional or clinic. The employer may seek a second medical certificate from a doctor or clinic of his choice at his expense.

In the event that the second medical examination renders results conflicting with the certificate originally presented by the employee, either party may refer to the local office to request adjudication by a specialized medical committee.

Every female employee is entitled to three months’ maternity leave at full pay once she has completed a minimum of ten months of employment with the same employer. Maternity leave may be exercised twice during employment with the same employer or establishment.

Mothers who are nursing (breastfeeding) their infants also are entitled to two half-hour “nursing-breaks” during each workday. These breaks may be taken at any time during the workday for twenty-four months following delivery.24

Female employees in establishments or companies employing over fifty employees may take a leave of up to two years with no pay for the care of a new child. Such unpaid leave may be taken twice during employment.

22 Labor Law, art 53.
23 Law Number 21 of 1958 on the regulation of industry.
24 Article 155 of the Labor Law had only provided for eighteen months, but this was increased to two years by the Child Care Law.
**Health Care Coverage**

Employers are required by Article 220 of the Labor Law to provide their employees with on-the-job first aid and emergency medical supplies, regardless of the number of employees working in the business.

In addition, workplaces employing over fifty employees are required to retain a nurse to administer any first aid or emergency care, as may be needed, and to have a designated clinic and medical doctor at the disposal of the employees. Such medical care as well as any treatment or medicine should be available to the employees for free.

Employers whose employees are at risk of acquiring any type of work-related illness or disease are required to carry out medical examinations on the employees at a regular basis. Such medical examinations are meant to provide early detection of any illness. The General Authority for Health Insurance conducts these examinations for a fee determined by the Social Insurance Law and borne by the employer.

All employees are entitled to the coverage offered by the Social Insurance Law, specifically medical care and treatment for a work-related accident, illness, or any other medical problem the employee may be suffering from. Employers are required by law to pay for each employee’s health and accident insurance in accordance with the Social Insurance Law and the General Authority for Health Insurance.

**Discrimination**

The principle of equal treatment applies only to employees of the same establishment working under similar conditions and does not extend, for example, to employees of the private sector vis-à-vis the public sector or employees in different businesses or industries.

However, employers may choose to reward exceptionally efficient, productive, or otherwise outstanding employees by granting special bonuses or other benefits, as long as preferential treatment is not based on racism or other biases. The Labor Law contains no clear provisions on discrimination on the basis of gender, but equality between the genders is provided for in the Constitution.

Accordingly, there are no differing practices on recruitment, hiring, or terms and conditions for men and women, except those meant to extend protection measures to women in the workplace as well as the benefits and entitlements granted to pregnant women and new mothers.

Law Number 39 of 1975 requires employers of the private sector who employ fifty workers to hire and maintain the employment of rehabilitated disabled persons at a rate of five per cent in the business or establishment as a whole or in

25 Law Number 79 of 1975.
any of its branches. The public sector and governmental organizations also are
required to fill a minimum of five per cent of their third-level civil service jobs
with disabled persons who have recovered.

**Collective Bargaining and Employee Participation in Management**

**Collective Bargaining**

The law allows for collective bargaining through government-sponsored unions,
but collective bargaining rarely occurred in the private sector in practice. As a
result of the privatization of formerly government-owned companies, union
interference became more evident in the past three years.

The most common form of collective bargaining is that which takes place
between a group of workers represented by their union and an employer desirous
to employ the workers through a collective employment contract.

The union negotiates the terms and conditions of the contract including
minimum wage, working hours, holidays and leaves, training of unskilled
employees, methods of dispute resolution and arbitration, employee benefits,
end-of-service pay, and any other condition or detail which serves the
employee’s interests, safety, and security.

Collective bargaining in instances of dispute between an employer and a group
of his employees or to obtain better benefits or terms of employment also can
take place through the union, which represents the group of disgruntled
employees.

Collective bargaining may be in the form of signing petitions to be presented to
the Manpower Office, demanding that employers improve working conditions or
wages. It also includes filing collective lawsuits against employers who are in
violation of employment contracts, and resorting to legal and justified union-
sponsored strikes in the event that all other forms of negotiation or mediation
have failed to produce the employees’ demands.

The Labor Law explicitly grants the right to strike. Strikes should be organized
by the relevant union, and the relevant labor office and employer should be
notified of the strike at least ten days prior to the date of the expected strike.

Strikes are not permissible in entities providing strategic services and which
could affect national security. Employees on strike will be considered on unpaid
leave. Article 374 of the Penal Code prohibits employees providing public
services necessary for the smooth operation of public facilities from
participating in, inciting, or encouraging any form of collective striking.
Penalties for strikers are increased in the event that their striking has disrupted
daily lives, health, safety, or in any way harmed citizens or put them in danger.
Health and Safety Protection in the Workplace

Article 208 of the Labor Law requires employers to provide safety and health protection in the workplace to protect employees from danger and damages at work.26 Failure to comply with protection rules in the workplace will subject employers to a fine and/or imprisonment. Employees should be informed and briefed on the importance of complying with rules and instructions of safety. Failure by the employee to comply would constitute a basis for dismissal.

Workers’ Compensation and Survivors’ Benefits

The Social Insurance Law and some provisions of the Labor Law regulate an employer’s liability to his workers in case of work-related injury or death. Employers are responsible for insuring their workers against work-related injury at the rates specified by the Social Insurance Law.

Distinctions were made in the rate of coverage between the public and private sectors according to the levels of danger or risk that employees are exposed to. No contrary agreements on social insurance may be made between an employer and an employee. Any arrangement which requires the employee to be responsible for insurance payments of this kind will be considered null and void.

Certain categories of employees are excluded from certain benefits of the Social Insurance Laws including old age pension, death, and unemployment insurance. These are workers who are under eighteen years old, students working during their summer vacations, and vocational trainees.

Employees who work abroad benefit only from insurance against work-related injury and old age pension, but do not benefit from any medical coverage or compensation of wages during recovery. If injuries prevent an employee from performing his job, he will be entitled to compensation, which replaces wages.

Employees should be subject to the Social Insurance Law to continue receiving compensation, and wage compensation is not subject to any taxes or deduction-related mandatory insurance payments.

Injured employees or their families are entitled to a pension in the event of death or complete or partial incapacity to perform their job. If the employee’s incapacity is less than thirty-five per cent, compensation is due.

The employee is considered temporarily unable to perform his job even if he has the capacity to perform any other job. If the employer has no work suitable for the partially disabled worker, the audited pension will increase by five per cent.

26 In particular, employees should be protected against the following: (a) excessive heat or cold; (b) noise and movement; (c) light; (d) hazardous radiations; (e) variation of pressure; (f) static and dynamic electricity; and (g) explosions.
every five years until retirement, at which time he will be entitled to his pension only.

Law Number 39 of 1975 regulates the rehabilitation of disabled workers by providing social, medical, educational, and psychological services. These government-sponsored rehabilitation programs are funded by the General Authority for Social Insurance to which all employers and employees make an indirect contribution through monthly social insurance payments. The General Authority for Social Insurance is responsible for the medical care\(^{27}\) of any injured employee until cured or proven incapable of performing his job.

**Termination**

**In General**

The employment contract is a consensual contract binding on both its parties. Should one party fail to perform any of his obligations under the contract, the other party is entitled to request for termination of the contract after giving notice to the party in breach or to simply refuse to perform his obligation until his counterpart remedies the breach.

The employment contract is subject to the general provisions of the Civil Code on termination. The Labor Law also sets out very stringent conditions and procedures for termination of the employment relationship.

**Termination by Mutual Agreement**

The parties may expressly agree to terminate the employment contract, or such agreement also may be implied by their actions. The contract will then be considered mutually terminated on the date of the agreement, at which time it ceases to have any force or effect.

**Termination by Court Order**

Should one party fail to perform any of his obligations under the contract and, despite notification by the other party, fail to remedy such breach, the other party may request the court to order termination of the employment contract.

In this case, the contract is considered officially terminated until a judge provides a ruling. However, the requesting party also may cease to perform his obligations under the contract until a judgment is rendered.\(^{28}\) This method of termination is rarely utilized except in cases where the law has restricted termination by one party to the contract.

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\(^{27}\) Medical care includes all services provided by general and specialized doctors. The extent of such medical care is specified in Article 47 of the Social Insurance Law.

\(^{28}\) Civil Code, art 161.
Termination of a Limited Period Employment Contract

Parties to a limited period contract may not terminate the contract unilaterally until its original duration has expired, except in instances provided by law. However, if the working relationship is not terminated upon expiration of the fixed-term contract, the contract is automatically renewed for an indefinite period.

Notices for the termination of a limited fixed-term contract are not required since it is assumed that the parties are aware of the duration of the agreement.

Termination during Probation Period

Employees may be hired after their successful completion of the probation period, which cannot exceed three months. During this period or at the end thereof, the employer may dismiss the employee on any ground and for any reason.

An employer’s right to terminate is waived should he fail to exercise the right during or at the end of the three-month period.

Resignation

Resignation is another form of termination which can be offered by the employee and, if accepted by the employer, constitutes mutual agreement to end the employment relationship.

This method is used by the employee when there has been no breach of the contractual obligations, thus ruling out resorting to judicial channels to terminate, or when the employer wishes to initiate dismissal procedures and offers the employee the opportunity to resign of his own accord.

The Labor Law allows the employee to withdraw the resignation within one week from the date of acceptance by the employer. In this case, the resignation will be considered nonexistent.

Termination Due to Death

The death of the employee automatically renders the employment contract void since the object of the contract (i.e., the work to be performed) is no longer possible.²⁹

The same does not necessarily apply in case of death of the employer since the operation of the establishment may continue, or the contract may have been entered on behalf of the employing entity or company. However, if the personal

⁲⁹ Labor Law, art 123.
capacity of the employer was a consideration in the employment contract, then his death also would result in termination of the contract.30

Termination Due to Employee Disability

The total incapacity of an employee to perform the job for which he was originally hired, or partial permanent disability for which no other suitable job is available, is a ground for termination of the employment agreement.

The disability should be established in conformity with the guidelines of the Social Insurance Law.

Grounds and Procedures for Dismissal

Permissible grounds for dismissal or discharge of an employee, in both indefinite and limited term contracts, should involve a flagrant violation on the part of the employee. Article 69 of the Labor Law gives the employer the right to dismiss an employee in the following cases:

- Where the employee assumes a different identity or presents false documents.
- If the employee commits a mistake by act or omission which results in major physical loss to the employer, provided that such mistake is reported to the competent authorities within twenty-four hours of its discovery by the employer. The gravity of the loss, if disputed, is decided by the court taking into account the value of the loss against the financial status of the employer and the establishment.
- Failure of the employee to comply with safety regulations as posted in plain view for all employees, provided that he was given notice or warning of such failure to comply. As a rule, posted safety regulations should specify the number of violations each employee is entitled to before dismissal or other penalties are imposed.
- Unexcused absence by the employee for ten consecutive days or twenty intermittent days, provided that he is given notice of dismissal after five days of absence in the first case and ten days in the second.31 Unexcused absence of this kind is considered a default or breach by the employee of his obligations under the employment contract.
- Any divulgence by the employee of the employer’s or establishment’s secrets, regardless of the nature of work being performed or the field of business in which the establishment is engaged.
- If the employee engages in a business that is in competition with the employer’s line of business.
- An employee’s obvious state of drunkenness or being under the influence of any type of illegal drug or narcotic during working hours.

30 Civil Code, art 697.
31 Labor Law, art 69.
• The employee attacks or assaults the employer, supervisor, or manager during the course of work or in relation to it, whether in the workplace or outside.
• If the employee fails to observe the provisions of law related to the necessary requirements to go on strike.
• An employee’s failure or refusal to perform essential obligations and duties under the employment contract.

Procedures for Termination

Labor disputes are now referred by the requesting party to a three-party committee made up of representatives of the labor office, union, and employer for amicable settlement within 21 days upon request. If no settlement is reached, either party may go to court within 45 days.

A request for dismissal by the employer should be decided by the court within fifteen days. If rejected, the court will order the employer to pay a preliminary compensation equal to 12 months of the dismissed employee’s salary (assuming the employee had worked for over a year).

This amount will serve as an “advance” on compensation until the employee files an action requesting the full amount. The amount paid as preliminary compensation will be deducted from the final compensation. Should the termination be found to be unjustified, the court will order the employer to pay damages to the employee amounting to at least two months’ salary per year of service.

The employer may suspend the employee if he has been officially accused of committing a crime. In this case, the employee will be paid fifty per cent of his salary until a decision is made by the competent authority. If the employee is acquitted, he should be reinstated and paid all pending amounts of his salary.

Retirement, Social Security, and Old Age Pension

Egypt has no specific social security or healthcare program for the aged. Part of the social insurance package to which both employers and employees make contributions goes to old age or retirement pension. The employer is responsible for deducting the employee’s pension payment from the wage before it is paid out.

Once retired, the insured employee is entitled to a monthly pension. Entitlement to retirement or old age pension is subject only to the employee having completed at least 120 months’ worth of social insurance payments and is not linked to any other employment status.

32 Essential obligations and duties are those related to the main purpose or object of the contract such that if they are not performed, the purpose of the contract is not fulfilled.
Accordingly, the 120 months (or 10 years) need not be consecutive or under the same employment contract. The Social Insurance Law sets the maximum pension entitlement at eighty per cent of the employee’s wage on retirement.

Social Costs

Social Security, Pension, and Disability Fund
The employer is required to make a monthly contribution of fifteen per cent of the total employee wages paid out to the old age, retirement, disability, and life insurance fund under the Social Insurance Program. The employee’s contribution to this fund is ten per cent of his monthly wage.

Injury Insurance and Compensation Fund
Employers are required to pay between one per cent to three per cent of total employee wages to the Injury Insurance and Compensation Fund, depending on the category of employee and the type of establishment. Employees should not bear any of these costs or make any contributions to this fund.

Health and Medical Insurance Fund
Employers contribute between three per cent to four per cent of total employee wages (depending on the type of establishment) to health and medical care coverage for employees, their spouses, and dependent children. Employees contribute one per cent of their pension if they wish to continue benefiting from the coverage during their retirement years.
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Introduction

Employment law in France is sourced from the Labor Code, the jurisprudence of the Supreme Court, collective bargaining agreements (CBAs), customary practices, and individual employment contracts.

The Labor Code governs the employer-employee relationship in the private sector. Government employees (fonctionnaires) and those employed in the agricultural sector are generally covered by special laws which may supersede the general provisions of the Labor Code.

Employer-employee relationships also are governed by CBAs which, in principle, may grant employees more favorable treatment than the Labor Code. The employment contract also may grant employees greater rights than both the Labor Code and CBAs.

Like all ordinary contracts, employment contracts should comply with the Civil Code, although the Civil Code does not address employment law issues with any degree of detail. Only two articles were devoted to the provision of services. The general governing principle was employment-at-will — the employer or employee could terminate the contract at any time or for any reason, and they were free to fix the salary and the workweek without any government intervention. Security in employment for the employee did not exist.

Toward the end of the nineteenth century, one of the by-products of industrialization was the exploitation of the worker. Freedom of contract meant abuse, not equality, and government intervention in the workplace was deemed necessary to protect the worker.

The first pieces of legislation prohibited child labor abuse. Children under eight years of age were not allowed to work. Laws limiting the duration of employment for women followed. In 1919, the first law limiting the duration of employment for all workers was passed.

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1 The author wishes to thank Marie-Pascale Piot, Caroline Delaporte, and Xavier Caroff for their valuable contributions to this chapter.
2 This was recodified in accordance with the Law of 21 January 2008.
In 1936, the 44-hour workweek and two weeks of paid holidays were established. Laws also were passed to protect the hygiene, safety, and security of the worker and to prevent work accidents and occupational illness.

The employer and the employee remain free to fix the amount of compensation, but a minimum wage has been set since 1950. On the other hand, terminating the employment contract is highly regulated, although flexibility has recently increased. The rights of the worker to organize and to strike have been a source of conflict in France since the French Revolution of 1789.

Worker coalitions were condemned during the first half of the nineteenth century. It was not until 1864 that the ban against worker coalitions was lifted by Napoleon III, and that a worker could strike without the threat of prosecution.

However, unions did not acquire a legal existence until 1884, and collective bargaining laws were not passed until 1919. Such laws require annual collective bargaining, at least with respect to salaries and duration of employment in all companies with union representation.

French law is most protective when it comes to discrimination due to union membership or political persuasion. Legislation also is active in the area of discrimination based on sex, mores, family situation, national origin, age, sexual orientation, race, or religion. Sexual harassment laws were passed in 1992, while “moral harassment” laws were passed in 2002.

As of 1993, a workplace with more than 20 employees is required to employ handicapped workers at six per cent of its total staff, with exceptions. Age discrimination persists without much protection, but employers may not set a maximum limit on the age of a candidate for employment, and protections exist for those approaching retirement.

The law also has protected privacy rights in the recruitment process since 1993, while the 35-hour workweek was established in 1998.

The concept of “State’s rights” is not active in France. Napoleon I believed in a centralized France, which legacy continues today. Recent legislation tends to promote rules negotiated at the company level through collective bargaining negotiation.

The legislation on pension is continuously changing, with the government trying to balance the heavily indebted pensions system by raising the retirement age and having the “senior workers” back in the labor market.

**Legal Relationship between Employer and Employee**

**In General**

An employment relationship arises when a contract of employment has been entered into between an employee and an employer. The general rule is that employment is of undefined duration and that the employee may only be
dismissed for cause. Employment of limited duration is recognized, but only under limited circumstances.

Only employment relationships are governed and protected by the Labor Code. The Labor Code does not define the term “employment”, but case law requires three essential elements, namely (a) performance of a service, (b) remuneration, and (c) existence of a bond of subordination between the employee and the employer.

The element of subordination is critical, and is usually satisfied when the employee has regular working hours and a regular place of employment in the employer’s premises. However, the question becomes more difficult if the employee enjoys a great deal of freedom in performing the job.

Thus, independent contractors, freelance workers, agents, partners, and directors are not considered employees. Doctors, lawyers, architects, and other professionals may or may not be deemed employees depending on the nature of their work, the degree of supervision, and the freedom they enjoy.

The employer should provide the employee work with and the means to do it, and should pay the employee the salary agreed upon and all other benefits conferred by law. The employee should do the work personally, conscientiously, correctly, and loyally. He should obey the employer’s instructions, guard corporate secrets, and refrain from competing with the employer.

While good practice would require that a written employment contract be used, the law may recognize the employment relationship without a written contract or letter agreement. However, an employment contract that is not reduced to writing is considered to be one for an undefined duration.

A provision in an employment contract that seeks to limit or waive employee protections granted by the Labor Code or by any regulation or operative collective agreement is ineffective, as it would be deemed to be a violation of public policy.3

With few exceptions (e.g., the duration of the trial period), the same worker protections apply regardless of the type of contract entered into. The crucial difference between the undefined duration contract and the fixed-term contract relates to termination.

The undefined duration contract can be terminated by the employer’s dismissal (with varying consequences), the employee’s resignation, or by mutual agreement of the parties (rupture conventionnelle), while the fixed-term contract expires automatically at the end of the contract term. An employee under a fixed-term contract is assured of remuneration throughout the contract term, but has no continuing rights upon expiration.

Every employment contract is understood to contain a trial period, during which either party can terminate the contract upon the giving of proper notice without

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3 Labor Code, art L. 2251-1.
consequences, provided that the reason for notice is not abusive. The duration of the trial period for undefined duration contracts is no longer freely determined by the employment contract and/or the CBA. It should comply with the maximum duration provided by the law, depending on the vocational category of the employee:

- Two months for an employee (employé);
- Three months for a supervisor (agent de maîtrise) or technician (technicien);
- Four months for an executive (cadre).

Usually, the greater the qualifications for the job, the longer the notice period. The trial period may be renewed once for the same duration, subject to conditions. The trial period for fixed-term contracts should not exceed two weeks if the contract period is less than six months, and one month if the contract term exceeds six months. The applicable CBA or customary practices may provide for shorter durations.

European Community (EC) Directive 91-533 required member states to enact legislation requiring employers to provide new employees, within two months of being hired, with a document which sets forth pertinent information on the employment contract or their employment conditions. French law considers that the employee’s pay slip satisfies this obligation, but the employer should ensure the signing of an employment contract.

Types of Employment Contracts

Undefined Duration Contract

A contract for an undefined duration is appropriate for the normal and permanent activities of a company. All employment is presumed to be of undefined duration unless the employment falls squarely within one of the other recognized categories of employment contracts.

The undefined duration contract may be of any form. As a general rule, it need not be in writing unless it concerns part-time work. However, a letter of engagement should at least state the salary and the work to be performed.

Fixed-Term Contract

The fixed-term contract (contrat à durée déterminée) is the most common type of special category of contract under the Labor Code. Recourse to a fixed-term contract is allowed to permit a company to adjust to certain temporary work demands without having to increase its permanent staff or to lay people off after they are no longer needed. Fixed-term contracts may be entered into only under limited circumstances specified in Article L. 1242-2 of the Labor Code, such as:

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4 Labor Code, art L. 1242-10.

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• Replacement of a permanent worker (worker employed under an undefined duration contract) in case of illness, maternity, or vacation, or a full-time employee temporarily working on a part-time basis; and
• Employment of a seasonal character or that does not lend itself to an undefined duration (e.g., hotels, performances, and cinematographic productions).

A fixed-term employment contract can be concluded for export assignments of at least six months and may be performed mainly abroad. A CBA should provide for such contract.6

A fixed-term employment contract also can be concluded for the specific hiring of a person at least 57 years old who is registered with the unemployment fund (Pôle Emploi) as an official jobseeker (demandeur d’emploi) for more than three months.7

A general multi-industry agreement dated 11 January 2008 also provides for the conclusion of fixed-term employment contracts with engineers and executives for the performance of a project (contrat à durée déterminée à objet défini). The term of the contract should range from 18 to 36 months. The contract is terminated upon the completion of the project.

In no event can an employee be hired under a fixed-term contract to perform work considered dangerous or to replace a permanent employee who is on strike.8 The fixed-term contract should be in writing, and should specify its purpose, duration, and the work to be performed so as not to be presumed as one for an undefined duration. In cases where the termination date is unknown, the contract should specify that it will expire upon the completion of the project or provide the minimum duration of the contract.

The Labor Code also specifies other information which should be contained in the written contract, including the employee’s position, compensation, and any possibility of renewal.9 A fixed-term contract automatically ends by force of law upon its expiration date without need for termination or justification. However, the employee is entitled to an end-of-contract indemnity equal to 10 per cent of his total gross wages under the contract.

A collective agreement may provide for a six per cent end-of-contract indemnity, provided that it offers other compensation, such as access to professional training.

However, the employment contract may provide for a greater amount. The end-of-contract indemnity is not paid in certain exceptional instances:

6 Labor Code, art L. 1223-5.
8 Labor Code, art L. 1242-6.
9 Labor Code, art L. 1242-12.
• Where the employee is offered and refuses to accept a contract of undefined duration for the same position or a similar position with at least an equivalent remuneration;

• Where the contract is for seasonal employment;

• Where the employee breaches the contract by committing acts intended to harm the employer (faute lourde); or

• In the case of contracts for young employees during the summers and holidays.  

The employer may terminate the employment contract before the term fixed only in case of gross misconduct by the employee or absolute necessity.

On the other hand, the employee may terminate the employment contract before its term if he can prove that he has been hired by another employer under an undefined duration contract.  

A fixed-term contract can only be renewed once, and the total period together with the original term should not exceed 18 months. This may be extended to 24 months under certain conditions (e.g., where the contract is performed outside of France), or reduced to nine months. The conditions for renewal should be provided for in the initial contract.

However, the Labor Code prohibits successive contracts of fixed-term duration with the same employee or with different employees for the same position, except in certain instances such as seasonal employment or replacements for an absent permanent employee.

A company which has dismissed an employee for economic reasons in the last six months cannot hire an employee under a renewable fixed-term contract of more than three months due to a temporary increase in workload or for the performance of a specific and temporary task unrelated to the employer’s ordinary activities.

If the employment relationship continues after the expiration (and permitted renewal) of the fixed-term contract, or if the employee remains employed in violation of relevant rules, the employee may be deemed to be a permanent employee under an undefined duration contract.

Seniority accrues from the beginning of the fixed-term contract, as does the trial period, and the employee cannot be later dismissed except for cause.

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10 Labor Code, art L. 1243-10.
13 Labor Code, art L. 1242-5.
Other Forms of Limited-Duration Contracts

The Labor Code also provides for other forms of limited-term contracts, including contracts for temporary employment with an employment agency and part-time employment. Each form has its own rules with respect to duration, renewal, termination, remuneration, and trial periods.

If such contracts do not strictly conform to statutory requirements, they may be deemed as contracts of undefined duration.

Special Categories of Workers

Young Workers

Workers under 16 years of age can be employed only during the summer and school holidays. Young workers between the ages of 16 and 25 generally can be employed under a contract of apprenticeship, where the employer agrees to train a young worker within at least 400 hours a year or from six months to one year to enable him to obtain a diploma or title.

A four-year term may be agreed when the apprentice is handicapped. In exchange, the young worker commits to remain with the employer throughout the duration of the contract (usually one to three years) and to follow the training.

The contract should be in writing and signed by both the employer and the young worker (or his parents, if he is under 18 years of age). Either party can cancel the contract during the two-month trial period, after which it will run to term as an ordinary fixed-term contract and can be cancelled only by mutual agreement or if the young worker proves to be incapable of following the training.

Since 1975, the legislature has taken certain measures to help young workers enter the workforce. A “plan of emergency” was implemented in 1986 to train workers aged 16 to 25 to help them adapt to an employment setting through various programs. These programs took the form of written contracts of qualification, adaptation, or orientation, which were merged (contrat de professionnalisation) by the Law of 4 May 2004.

The Law of 4 May 2004 also authorizes employees with undefined duration contracts to conclude apprenticeship contracts with their employer. In such a case, the employment contract is suspended until the apprenticeship contract has come to an end.

A law also was passed on 29 August 2002 favoring the employment of youths aged 16 to 22 whose highest educational attainment is graduation from high school. Under the law, the State will grant aid to employers hiring these youths so as to compensate for the cost of social charges.

15 Labor Code, arts L. 6222-1 et seq.
Foreign Workers

Foreign workers should satisfy the requirements of the Office of Migration and Integration before accepting employment. To be legally employed, a foreign worker should have either a resident card or a visa and work permit (carte de séjour salarié). It is possible to obtain a temporary visa and work permit (carte de séjour temporaire salarié), as well as a specific type of visa for seasonal workers.

The prospective employer should present a proposed work contract to the French consulate nearest the foreign worker’s residence and apply for the work permit which, if approved, entitles the foreigner to enter France with permission to work. The employee also should undergo a medical examination and present a medical certificate.17

Citizens of European Union (EU) member states, of the European Economic Area (EEA), and of Switzerland do not need a resident card to live and work in France. However, they should be able to prove their citizenship with a valid identity card or passport. Legislation enacted in 1993 imposes strict punishment for the illegal employment of foreigners.

Violators may find themselves in court18 and/or paying penalties to the Office of International Migrations. Nevertheless, a foreign worker employed illegally should be treated equally as a legal worker with respect to the employer’s obligations under the Labor Code.19

Changes in Employer’s Legal Status

Pursuant to Article L. 1224-1 of the Labor Code and the European Acquired Rights Directive, if an employer’s legal status is modified through merger, sale, succession, or any other change in the form in which the employer does business, the new employer is bound by all employment contracts which were in existence on the day the modification became effective.

The new employer is bound to honor all employment contracts if the new entity continues to perform the same or analogous activities as the prior employer. A transfer is deemed to occur when an activity is transferred or taken over by a new entity. The activity should be an autonomous economic entity. Thus, outsourcing of an accounting department would not meet this test.

The new employer should assume all existing employment obligations on the day of the transfer, regardless of the type of employment contract. As the law assumes that, with respect to the employees, the identity of the employer did not change, the employee retains all the rights and privileges of his old employment,

18 Labor Code, arts L. 8256-1-8. Punishment can include prison time, confiscation of the product produced by the illegal worker, and even a shutdown of the enterprise.
19 Labor Code, art L. 8252-1.
including length of service and accrued vacation, and the new employer is bound to respect all pre-transfer obligations.

As to collective rights, the same protections continue for at least one year, during which time a new collective agreement should be negotiated. If a new agreement is not negotiated in due time, the employees are entitled to retain their individually acquired rights.

If the employee refuses to work for the new employer, he is deemed to have resigned from employment. Much case law has developed with respect to the application of Article L. 1224-1. For example, Article L. 1224-1 applies to the transfer of a business segment or other partial asset transfer, but not where there is a change in management but no change in ownership. It also does not apply in the case of a corporate takeover or a stock sale.

Terms and Conditions of Employment

In General

The Labor Code heavily regulates the terms and conditions of employment, including minimum wage. It also regulates working hours, vacation time, night work, rest time, and sick time, and provides for various types of leaves.

Remuneration

Subject to minimum wage laws and certain collective agreements, the salary to be paid is left to the mutual agreement of the employer and the employee. Almost all employees in the private sector should be paid the minimum salary growth (SMIC).20

As of 1 January 2012, the SMIC hourly wage was fixed at €9.22.21 Violations of minimum wage laws are punishable by fines of €1,500 or more per employee for a first offense.22

Most employees are paid monthly. The employee’s salary should be accompanied by a payment slip (bulletin de paie) containing a host of information detailed in Article R. 3243-3 of the Labor Code, including the employee’s name, salary, applicable collective agreement, and deductions taken out of pay.

The employee’s acceptance of the salary does not waive his right to challenge the correctness of the amount paid, but a five-year prescriptive period runs on

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20 Exceptions apply for young workers under the age of 18 or in training programs. The young worker’s salary should be a percentage of SMIC, taking into consideration the age of the worker and the year of the training.

21 The minimum wage is calculated on the basis of SMIC, which fixes the minimum hourly wage as of 1 January of each year based on economic data for the preceding year.

22 Labor Code, art R. 3233-1; Penal Code, arts L. 131-12 et seq.
any such claim. The employer should maintain a register showing all salary payments made.

In addition to salary, workers often receive a bundle of extras, which may take various forms. Case law distinguishes between contract-based compensation to which the employee is entitled, and voluntary compensation such as bonuses, the payment of which is left to the discretion of the employer.

However, today’s generosity may become tomorrow’s obligation. Additional compensation may be deemed as custom and usage if the following conditions are met: (a) generality, or that every employee of a certain category receives it; (b) continuity, or that it is given several times under the same situations; and (c) the same calculation is used to arrive at the amount given. In such case, the employee would be able to claim an entitlement to those additional items of compensation.

**Working Hours and Overtime**

*Maximum Working Hours*

Working time is strictly limited in Europe and notably in France, due to European regulations and Directives aiming at protecting the workers’ health and safety. In France, the daily maximum hours worked is set at 10.

The maximum working hours within a week is 48 hours per employee. The average weekly working hours calculated over a 12-week average should not exceed 44 hours per week, but an absolute maximum of 60 hours per week is allowed under exceptional circumstances.

Additional work beyond these limits (48 hours in a single week or 44 hours per week in average over 12 weeks) may be allowed after consulting with one of the worker management committees and with the permission of the Labor Inspector.

The legal duration of the workweek was reduced as of 1 January 2002 from 39 hours to 35 hours for all companies. Line employees are generally subject to the 35-hour workweek. However, a company agreement or an industry-wide CBA may provide that the working time will be organized as an average over a period which exceeds one week, but no longer than one year, in order to better fit with the constraints resulting from the company’s activity or the needs of the sector or industry.

In the absence of a collective agreement, the employer may decide that working hours will be calculated as an average over a maximum period of four weeks.

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23 Labor Code, art L. 3245-1.
24 Employers are required to reimburse employees for one-half the cost of public transportation to and from work.
25 Labor Code, arts L. 3122-2 et seq.
26 This would notably help avoid the employer’s exposure to payment for overtime during heavy work periods.
The normal 35-hour workweek does not apply to managers who work on an individualized schedule, such as senior management, autonomous managers, and, under certain conditions, non-managers as well. The working time of “autonomous managers” is generally measured according to a fixed number of days per year (forfait-jours system), regardless of the actual number of hours worked.

Due to European case law and regulations, the validity of the forfait-jours system was questioned in France. On 29 June 2011, then on 31 January 2012, the French Supreme Court (Cour de Cassation) confirmed the validity of the system, provided that it is accompanied with strict limitations and guarantees in terms of working time, health, and safety.

Overtime

Under the Law of 20 August 2008, an employee can work more than 220 overtime hours per year without the special permission of the Labor Inspector, unless the applicable CBA provides otherwise.

Overtime is paid at increased rates as follows: (a) 25 per cent from the 36th hour to the 43rd hour; and (b) 50 per cent from the 44th hour unless the applicable CBA provides for other rates, which should be at least equal to 10 per cent.

The additional pay can be fully or partially replaced by a compensatory rest. The Law of 21 August 2007 exempts overtime payment from social security contributions and income tax under certain circumstances.

Compensatory Rest Periods

A compensatory rest should be granted for any hour worked beyond the 220-hour annual legal overtime ceiling (or other collectively bargained ceiling).

In companies employing at least 20 employees, the compensatory rest is one hour for each employee, or 30 minutes in companies employing less than 20 employees. A CBA may define the conditions of the rest.

Weekend Work

An employee cannot be employed for more than six days a week. In general, the day off should be Sunday and should be for 24 hours, although there are numerous exceptions under the Labor Code.

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27 Senior managers are top executives entrusted with large responsibilities who are authorized to make decisions and organize their working time autonomously. Their position allows the company to exempt them from the legal constraints of working time limits.

28 Autonomous managers are autonomous in organizing their working time.

29 Non-managers can benefit from a relative autonomy.

30 This is usually set forth in CBAs as 218 days in a year.


32 Labor Code, art L. 3121-11.
For instance, employers whose business activity covers hotels, restaurants, museums, hospitals, florists, and tobacco shops may grant their employees a day off other than Sunday.33

Night Work
Any work performed between nine o’clock in the evening and six o’clock in the morning is considered as night work. The Labor Code used to prohibit night work for young workers and for women, but a decision of the European Court of Justice in July 1991 (the Stoeckel case) stated that such provisions hampered women’s position of equality and are contrary to the principles of non-discrimination against women.

A law was thus passed on 9 May 2001 removing the distinction between men and women as far as night work is concerned. However, night work should remain an exception and should be justified by the necessity of ensuring the continuity of the company’s business activities or a service of social utility. Special exemptions exist for media and entertainment businesses. Compensatory rest and — under certain conditions — payment compensation are allocated to balance with constraints that are inherent in night work.

Part-Time Work
Prior to 1991, the option of part-time work could only be initiated by the employer. This has since changed, and the employee or the employer may initiate part-time work.

An employee may refuse an employer’s request to convert to part-time work, and the refusal cannot be a ground for dismissal. A part-time employee has priority in filling a full-time position if one becomes available. In all other respects, part-time employees have the same rights as full-time employees.

Public Holidays

Employees should perform one additional working day per year (“Solidarity Day”), but are not paid by the employers, who actually pay a specific contribution. In the absence of any industry or company agreement regarding the day chosen as Solidarity Day, this additional day of work takes place on Monday of Pentecost.

Only 1 May is an obligatory paid vacation day for all employees other than those employed in establishments which, because of their nature, cannot close


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(e.g., hospitals). The employees of those establishments are thus entitled to double compensation.34

An employee requested to work on a public holiday other than 1 May should do so without a statutory right to extra compensation, although most collective agreements provide otherwise. If the employee is not required to work, he should be paid for the day. If the public holiday falls on a Tuesday or Thursday, most employees are allowed to faire le pont (“make the bridge”) and take the preceding Monday or the following Friday off.

Vacation

As a general rule, each employee is entitled to paid annual vacation during which he should not work. Working for another company during this time constitutes a ground for dismissal. For each month of work, the employee legally accrues 2.5 working days of paid vacation not to exceed 30 vacation days per year. Four weeks of work, or 24 working days (six days per week), are considered to be one month of work.

Both the employer and the employee decide when the vacation leave will be taken. The employer cannot change the vacation period within one month before its commencement unless exceptional circumstances arise.

Certain restrictions on vacation are provided by the Labor Code. For instance, no more than 24 working days (four weeks) of leave may be taken at any one time, and at least 12 consecutive work days should be taken between 1 May and 31 October. Married employees in the same company are allowed to take their leaves together.

If the employee resigns or is dismissed with vacation time outstanding, the employee is entitled to be paid accrued leave time in full, unless he is dismissed for engaging in conduct intended to harm the employer (faute lourde).

Sick Leave

The Labor Code does not limit the number of sick days an employee may take per year. However, the employee should substantiate the illness by presenting a medical certificate to the employer within 48 hours of his absence from work. The employer may ask the employee to submit to a second medical examination to verify the illness.

As the employee is technically not working during his illness, his absence suspends the employment contract, and the employer is technically not required to pay him during his illness. In practice, collective agreements provide greater protection for the employee in such a case, and require employers to pay the ill employee a certain percentage of the difference between what the employee receives from the social security system and his usual salary.

34 Labor Code, arts L. 3133-4-6.
After his third day of absence, the ill employee is entitled to compensation from the social security system. An employee with at least three years of service within the company is entitled to receive combined compensation of 90 per cent of his salary for the first 30 days of absence, and 66 per cent of his salary for the next 30 days.\textsuperscript{35}

The prolonged illness of an employee which disrupts business operation may be a real and serious cause for dismissal, but collective agreements may prohibit this practice. To establish the disruption caused by the absence of the ill employee, the employer should show that a new worker would have to be employed on an undefined duration contract to replace the ill worker.

The employer should explore other possibilities to accommodate the employee’s illness before taking the extreme measure of dismissal. The employer should proceed with caution in dismissing an employee on sick leave because if the legal requirements are not met, the employee may seek a declaration that the dismissal is null and void and ask for reinstatement and/or enhanced damages and dismissal indemnities.

Employees are entitled to continue benefiting from welfare and medical schemes and plans for nine months from the termination of their employment contract (except in case of dismissal for willful misconduct) as long as they are covered by unemployment insurance.

\textbf{Maternity and Paternity Leave}

A pregnant woman is entitled to maternity leave for 16 weeks, which should be six weeks before her due date and 10 weeks after delivery. She should formally advise her employer of these dates through a letter with return receipt requested. The leave may be extended if required by the woman’s health and after a doctor’s certification, but not beyond eight weeks before and 14 weeks after delivery.

If a pregnant woman already has two children, her leave is automatically extended to eight weeks before birth and 18 weeks after delivery. The maternity leave also is extended for multiple births (a total of 34 weeks). The father also may benefit from the birth of his child with an 11-day leave (or 18-day leave in the event of a multiple birth) as paternity leave.

In the case of adoption, the employee is entitled to a leave of 10 weeks after the arrival of the child. The employee should advise the employer when she intends to return to work. The leave also is extended to 18 weeks if the woman already has two children at home.

\textsuperscript{35} These time periods are extended by 10 days for every five years above the first three years of service. For instance, an employee with eight years of service is entitled to 90 per cent pay for the first 40 days of illness, and 66 per cent for the next 40 days.
The employee’s work contract is suspended during maternity leave, and she is not paid by her employer even if she is entitled to a daily indemnity from the social security system, which is 84 per cent of her daily salary subject to a ceiling. CBAs often provide that women on maternity leave are entitled to their full salary, in which case the employer pays the difference.

Maternity leave is a right which a pregnant woman may choose not to exercise. However, even if a woman chooses not to take her full leave, the employer cannot allow her to work two weeks before the anticipated delivery date and six weeks after delivery. All violations are punishable by fines of € 1,500 or more for a first offense, which is doubled if a second offense occurs within one year.

**Child Care Leave and Other Family Leaves**

A three-day personal leave is granted for the birth or adoption of a child. Parents also are entitled to an educational leave within which they can choose to work part-time or not at all, provided they have at least one year of service.

The leave is initially for one year, but may be extended twice until the child reaches the age of three (or until the third anniversary of the adoption of the child). The employee is not paid during an educational leave, but he is entitled to return to his job or to an equivalent job at the end of the leave.

If the employer has fewer than 200 employees and believes that the educational leave will adversely affect the business, he may (with the approval of the works council) refuse the employee’s request for educational leave.

Certain family events likewise trigger certain leaves, namely four-day leave for marriage, one-day leave for the marriage of a child, two-day leave for the death of a spouse or child, and one-day leave for the death of a parent. CBAs may provide enhanced leave for these events.

The Law of 19 December 2005 and two Decrees issued in June 2006 allow an employee to 310 days of absence over three years to accompany his child under 20 years of age who suffers from a disease or handicap or was the victim of an accident. The employee is not paid during such absence, but he is given a specific social security allowance.

**Other Special Leave**

Certain leaves also are recognized for a variety of other personal pursuits. A one-year leave may be taken for technology training related to one’s job, and a 20-day leave may be taken to seek public office.

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36 Labor Code, arts L. 1225-4 et seq.
37 Labor Code, art L. 1225-29.
38 Labor Code, art R. 1227-6.
41 Labor Code, arts L. 6322-53 et seq.

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An employee also may be entitled to leave without pay to create a business, provided he has at least three years of service. This leave usually lasts for a year, but can be extended for two years. The work contract is considered to be suspended during this period.

Employees with six years of professional activity and three years of service in a company also are entitled to a one-time sabbatical leave without pay which may last from six to 11 months, during which the work contract is suspended. Unpaid leaves which should not exceed 12 days per year also are recognized for social and economic education or union training.

**Continuing Vocational Education or Professional Training**

Employees have collective and individual rights to continuing training. Employers with at least 20 employees should contribute 1.6 per cent (or 0.55 per cent for companies with less than 10 employees or 1.05 per cent for companies having between 10 and 20 employees) of the total salaries paid over the past year to vocational training programs.

Employers are required to meet once a year with the works council or the personnel representatives to discuss, negotiate, and decide on vocational training programs to be undertaken for the coming year.

An employer may schedule training programs for his personnel within the framework of a company training plan (plan de formation). In principle, these should take place during working hours. Employees may not refuse to participate in the continued training programs which take place during working hours, but they may refuse to participate in those that are scheduled outside of working hours.

Should they decide to participate, the employer can require them to partially reimburse the cost of the training if they subsequently resign, provided they earn more than three times the SMIC wage and such contribution has been provided for in a specific agreement prior to the training session.

Employees who have served for at least one year acquire an individual right (Droit individuel à la formation — DIF) to professional training corresponding to 20 hours per year that can be accumulated over six years. The implementation of the employee’s right is subject to the agreement of the employer, especially as regards the choice of the training session.

The employer can decide the timing of the individual training, taking into consideration the needs of the business and the number of other employees.

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43 Labor Code, arts L. 3142-91 et seq.
44 Labor Code, arts L. 3142-7 et seq.
already on training leave. Under certain conditions, employees may continue to benefit from their individual rights to professional training after the termination of their employment contract (except in case of dismissal for willful misconduct).

Health Care Coverage

Health care coverage in France is one of the most comprehensive in the world. The healthcare system is a part of the mandatory social security system which also includes maternity, old age, invalidity, death, work injury, unemployment, and retirement.

The social security system is financed by the State, the employee, and the employer. The employer’s mandatory contribution alone is approximately 40 to 50 per cent of the employee’s gross salary. Because the social security system only reimburses the employee for approximately 70 per cent of healthcare costs, many employers offer their employees a supplementary insurance (mutuelles) to cover the remaining costs. The government encourages companies to implement supplementary healthcare insurance considering the tremendous budget deficit for healthcare coverage.

Modification of the Employment Contract

The employer is at liberty to unilaterally modify the terms and conditions of employment. If the employee does not obey, he may be dismissed for cause. However, a modification of a term of the employment contract can only be made by mutual consent of the parties. Modifications of the remuneration, place of employment, or the duties of the employee require the employee’s written consent.

Discrimination

In General

An employer cannot discriminate against an employee based on sex, mores, marital status, national origin, race, gender, political opinion, religion, or union membership or any related activities. Dismissal of an employee based on such grounds is considered null and void.

Laws that protect against discrimination were not as developed in France as they are in the United States. The most developed laws on this matter cover gender discrimination and protection for the handicapped. Nevertheless, employees have been raising more claims on the basis of discrimination.

A recent series of laws were enacted to harmonize French regulations with European standards and to extend the scope of discrimination to sexual and/or

46  Labor Code, arts L. 6322-7-9.
moral harassment. Criminal penalties for discrimination against victims and witnesses of sexual or moral harassment are provided by the Law on Social Modernization dated 17 January 2002.

In 2004, the High Authority against Discrimination and for Equality (HALDE) was created to ensure the actual implementation of these protective laws. The HALDE was replaced as from May 2011 by a new constitutional and independent body called the Défenseur des droits, which is empowered to fight against discriminations prohibited by law by assisting and supporting victims in proving alleged discriminatory misconducts.

**Gender Discrimination**

*Women Workers*

Discrimination in recruitment and hiring on the basis of gender or marital status has been unlawful since 1983. It is unlawful to mention in an employment advertisement, or in any other publicity relating to employment, a requirement of gender or marital status of the prospective candidate.

Employers also are prohibited from deciding on hiring, transfers, promotions, renewal of employment contracts, or dismissals on the basis of gender or marital status or on the basis of criteria which differ on account of the applicant’s gender or marital status.

Women and men should be compensated equally for work of equal value. This includes all calculations with respect to remuneration, including methods and criteria used for employee evaluation. The burden of proof in a discrimination case is on the employer, not the employee. Once the plaintiff has put forth a *prima facie* case of discrimination, the burden shifts to the employer to establish that objective reasons exist to justify the apparent discrimination.

To monitor compliance, employers with at least 50 employees are required to report annually to the enterprise committee on the comparative working situation of men and women in the enterprise, including figures on remuneration and training. The Labor Code does not prohibit employers from taking temporary measures for the sole benefit of women with the goal of providing equality between men and women.

Unions may pursue violations of Articles L. 1142-1 *et seq* even without the request of the victim, who only needs to be informed of the action and not oppose it. Dismissal of the employee after a lawsuit is filed by the employee or the union on his behalf for a violation of Articles L. 1142-1 *et seq* is void if it is

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48 Pursuant to the Law of 29 March 2011.
50 This principle is captured in the Law of 23 March 2006 (loi relative à l’égalité salariale entre les hommes et les femmes), which sets forth equal pay for men and women for an equivalent job ("à travail égal, salaire égal").
established that the action was retaliatory and that the dismissal lacked a real and serious cause.

In such a case, the employer will be ordered to reinstate the employee as a matter of law. If the employee refuses reinstatement, he may be awarded a minimum of six months’ salary in addition to the other indemnities for an unjustified dismissal.51

Legislation prohibiting sexual harassment in the workplace covers the use of orders or threats by a person to obtain sexual favors, and demands made by a supervisor for an employee to have sexual relations with an important client. Violations can result in criminal penalties of up to three years in prison and disciplinary sanctions by the employer, in addition to €45,000 in penalties.

Pregnant Woman Worker

A woman may not be discriminated against because she is pregnant. She is not required to reveal the fact of her pregnancy, nor can the employer seek information regarding her pregnancy status.52 A pregnant employee may be temporarily transferred to a job which is more appropriate to her situation if her medical condition warrants it. If the employer and the employee disagree with respect to the transfer, the industrial doctor makes the determination.

A pregnant woman cannot be dismissed during her pregnancy, maternity leave, or the four weeks following the expiration of this period regardless of whether she chooses to exercise her right to the leave or not.53 The employer can dismiss her only if he:

- Proves that she has committed a very serious fault (faute grave) not related to her pregnancy; or
- Finds it impossible to maintain her employment for reasons not related to her pregnancy (e.g., reduction in demand, closing of the business).

Dismissal of a pregnant employee other than for these reasons is void, and an employer who chooses to dismiss a pregnant employee for any of these reasons should respect dismissal procedures. The employer cannot begin the dismissal process until the employee returns to work. Any dismissal proceeding during the leave period is void if the employee informed the employer of her pregnancy and provided a medical certificate to that effect.

The employer should pay the employee her salary throughout the protected period (four weeks after the maternity leave period expires), and the employee on maternity leave is entitled to general salary increases which occur during her absence.

52 Labor Code, arts L. 1225-1-3.
The employee is entitled to indemnities if she is fired, and may be entitled to damages if the dismissal lacks a real or serious cause. The employer also may be subject to criminal sanctions. The rules on dismissal of a pregnant employee also apply with equal force after the adoption of a child. A fixed-term contract is not affected by the employee’s pregnancy. The pregnancy will not accelerate the termination date or prevent the fixed-term contract from expiring.

**Age Discrimination**

Article L. 5331-2 prohibit advertisements for employment which set a maximum age of the applicant, but in practice, people over 50 years of age often encounter difficulty in finding work. Any clause in a contract or collective agreement which states that the age of the employee or the employee’s right to receive a pension is a cause for dismissal is null and void.

A company with at least 50 employees should either sign a CBA or implement an action plan to improve the employment rate of seniors, otherwise the company is subject to a penalty of one per cent of the gross wages (masse salariale), paid monthly. This penalty may not be imposed if the company has less than 300 employees and is already covered in this respect by an industry-wide CBA, subject to conditions.

**Race or National Origin Discrimination**

No person may be discriminated against in recruitment or hiring on the basis of race, national origin, or family situation. No person also may be disciplined or terminated from employment on account of race, ethnicity, or national origin.

The Commission Nationale de l’Informatique et des Libertés (CNIL), a national commission for the protection of privacy and the rights affected by the use of computerized data, regularly ensures that employers do not collect and/or use data relating to race or ethnic origin.

**Physical or Mental Handicap of Workers**

All employers with at least 20 employees should employ, on a full-time or part-time basis, handicapped workers as six per cent of the total staff. The definition of “handicapped” pertains to any diminution in either physical or mental capacity, regardless of the cause. This may include invalids, war orphans, and war widows.

Employers may be exempt from the six per cent requirement if they satisfy other requirements to improve the conditions of the handicapped in the workplace,

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54 Labor Code, art R 1227-5.
56 Labor Code, arts L. 1132-1 et seq.
57 Labor Code, arts L. 5211-1 et seq.
i.e., establishing a plan for the placement, training, and adaptation of the handicapped to technology.

Employers also may be exempt if they contribute financially to programs for the integration of the handicapped into the workplace. Employers are required to submit annual reports to show compliance.

Financial assistance from the State is available, including aid to adapt tools and machines for the handicapped and to refit work stations. The health, safety, and working conditions committee and the works council of each company should be consulted with respect to the employment and retention of handicapped workers in the company. As regards terminations, the handicapped worker is entitled to an extended notice period.\textsuperscript{58} In deciding the selection criteria for dismissals for economic reasons, the employer should consider the difficulties handicapped (and elderly) workers would encounter in being rehired and should thus accord them special treatment.\textsuperscript{59}

Associations for the assistance of the handicapped may bring actions for violations of employment law related to the handicapped if the violation is detrimental to the interests of the association. The relevant company also faces heavy financial costs in case of breach of its duties to the handicapped.

**Religion**

The Labor Code and the Penal Code protect workers against discrimination on the basis of their religious beliefs.

Discrimination is prohibited in recruitment, hiring, dismissal, and disciplinary sanctions based on the employee’s religious convictions.

**Collective Agreements and Worker Participation in Management**

**In General**

The national character of unions in France and their function as negotiators and agents for political change distinguishes them from American unions. Their memberships may be formed along social, philosophical, or ideological lines.

Under the law, employee participation in management is very broad, touching almost every aspect of company operations and management which affects employees.

**Unions**

Under the Constitutions of 1946 and 1958 and the Labor Code, each employee has the absolute right to defend his interests and rights through union activities.

\textsuperscript{58} Labor Code, arts L. 5213-9 and L. 1234-1.

\textsuperscript{59} Labor Code, arts L. 1238-4 \textit{et seq.}
The worker has the right to organize or not to organize and to join or not to join any union of his choice regardless of his gender, age, or nationality.

Unions are organized to represent employees or employers, and to defend the individual rights and professional interests of their members. Commercial activity is prohibited. A union may be freely formed with a minimum of formality, and no administrative authorization is needed.

No closed shop practice exists in France. The worker has the right to resign from the union at any time and cannot be penalized in employment or in the workplace for refusing to join a union. Nor can an employer discriminate against a worker on the basis of membership in a union or participation in union activities. Several unions may be represented within the same company, and an employer may be required to deal with each of them.

A union has the legal capacity to acquire property, to enter into contracts, and to appear in court on its own behalf to defend its own rights, to defend the rights of its members, or to defend the interests of the profession it represents.

Breaking significantly with the presumption of union representation since World War II, pursuant to the Law of 20 August 2008, all unions must now prove that they are “representatives” at the level which they bargain, in accordance with the following cumulative criteria:

- Minimum length of service of two years at the level of bargaining concerned;
- Independence;
- Financial transparency;
- Respect of republican values;
- Sufficient influence of the union (activity and experience);
- Sufficient workforce subscribers and union contributions collected; and
- Sufficient attendance of the union, i.e., at least 10 per cent of the votes at the first tour of the professional elections within the company.

Historically, the largest national employee unions which mainly negotiate collective agreements on a national level for employees are Confédération Générale du Travail (CGT), Force Ouvrière (FO), Confédération Française Démocratique du Travail (CFDT), Confédération Française des Travailleurs Chrétiens (CFTC), and Confédération Générale des Cadres (CGC). Most employers are represented by the Mouvement des Entreprises de France (MEDEF), which is the largest employer union.

**Collective Agreements**

Unions represent employees in industry-wide collective bargaining sessions and negotiate collective agreements with employer groups. The representative national and/or local unions and their affiliates also play a significant role in legislative action and in worker participation in the management of the enterprise.

(Release 1 – 2012)
At the negotiations, employees are represented by one or more union(s) and employers are represented by one or more employer union(s) or employer group(s). While employees may join the union of their choice, the most representative union usually has the most influence in negotiating with employer groups or unions.

The territorial and professional scope of the collective agreement is determined by the collective agreement itself. The territorial scope may be national, regional, or local, depending on the level at which the negotiations take place. The professional scope is determined by the dominant economic activity.60

The collective agreement should be in writing61 and cannot diminish or waive employee rights already granted by the Labor Code.62 The Labor Code and the national collective agreement establish the minimum conditions of employment, although a national CBA may be supplemented by regional, local, or company agreements.

Traditionally, agreements concluded at local levels could increase, but not decrease, the advantages provided by agreement concluded at a higher level. However, the Law of 4 May 2004 and the Law of 20 August 2008 provide that a local agreement may depart from an agreement concluded at a higher level, even in a less favorable sense, under certain conditions.

Such a local agreement should be approved by 30 per cent of the trade union representative organizations who signed the agreement, and without the formal opposition of the majority of trade union representative organizations who did not sign the agreement, when these non-signatory organizations have obtained a 50 per cent majority of the votes at the last professional elections.

Once the collective agreement is signed, all employees within an enterprise are protected by that collective agreement, regardless of whether they belong to the union(s) which negotiated the agreement or to any union at all. All enterprises which fall within the territorial and professional scope of the agreement and which are signatories to it are likewise bound.63

Intra-company agreements also may supplement workers’ rights. In all companies with one or more representative unions, the employer is required to meet and negotiate at least once a year with the union representatives on salaries, working hours, and the organization of work.

60 For example, a truck driver working for a chemical company will be covered by the collective agreement of the chemistry branch because that is the dominant activity of his employer, and not a truck driving union.
61 Labor Code, arts L. 2231-1-3.
63 Under certain circumstances, the government may extend coverage of collective agreements to non-signatory companies which nevertheless fall within its territorial and professional scope. Thus, an employer may be bound as a matter of law to a collective agreement that it never negotiated or agreed to.
CBAs can be of a fixed or undefined duration. A collective agreement of undefined duration may be amended or cancelled by either party under certain circumstances and following the appropriate notice procedures. The term of a collective agreement of a fixed duration may not exceed five years.

In either case, the expired collective agreement will remain in force until a new collective agreement is negotiated. If no agreement is reached after one year, the collective agreement is no longer in effect, but the employees retain their previously acquired individual rights.64

Worker Participation in Management

In General

There are several entities within a company whose object is to represent employee concerns and inform the employees of company activities.

These are the union section within the company, the union delegates, the union section representative, the personnel representatives, the works council, and the Health and Safety at Work Committee (the “Committee”).

Trade Union Sections

Unions also may be granted a host of rights to represent employees within the company provided that they are representatives or have been constituted for at least two years.

For example, each union represented within a company employing 50 or more employees has the right to form a union section entitled to participate in all worker discussions with management.

Because of their special function, the representatives of the union sections are considered to be protected employees (salariés protégés) and may not be dismissed without prior authorization from the Labor Inspector.65

Trade Union Delegates

Trade union delegates (délégués syndicaux) represent the trade union which appointed them, and bring employees’ proposals and claims to the employer. They may be appointed under the following conditions:

- The trade unions qualify as representatives under the Law of 20 August 2008;
- The trade union delegate that is to be appointed has gathered at least ten per cent of the votes at the first tour of the last professional elections within the company.

64 Labor Code, arts L. 2222-4-6 and L. 2261-7-14.
65 Labor Code, arts L. 2411-1 et seq.

(Release 1 – 2012)
As a principle, they benefit from a monopoly concerning the negotiation of CBAs. They also are especially protected with regard to the modification or termination of their employment contracts.

**Trade Union Section Representative**

Each trade union is entitled to appoint a trade union section representative (représentant de la section syndicale) within companies with at least 50 employees so long as the trade union (a) has constituted a union section prior to the searched appointment, and (b) is not representative within this company.

The trade union section representative ensures that the trade union will obtain at least 10 per cent of the votes at the next professional elections within the company. Thus, if the threshold is reached, the trade union becomes representative and is then entitled to negotiate CBAs.

The trade union section representative also passes the employees’ claims on their working conditions to the employer. They also are especially protected with regard to the modification or termination of their employment contract.

**Personnel Representatives**

An employer with 11 or more employees should have a personnel representative. One representative is required for companies with up to 25 employees, and two representatives for those with 26 to 49 employees. Collective agreements may provide rules for companies employing fewer than 11 persons.

The personnel representative presents individual and collective claims and grievances on salary and working conditions to management, concurs in the reorganization of employee work schedules, and informs the Labor Inspector of violations of the Labor Code.

The personnel representative also has the right to an alert (droit d’alerte). If he learns of acts by the employer, he may exercise his right of alert, following which the employer is required to investigate and resolve the issue.

If the personnel representative is not satisfied with the employer’s response, he or the employee concerned can seek relief from the labor court.

The personnel representative is elected by the employees for a four-year term and may demand a meeting with the employer once a month. Because of the nature of his task, the personnel representative also is considered to be a protected employee and is entitled to special protections with respect to dismissal. Internal rules should be drafted by the employer and reviewed by the representatives in companies with more than 20 employees.

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66 Labor Code, arts L. 2311-1 et seq and L. 2315-12.
Works Council

Companies with at least 50 employees should have a works council, which is tasked to supervise company activities that affect the employees’ welfare, and to advise and cooperate with management on the general working conditions of all employees. The works council also is in charge of all social and cultural activities of the company.67

The works council is comprised of employees (elected for four years or between two or four years, should the applicable CBA provide) and chaired by the employer or his representative. It should be informed and consulted on economic matters relating to the operation and management of the company, including holidays, reduction in the labor force, working hours, salary rates, and professional training.

It should be provided the same corporate information that shareholders receive (e.g., annual reports and financial data). The works council should be invited to board meetings, but has no voting power. Members of the works council also are protected employees and are entitled to special protections against dismissal.

Health and Safety at Work Committee

The Committee should be set up in establishments with at least 50 employees. Members of the Committee are entitled to special protection against dismissal. The role of the Committee continues to increase.

Employees’ Rights to Free Expression

All employees have the right to express their views, individually or collectively, on the content, conditions, and organization of their work.

The employer should organize at least one meeting a year to facilitate the employees’ expression of their views. The employees’ exercise of this right is not a lawful ground for dismissal.68

Right to Strike

The right to strike is guaranteed by the Constitution and the Labor Code, although most rules relating to the right to strike are derived from case law and not the Labor Code. If an employee engages in a legal strike, his constitutional right to strike is protected. He cannot be reprimanded or punished for exercising this right.

However, if he is engaged in an illicit strike, he is afforded no protections and can be dismissed for cause.

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67 The internal regulations should be in writing and are limited to health and safety issues and disciplinary measures that an employer may take against employees.
68 Labor Code, arts L. 2212-1 et seq.
To be licit, several criteria must be met. A strike should be for the purpose of vindicating worker rights within the company, and cannot be motivated by political reasons unrelated to employer action.

Case law places certain restrictions on an employee’s right to strike. Striking employees should stop work completely and stay off the work areas. They should not interfere with the non-striking employees’ right to work.

Employees in the public sector workplace should give advance notice of a strike, after which both the union and the employer should immediately begin a conciliation process. The conciliator may order mediation, but the strike can begin if talks break down.

In the private sector, CBAs often do not provide rules with respect to conciliation requirements before a strike can begin. No advance notice or conciliation effort is required. During the strike, the employment contract is suspended and the striking employees are not paid by the employer or the unions. However, this does not seem to hamper strikes when deemed necessary.

Lockouts in France are unlawful because they are deemed to have a chilling effect on the constitutionally guaranteed right of non-striking colleagues to work. The only exceptions are in the case of force majeure or if it becomes impossible for the employer to maintain operations due to the strike.69

**Health and Safety Protection in Workplace**

**Health and Safety Regulations**

To guarantee the safety and good health of employees, the Labor Code contains a plethora of health and safety regulations (e.g., with respect to ventilation, light, and noise) with which employers should comply.70 Failure to guarantee the safety of the personnel would expose the employer to civil and criminal sanctions, even in the absence of negligence or violation of specific rules, as the employer is, pursuant to an established case law, subject to strict liability in this respect (obligation de sécurité de résultat).

Smoking also has been prohibited in the workplace since 1992. The Supreme Court has considered that the employer has the obligation to achieve security in the workplace as far as smoking is concerned, which means that the employer is responsible for having the non-smoking law enforced within the company.

The system of regulations is designed to prevent work accidents and requires employees to play an important role. All personnel should receive practical and appropriate safety training from the employer, and employees should notify the company of any work situation which they believe is likely to endanger life or health.

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69 Special rules apply to the dismissal of striking employees.
In addition, all companies with more than 50 employees for any 12-month period during the past three years should establish a Committee for Health, Safety, and Working Conditions (CHSCT). 71 If the company has fewer than 50 employees, the personnel representatives fulfill the function of the CHSCT.

The CHSCT is charged with analyzing occupational risks and the working conditions of the company, including occupational risks to pregnant women. Comprised of employee representatives, members of the works council, and the employer, the CHSCT regularly inspects the workplace and meets quarterly as well as after the occurrence of a work accident.

A manager of the company should attend the CHSCT meetings at least once a year and should present a written report on all actions taken during the past year vis-à-vis health and safety and working conditions. The employer also should provide a program of preventative measures to be undertaken for the following year, which the CHSCT may comment on, and which comments should be taken into consideration by the employer.

The CHSCT also should be consulted by management before all major decisions are made with respect to working conditions which may affect health and safety in the workplace. If the CHSCT learns of a dangerous working condition, it advises the employer immediately in writing. The employer and the CHSCT then meet to decide on a remedy. The Labor Inspector becomes involved if no remedy is agreed upon.

The Labor Inspector verifies and ensures compliance with health and safety regulations. He is authorized to create a remedial action plan, order corrective action, and/or institute court proceedings. 72

The employer may object to the demanded action, but failure to timely comply or object may subject him to sanctions. Penalties for health and safety violations are heavy, and amount to €3,750 for each employee affected by the violation. The employer is given a fixed period to correct the infractions. Second-time offenders can be punished with fines of €9,000 per employee affected and one year in jail.

If the employees’ safety is in serious danger, the Labor Inspector will institute court proceedings. The court can order a host of measures to ensure compliance, including closing the workplace until the violation is corrected. If the violation results in a work accident, the Penal Code may be applicable. There also are sanctions for hindering the work of the CHSCT and its members, who also are protected workers and receive special protection against dismissal.

The head of the company, its directors, and managers are personally liable for health and safety violations. The delegation of compliance to a negligent subordinate is not a defense.

Only if authority has been delegated and the responsibility was clearly and unambiguously accepted by the employee will such employee be held responsible in place of the directors of the enterprise.

The Labor Code also contains implementing regulations with respect to machine manufacture and dangerous product production. This domain also is being increasingly regulated by EU Directives, which may require a modification of French regulation (e.g., risks from carcinogens).

**Right to Refuse Dangerous Work Situation**

An employee can refuse to work in a situation which constitutes an immediate threat to his health and safety. He cannot be punished or sanctioned for exercising this right nor can his salary be reduced for not working, unless his failure to work constitutes an abuse.

If a work accident occurs after the employer has been alerted of the hazard, the employer is considered to have committed an inexcusable fault which carries heavy consequences, including penal sanctions under both the Labor Code and the Social Security Code.

**Industrial Doctor**

The employer should ensure that an industrial doctor, whose duties are purely preventive, examines the employees. Medical exams of employees are conducted in the following instances:

- Hiring of an employee;
- Periodic exams (at least, in principle, once every two years); or
- On an employee’s return to work following an absence due to a work accident, repeated absences, pregnancy, or any other absence of more than three weeks due to illness (or of more than eight days in the event of a work accident).

The industrial doctor works closely with the CHSCT. He can recommend changes in an employee’s job because of age or physical condition. If the employer disagrees, the issue is presented to the Labor Inspector, who decides after consulting the occupational health labor inspector.

The industrial doctor is paid by the employer but is independent. The hiring and dismissal of the industrial doctor is regulated and often requires the consensus of the employer and an employee committee.

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74 Labor Code, arts L. 4622-2 et seq.
75 Labor Code, arts L. 4623-4 et seq and implementing regulations.
Workers’ Compensation and Survival Benefits

An employee injured at work cannot be terminated from employment unless the work accident or injury resulted from the employee’s faute grave (negligence). The employer also cannot refuse to renew a fixed-term contract because of the work injury or accident.

After the recovery period, the injured employee should be offered the same position, paid the same salary, and the accident or injury cannot be used as an excuse for not giving the employee a promotion. 76

If the employee is unable to do the same work as a result of the injury, the employer should make reasonable efforts to accommodate him (e.g., change the work station after consulting personnel representatives) or give him an equivalent position. Financial aid from the State also may be available.

If the industrial doctor has determined that the employee is inept and if the employer finds it impossible to adapt a position for the injured employee, the employer may terminate the employee for cause after explaining the reasons for such in writing. 77 The employee is entitled to legal indemnities and a special indemnity which is at least double the indemnities provided by Article L. 1234-9 of the Labor Code.

The employee is entitled to compensation from the social security system during his recovery. He receives a minimum compensation of 60 per cent of his daily salary during the first 28 days of illness or recovery. From the 29th day of his illness or recovery, he receives at least 80 per cent of his salary for temporary disability, or an annuity for permanent disability. 78

The employer may be subject to serious penalties and sanctions under the Social Security Code and the Penal Code if the accident or injury is caused by his fault. Where an employee dies as a result of a work accident or illness, his heirs receive a life annuity which is a percentage of his annual salary.

The percentage varies depending on the age and marital status of the surviving spouse, and the number of children. The total compensation may not exceed 85 per cent of the deceased employee’s salary. 79

Dispute Resolution

Individual Employee

All individual disputes between an employer and an employee arising from an employment contract fall within the exclusive jurisdiction of the Labor Tribunal.

76 Labor Code, arts L. 1226-6 et seq.
77 Labor Code, arts L. 1226-10 et seq.
78 Social Security Code, arts L. 433-1 et seq.
(Conseil de Prud’hommes). Several individual employees with the same claims against the same employer also fall under the jurisdiction of the Prud’hommes.

The Prud’hommes is composed of an equal number of employer (elected by employer groups) and employee (elected by employee groups) representative judges.80 The parties may represent themselves or may be represented by counsel during the proceedings before the Prud’hommes.

A grievance before the Prud’hommes begins with the filing of a complaint. The parties are then notified to appear for a first phase meeting (conciliation phase), which occurs in the presence of one employee judge and one employer judge and is not open to the public.

If conciliation does not resolve the dispute, the proceeding continues to the second phase (judgment phase), over which at least two employer judges and two employee judges will preside. If the vote is split 2-2, a judge from the trial court of general jurisdiction (tribunal d’instance) will preside and participate in reaching a decision.

If the amount in controversy does not exceed € 4,000, the Prud’hommes is the tribunal of last resort and no appeal may be taken from its decision. However, if the appeal is exclusively based on a point of law, the decision may be reviewed by the Supreme Court (Cour de Cassation).

If damages are uncertain or exceed € 4,000, the court of appeal will hear the case de novo. As a general rule, the appeal stays execution of the judgment. The losing party in the court of appeal can appeal to the Cour de Cassation, but the judgment is not stayed pending appeal. The Cour de Cassation will review the judgment only for errors in law, abuse of discretion, or lack of jurisdiction.

Disputes with regard to uncontestable issues that mainly pertain to administrative matters are usually heard in an expedited proceeding by the emergency judge (référe prud’homal).

Collective Disputes

Collective labor disputes are heard by the trial court of general jurisdiction (tribunal de grande instance). However, employees or employers may pursue three different procedures for resolution of collective disputes before going to court, namely conciliation, mediation, or arbitration. All three procedures are now voluntary.

The conciliation procedure attempts to resolve the dispute by placing the employer and the employee face-to-face, in the hope that they will resolve the dispute alone. The Labor Code does not specify the procedures to be followed,

80 The judges of the Prud’hommes are not professional judges and often have no legal training. They are elected for five-year terms and continue to work in their salaried positions. The time devoted to their functions as judges is compensated by the State. They receive special protection with respect to dismissals and may only be dismissed with the permission of the Labor Inspector.
although most collective agreements are very specific with respect to conciliation procedures. If conciliation does not resolve the dispute, the parties may continue to mediation or arbitration.

Either party may choose to mediate the dispute after a failed conciliation or with no conciliation, by making a reasoned demand to the Labor Minister who will then initiate the mediation. The Labor Minister and the president of the conciliation commission also can initiate the mediation on their own. The parties designate a mediator or a mediator will be chosen from a list if they cannot decide on one. The mediator may conduct an extensive investigation and then give a non-binding recommendation.

A party wishing to reject his recommendation should do so in writing with proof of delivery within eight days. It also should be justified, otherwise the non-binding recommendation becomes binding. Both the recommendations and rejections are public records.  

Arbitration differs from mediation in that the arbitrator renders a sentence to which the parties agree in advance to be bound. The sentence should be a reasoned one.

The only appeal possible is on the ground that the arbitrator exceeded his powers or based his decision on a violation of the rules agreed to by the parties. If the arbitration sentence is fully or partially annulled, the parties designate a new arbitrator.

Despite the availability of conciliation, mediation, and arbitration procedures, the Labor Inspector intervenes in work conflicts in an official capacity. His participation is usually sought by one of the parties to help bring about a resolution.

The Labor Inspector conducts a negotiation session where each party has the opportunity to express his view of the dispute. These negotiations remain the predominant method for collective dispute resolution.

**Termination of Employment**

**In General**

Limited-duration contracts need not be terminated at all because they automatically expire at a predetermined date. They can be terminated before their natural expiration, but only if mutually agreed upon by the parties, in the event of the employee’s serious misconduct, *force majeure*, or if the employee has found another job on the basis of an indefinite term employment contract.

If the employer breaches the contract, the employee is entitled to the total remuneration under the contract, including additional compensation for the
unstable working situation. If the employee breaches the contract, he should pay the employer damages sustained as a result of the breach.83

Unless the employment relationship fits squarely within the definition of a limited-duration employment relationship, the employment is deemed to be of undefined duration. After the expiration of the trial period, the employment relationship can be unilaterally terminated by the employee (resignation), by both parties (mutual agreement or rupture conventionnelle), or by the employer (dismissal) for personal or economic reasons.

Resignation

An employee may resign at any time and for any or no reason so long as he gives the proper notice and does not abuse the right to resign. Resignation does not require any particular formality.

It may be oral, written, or inferred from the employee’s action. Although the lack of formality is designed to give the employee the freedom to resign as he wishes, it also can work to his disadvantage, such as where the employer interprets his ambiguous words or actions as a resignation. Where the employee acts ambiguously, the courts will usually hold that no resignation occurred. This is true even where there is no ambiguity, and a subsequent retraction will often be given effect.

If the employee is forced to resign due to extortion, working conditions made intolerable by the employer, or the employer’s noncompliance with his duties, the employee is not deemed to have resigned but constructively dismissed. Judges will analyze the constructive dismissal (prise d’acte de la rupture du contrat de travail) regardless of whether the resignation results from the employee’s free will or is deemed to be a constructive dismissal. The employee is entitled to damages for wrongful dismissal and dismissal indemnities in case of constructive dismissal.

A short absence following a vacation or illness also is not deemed to be a resignation. Hence, the resignation should be of the employee’s own free unequivocal will to be effective. With the exception of certain professions (e.g., journalists who should give at least two or three weeks’ notice), the Labor Code does not provide a minimum notice period with respect to a resignation. However, the notice period is usually governed by collective agreements, the employment contract, or custom and usage in the profession.

The employee should continue his regular work during the notice period. If he quits his job prematurely, he may be exposed to damages which could equal his salary from the time of his departure until the termination of the notice period.

The employee may be liable for damages if his resignation is deemed to be abusive. This particularly refers to a situation where the employee resigns

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83 Labor Code, art L. 1243-3.
without notice, knowing that it will cause serious detriment to the employer, and with the intention of hurting the employer.

**Mutual Agreement**

An employment contract also can be terminated by a written mutual agreement between the employer and the employee. The labor authorities must approve the agreement. There is no notice period as the end of the employment contract is determined by mutual agreement.

Either party may challenge the agreement within 15 days. The employee is entitled to the same indemnity as the one paid for a dismissal and is entitled to unemployment insurance.

**Settlement Agreement**

A settlement agreement can be signed between the employer and the former employee to protect the employer from an employee’s claim relating to the execution, performance, or termination of his employment contract. Such agreement should comply with the following conditions:

- The agreement where the employee waives his rights to sue should solve a pending or threatening litigation;
- The parties are fully informed of their rights, and
- The agreement should be signed after the termination of the employment contract.

**Dismissal Based on Personal Reasons**

_In General_

The employer is required to observe strict procedural requirements, including proper notice, in case of dismissal. An employee may only be dismissed for a real and serious cause. Compliance with dismissal procedures falls under the control of the Labor Inspector and the courts.

_Procedure for Dismissal_

A dismissal entails three successive stages: (a) convocation; (b) pre-dismissal meeting; and (c) dismissal proper. An employer should first summon an employee to a pre-dismissal meeting before deciding to terminate him.

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84 Most of the time, the employee waives his rights to challenge the termination of his employment contract before the Conseil de Prud’hommes. The employer pays him the mandatory termination indemnities plus an additional indemnity called settlement indemnity (indemnité transactionnelle) for such waiver.

85 Labor Code, arts L. 1232-1 et seq.

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Notice of the meeting should be in writing, and should state the purpose of the meeting (potential dismissal of the employee), but not the reason for the contemplated dismissal or that a decision already has been taken.

The notice of the meeting also should state the place, date, and time of the meeting, as well as the employee’s right to be accompanied by another employee or a person appearing on a designated list. Neither the employee nor the employer may be assisted by a lawyer. The written notice should be delivered by hand or return receipt requested, and should give the employee sufficient time to prepare for the meeting (i.e., at least five working days).

If the dismissal is based on a *faute grave*, the same rules apply but the employee may be relieved of his duties until the meeting (*mise à pied*). The meeting should be held in person. The employer presents the reason(s) for the potential dismissal, and the employee may explain events and present a defense. If the employee does not attend (even due to illness), the procedure may continue as if he had attended without presenting a defense. However, it is recommended that the employee be allowed to comment on the contemplated measure in writing.

If the employer decides to proceed with dismissal after the meeting, he should follow the proper procedure with respect to notice of the dismissal itself. An employer seeking to dismiss an employee for fault should not “sleep on his rights” but should act quickly upon learning of the facts giving rise to the real and serious cause for dismissal.

The letter convoking the employee to the meeting should thus be sent within two months of the employer’s learning of the employee’s fault and within one month from the preliminary meeting.

The employer should advise the employee of the dismissal in writing with return receipt requested. The employer should wait at least two working days after the pre-dismissal meeting to send the dismissal letter so as to avoid impulsive decision-making.

The letter should state the reason for the dismissal, and the employer cannot later change or add reasons to justify the dismissal.

*Proper Notice*

To protect the employee and to allow him time to seek other employment, the employer should obey the proper notice requirements for dismissal. The notice period runs from the date on which the employee receives the dismissal letter until the end of employment. The employment contract is not terminated until

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86 A *faute grave* renders the continuation of the working relationship impossible because of the disruption it would cause the company (e.g., a night watch person who sleeps on the job, or fights or brawls at work). A *faute lourde* is conduct by the employee who injures the employer and who intends to harm the employer.
the notice period expires. Its duration is based on the employee’s length of service, the employment contract, and the collective agreement, as follows:

- If the employee has fewer than six months’ length of service, the notice period is treated as his resignation period. Thus, no minimum time is prescribed, but the employment contract, collective conventions, or custom and usage may provide otherwise.
- If the employee has six months to two years’ length of service, one month’s notice should be given. If the employee has more than two years of service, at least two months’ notice is required.

The employment contract or the collective agreement can extend these notice periods to grant the employee greater rights, but any provision abridging the employee’s rights is null and void. The employment continues as usual during the notice period. If the employer chooses to relieve the employee of his duties immediately, it may do so in accordance with custom and usage and most collective agreements, but should continue to pay the employee’s salary until the notice period expires. The employee is usually allowed to devote two hours per day to search for other employment during the notice period.

**Real and Serious Cause**

A real cause or reason for termination is one based on facts. The cause also should be the real cause and not a pretext. Under case law, real and serious cause may pertain to insubordination, chronic absences, or false representations during recruitment. Loss of confidence by the employer will constitute a serious cause for dismissal only if the employer can show a real and concrete effect from the alleged loss of confidence.

Since 1977, the employee no longer bears the burden of proof in showing that the dismissal was abusive. The courts, after hearing all of the evidence presented by the employer and employee, will make the decision. However, the employee has the benefit of the doubt.

**Sanctions against the Employer**

Where the employer fails to follow the procedures for dismissal but the dismissal is for a real and serious cause, the employee is not entitled to reinstatement. However, he can seek compensation not exceeding one month’s salary. In companies with less than ten employees or if the employee has fewer than two years’ length of service, the compensation may be damages depending on the harm suffered for violation of the dismissal procedures.

The employee is entitled to reinstatement if the dismissal is not for a real and serious cause. If he or the employer refuses the reinstatement, the court will order the employer to indemnify the employee for damages in lieu of

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87 Labor Code, art L. 1235-1.
reinstatement, in addition to any other indemnity the employee is entitled to receive for dismissal.88

Where the employee has more than two years’ length of service and the employer has more than 10 employees, prejudice is determined by law to be a minimum of six months’ salary. In other cases, damages depend on the harm demonstrated by the employee.

**Dismissal for Economic Reasons**

Employers have an obligation to adapt the employees to the evolution of their jobs and provide them with the appropriate training. The Law of 17 January 2002 (*modernisation sociale*) requires the employer to anticipate the evolution of jobs and skills prior to and in order to avoid any dismissal, while the Law of 18 January 2005 (*cohésion sociale*) encourages employers to conclude specific agreements that would prevent dismissals.

Small and medium-sized companies may benefit from public support for the implementation of a plan of jobs and skills (*plan de gestion prévisionnelle de l’emploi et des compétences*). Employees may successfully challenge their dismissal by demonstrating that the employer did not comply with the prior obligation to anticipate job evolution and adapt their job accordingly.

Pursuant to the Labor Code, the dismissal of an employee for “economic reasons” is defined as dismissal for reasons unrelated to performance and which results in the elimination or modification of a position or in the modification of an essential element of the employment contract refused by the employee concerned, such measure being justified by financial difficulties or technological changes.

Pursuant to case law, a real and serious economic reason requires that the company be operating at a deficit or that it be required to take measures to safeguard its economic position if it is in jeopardy or to prevent upcoming difficulties. A dismissal for economic reasons can be individual or collective. The procedures vary, depending on the number of workers to be dismissed and the size of the company.

Before 1987, an employer could not dismiss employees for economic reasons without the prior permission of the Labor Inspector. When this requirement was abolished, other regulations were implemented to prevent or diminish the number of economic dismissals.

Presently, the Labor Code sets forth in detail (a) the procedures imposed on the employer, (b) the sanctions for unjustified economic dismissal, and (c) the measures to be taken with respect to dismissed employees.89

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89 Labor Code, arts L. 1233-4 et seq.
The procedure for individual economic dismissals generally requires convocation and meeting in the same way as a dismissal for personal fault. The employer also should advise the employee of his right to reemployment should a suitable position become available during the upcoming year.

The employer also should formally propose to the employee the applicable legal redeployment scheme(s), which offer professional training and support in the employee’s search for another job after his termination. An employee in a company or group with less than 1,000 employees should be proposed an agreement aiming at facilitating the redeployment of the employee by specific measures (training, determination of professional goals, assistance for the creation or undertaking of a company). If he agrees to such, his contract would be considered terminated by mutual agreement.

An employee in a company or group with more than 1,000 employees should be proposed a “redeployment leave” (congé de reclassement). If he expressly accepts such scheme, he will benefit from a four-month to nine-month leave financed by the employer, which will partially take place simultaneously with his notice period.

For collective economic dismissals of fewer than ten employees within a 30-day period, the employer should follow the procedures for an individual economic dismissal and should meet with the personnel representatives to explain the dismissals, the reasons for such, and the timing and selection criteria of the dismissals, among others.

The factors to be considered in the selection criteria of the dismissals are: (a) the length of service of the employee; (b) his dependents; (c) his difficulty in finding reemployment; and (d) his professional skills. These factors should all be weighed and considered.

For collective economic dismissals of ten or more employees, the requirements with respect to individual economic dismissals are dispensed with (convocation and meeting with the employee). Instead, the works council and the Labor Inspector play an important role.

Information and consultation procedures with the works council should be complied with. These are the “Book II” procedure on the economic justification for the restructuring and redundancies, and the “Book I” procedure on the “social plan” (or job-saving plan) to demonstrate the

90 Pursuant to the Law of 28 July 2011, the contrat de sécurisation professionnelle replaces the schemes (respectively known as the convention de reclassement personnalisé and the contrat de transition professionnelle).

91 The Book II procedure entails a notice of meeting with the accompanying explanatory documents, a first meeting for discussion, and a second meeting within 14 days after the first one, where the view of the works council is obtained.

92 The centerpiece of the Book I procedure is the negotiation of the job-saving plan, which is a crucial piece of the collective dismissal and information or consultation process. If the plan is incomplete or insufficient, it may be declared null and void.

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measures that the employer commits to put in place to avoid the redundancies or to minimize their unavoidable negative consequences.

The Labor Inspector monitors all activity with respect to the dismissals and receives minutes of the meetings between the employer and the works council. The Labor Inspector should be informed of the proposed dismissals, and should be furnished with the same information and documentation as the works council.

If the Labor Inspector finds an irregularity in the procedures followed or decisions made, the Labor Inspector notifies the employer in writing and proposes changes which should be implemented. The employer should respond to the Labor Inspector’s comments and cannot notify the employees of their dismissal until the Labor Inspector’s concerns are addressed. The employer should observe a waiting period of 30 to 60 days (depending on the number of dismissed employees) before notifying the employees of the dismissal for economic reasons.

An employer may attempt to circumvent the rules on collective dismissals by timing the dismissals so that their requisite number does not occur within a 30-day period. To avoid this, Article L. 1233-26 of the Labor Code provides that, if an employer dismisses more than 10 employees during three consecutive months for economic reasons, each additional economic dismissal during the following three months is treated as if it had occurred within the same 30-day period.

The applicable procedure for redundancy procedures may be partly defined at an industry group or company level by CBAs (“method agreements” or accords de méthode). Method agreements could define the following:

- The rules for convening and informing the works council of the company’s economic and financial situation and allowing it the opportunity to propose alternative solutions for avoiding the economic plan grounding the collective redundancy;
- The organization of professional and/or geographical mobility actions; and
- The rules governing the conclusion of a CBA regarding the job-saving plan and anticipating its contents.

Sanctions for irregular or unjustified economic dismissals can be penal or civil in nature. Penal sanctions apply when the employer dismisses more than ten employees within a 30-day period without consulting the works council or the

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This means that the entire process should be started again, and no dismissal can take place until the process is completed. Otherwise, any dismissal would be considered void and the employees should be reinstated. The Book I procedure also entails a notice of first meeting with the accompanying explanatory documents, a first meeting for discussion, and a second meeting which should take place within 14 days after the first one, where the view of the works council is obtained. The works council also can demand the intervention of an expert, such that three works council meetings will be held.

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Labor Inspector and without observing the waiting period before notifying the employee of the dismissal.93

Civil penalties attach for the employer’s failure to consult with the employee in case of an individual dismissal, or with the personnel representatives in case of a dismissal of more than ten employees. The Labor Inspector also may annul the job-saving plan and declare that the dismissals have no legal effect.

Restrictive deadlines have been set for employees to challenge the regularity of the collective redundancy procedure regarding ten employees or more over a 30-day period. The claim could be lodged within 12 months from notification of the dismissal if provided in the dismissal letter. However, this limitation only applies to legal actions challenging the content of the job-saving plan.

Post-Dismissal Obligations

Regardless of the cause of the dismissal, the employer has certain obligations vis-à-vis a dismissed employee after terminating his contract of undefined duration. The employer should compensate the employee for the dismissal, and the employee should receive a work certificate and attestation of non-work.

The amount of compensation awarded depends on the employee’s salary and length of service. An employee with a contract of undefined duration and at least one year’s length of service has the right to minimum compensation as a dismissal indemnity which is calculated based on his average salary for the last 12 months (or, if more favorable, the last three months).94

For each year employed, the employee is entitled to one-fifth of his monthly salary for every complete year of service, with an additional entitlement of two-fifteenths of his monthly salary for every complete year over ten years of service in case of dismissal based on personal or economic reasons. However, the collective agreements or employment contracts usually grant the employee greater rights.

If the employee is terminated for a faute grave or faute lourde, he is not entitled to any compensation or dismissal notice period because the employer is entitled to dismiss him immediately. An employee dismissed for a faute lourde also is not entitled to compensation for vacation not taken. The dismissal procedures should be respected in all dismissals. The employee can challenge the dismissal for lacking a real and serious cause and, if successful, may be awarded damages.

Upon the expiration of the employment relationship, the employer also should provide the employee a work certificate showing the dates of employment, the nature of the work performed, and the employee’s right to training. The certificate permits the employee to prove his prior employment, and informs the new employer that he is not tied to another job.

93 Labor Code, arts L. 1235-10 et seq.
The certificate cannot state anything positive or negative about the employee. The employer is subject to penal sanctions for non-compliance and the employee can recover damages if he can show prejudice.

The employee may be bound by a non-compete obligation clause contained in the employment contract which takes effect upon termination. Its limits should be reasonable as to time, place, and the nature of the activity, and cannot effectively deprive the employee of earning a livelihood in his field.

The non-compete clause also should be for the purpose of protecting the legitimate interests of the company and should be based on the employee’s specific position or job. The employee also should be financially compensated for the non-compete obligation.95

An employee who is involuntarily unemployed and willing and able to work is entitled to unemployment compensation from the Pôle Emploi to which both the employer and the employee make contributions.

The employee is entitled to unemployment benefits called “allowance for help in finding a new job” (allocation d’aide au retour à l’emploi), calculated based on the employee’s age and the length of time unemployed.

Old-Age Pensions and Healthcare

A law passed on 9 November 2010 reformed old age pensions, mainly in order to postpone the age of retirement and extend the duration of activity. The new law provides that one must be 65 years of age to be automatically entitled to full pension.

Before reaching age 65, the age required by the law in order to benefit from pension ranges from 60 to 62 years old, depending on the date of birth of the employee. Moreover, since 3 August 2011, the employee must have contributed to the retirement regime for at least 41.5 years96 in order to benefit from a full-rate pension. A full rate pension would amount to at least 50 per cent of the average annual salary over the 25 highest earning years. This is subject to a ceiling of 50 per cent of the social security ceiling (€3,031 in 2012) per month.

If the employee resigns to retire, he should honor the notice period for resignations. He is entitled to an indemnity for leaving on retirement which is equal to a half-month’s salary after ten years of service, one month’s salary after 15 years of service, one month and a half’s salary after 20 years of service, and two months’ salary after 30 years of service.97

95 There is no provision or case law specifying how such proportional financial consideration should be calculated, except where such amount is fixed by an industry-wide or company-level agreement, so long as the amount is “sufficient”.

96 This duration is in accordance with the law of 21 August 2011, which provided for a gradual increase of the number of worked years required as from 2009.

Although a clause in an employment contract stating that the employer may terminate the employee based on his age or eligibility for retirement is void, the employer may put an employee on retirement from the age of 65 until 69, with the employee’s written agreement, provided he is entitled to a full-rate social security pension.

Since 2009, the employer is allowed to put an employee on retirement as soon as the employee reaches the age of 70 without any conditions. If the employer forces the employee to retire, the employee is considered to have been dismissed without any real and serious cause.

Various early retirement programs have been implemented for workers ranging from 55 to 66 years of age. Retired persons also can add up their retirement pension with a salary if they wish to start another job. Retired workers continue to be covered by the social security system as regards healthcare.

**Summary of Social Costs**

**In General**

The social security system in France, including healthcare, workers’ compensation, unemployment insurance, and pensions, is funded by a complicated system of employer and employee contributions and is one of the most extensive systems of employee protection in the world.

The broad social security coverage can be divided into general social security, including the family allowance system, unemployment insurance, retirement plans, and taxes.

**General Social Security System**

Contributions to the social security system are obligatory for almost all private sector employers on behalf of all workers deemed to be salaried workers by the social security system. The employer should request an employee’s social security registration number within eight days of hiring him, after which both of them should begin making contributions.

The employer is required to deduct the employee’s portion from his gross salary and to make direct payment of his and the employee’s contributions to the Unions de Recouvrement des Cotisations de Sécurité Sociale et d'Allocations Familiale (URSSAF), the collection center for all social costs.

The general social security system covers three types of risks, namely health insurance, family allowances, and occupational illness or accidents. Health insurance includes coverage for illness, maternity, old age, death, and disability. The employee’s share of payments to the healthcare portion of the social security system is 0.75 per cent, while the employer’s share is 12.80 per cent.

The social security system also includes a pension benefit to which the employer contributes 8.3 per cent of each employee’s total salary up to the social security

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ceiling, and 1.6 per cent above the ceiling, while the employee contributes 6.65 per cent of salary up to the social security ceiling and then 0.1 per cent above the ceiling.

The social security ceiling for 2012 was € 3,031 a month. Healthcare costs are generally reimbursed at a rate of 70 per cent. To cover the difference, most employers and employees contribute to complementary health insurance programs.

There are nine benefits incorporated in the family allowances that are paid to the head of a household. Some of them are paid across-the-board, while others are based on financial need. All of them are solely funded by the employer at the rate of 5.40 per cent of the employee’s total salary.

The occupational illness and accident system is akin to the workers’ compensation system in the United States, and is funded exclusively by the employer. The amount of contributions varies depending on the activity performed by and the safety record of the employer. Employers also contribute very small amounts (less than two per cent) to housing allowances and widows’ pensions.

**Unemployment Insurance**

Unemployment insurance should be paid by all employers with a presence in France. The employer contributes 4.5 per cent, while the employee contributes 2.40 per cent.

**Complementary Retirement Plans**

The complementary benefit system differs depending on whether the employee is upper-level management (*cadre*) or a regular employee (*non-cadre*). The *cadre* system covers three benefits: (a) mandatory old age retirement; (b) mandatory death benefit; and (c) voluntary supplementary fund.

These plans are meant to complement the general social security pension. The employee and employer contributions are based on the employee’s salary. The maximum contribution is 16 per cent, the difference over the eight per cent being funded equally by the employer and the employee.

**Taxes**

The employer should pay several contributions related to transport, real estate, and apprenticeship. Employers should contribute from 0.55 to 1.6 per cent of the total employee salaries to continuing professional education contribution programs, depending on the size of the workforce.

The employer also should pay a company car tax which may range from € 750 to € 4,500 for larger cars.
Whistle Blowing

On 10 November 2005, the National Data Protection Authority (Commission Nationale de l’Informatique et de Libertés or CNIL), opined that whistle-blowing schemes are not prohibited, provided the rights of the individuals concerned are guaranteed and that the following principles are complied with:

- The scheme is of a subsidiary nature, such that any problem should reach management through natural information channels, such as the staff representatives;
- It has a limited scope, such that there should be no abusive or disproportioned incrimination of the professional and personal integrity of the employee;
- Its use is not mandatory, such that whistle-blowing can be encouraged but not compulsory;
- Anonymous reports are prohibited;
- There are limited data retention periods and right of access and rectification by any person identified in the scheme; and
- Accurate information is provided to the incriminated person.

Moreover, whistle-blowing should comply with a procedure that includes prior authorization of the CNIL, prior individual information of employees, prior information of the works council and the CHSCT, and communication to the Labor Inspector in the event of modification of internal rules (règlement intérieur).

The CNIL can ask the employer to modify the whistle-blowing scheme. The employer may be sentenced to administrative and/or criminal penalties if he fails to cooperate. A person who recounts in good faith alleged misconduct is protected from discrimination, and any dismissal or sentence would be deemed to be null and void.

Conclusion

The government’s concept of its role with respect to the workplace is to intervene without hesitation by passing legislation when necessary to protect the worker.

The worker’s protections are not only legislative, but also are derived from collective agreements and case law. France remains a stronghold for workers’ rights and will undoubtedly continue to ensure worker protections.
Germany

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Introduction

Employment law in Germany focuses on the individual employee, and a significant part of it directly applies to the individual employment relationship. Law-making bodies also consider it their duty to protect the individual worker against exploitation.

Current employment law consists of an accumulation of many individual statutes which are rooted in different historical principles rather than in a uniform employment code. The provisions of these statutes also are open to interpretation by the labor courts.

Thus, the decisions rendered by the labor courts — especially by the highest German court for employment matters, the Federal Labor Court (Bundesarbeitsgericht) — constitute an important source of employment law.

The role of the government is mainly restricted to passing laws (a) guaranteeing minimum standards for conditions of employment, salaries, and wages; (b) guaranteeing equal treatment of men and women at work and of full-time and part-time workers; and (c) designed to protect employees from excess strain. The government provides the legal framework for ensuring autonomy in collective bargaining and for the participation of employees’ representatives in works and management decisions (Mitbestimmung).

Legal Relationship of Employer and Employee

In General

Each employment relationship is based on an employment contract between the employer and the employee. The agreement may be nothing more than a simple recital of the fact of employment mentioning the position involved, trial period, pay, and working hours, leaving other details of the relationship to be controlled by statutory law or a “collective agreement” (Tarifvertrag).

Even oral agreements are binding. The fact that someone is employed for a longer period also constitutes a “factual employment relationship” (faktisches Arbeitsverhältnis), with rights and duties for both parties.
The employment contract also may be a detailed document regulating numerous aspects of the relationship, but it should not be assumed that the employment relationship is regulated exclusively by the agreement.

Statutory law applies where a situation is not regulated by a contract, even if the parties did not expressly agree. Furthermore, mandatory statutory law supersedes the wording of an individual employment agreement violative of such law. The individual employment contract also can be subject to a collective bargaining agreement.

While the employment contract (Arbeitsvertrag) is not expressly mentioned in the Civil Code (Bürgerliches Gesetzbuch), it is a particular kind of service agreement (Dienstvertrag) which is governed by Section 611 thereof.

The service agreement is a reciprocal agreement wherein one party promises to perform services while the other is required to pay the agreed remuneration. Under an employment contract, an employee is not merely required to perform services, but to perform them subject to the authority of the employer.

A free choice of work is guaranteed for all Germans as a basic right. Thus, an employee is free to enter into an employment relationship or to refrain from it. Exceptions may only be permitted, according to the Constitution (Basic Law or Grundgesetz), in times of tension or in a state of defense.

As a rule, the employer is free to decide whether to conclude an employment contract or not. He may refuse to employ an applicant for objective or non-objective reasons. He also is not required to inform an applicant of the reasons for employment rejection. However, exceptions to these general rules exist as regards discrimination.

Employees may be divided into the following professional categories: (a) workers and salaried employees; (b) management employees; (c) executive officers; (d) other persons; and (e) foreign employees.

Other categories, such as commercial employees (gewerbliche Arbeitnehmer) under the Commercial Code (Handelsgesetzbuch), and those governed by legislation relating to sailors, miners, or “business clerks” (Handlungsgehilfe), are not subject to the general provisions of labor law.

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1 Schwerdtner, Fürsorgertheorie und Entgelttheorie im Recht der Arbeitsbedingungen (1979), at pp. 118 et seq.; van der Ven, Festschrift R. Reinhardt (1972), at p. 167.
2 Industrial Code, s 106.
3 Workers are often described as “blue-collar workers” and salaried employees as “white-collar workers”, but the difference between these categories is no longer important.
4 Commercial Code, ss 59–75h.
Categories of Employees

Workers and Salaried Employees

The distinction between workers and salaried employees is losing its importance as the statutory rights of both groups become increasingly similar.5

Management Employees

A management employee is one who regularly performs functions traditionally considered to be those of the employer and who, by virtue of his position, exercises regular and authoritative influence over significant technical, scientific, commercial, or organizational decisions of the enterprise.

He should either make such decisions directly or play a significant role in the decision-making process so that management should listen to him. He should thus have a considerable degree of independent decision-making authority within a significant area of the business.

Management employees have independent responsibilities within the company and generally amount to one per cent to three per cent of the employees in a business. The category of management employees has become increasingly important as they are generally not subject to the provisions of the Works Council Constitution Act6 and they are separately represented on supervisory boards of fully co-determined companies.

Executive Officers

German law distinguishes between service contracts of executive officers, which are subject to ordinary contract principles, and their appointment as members of the corporate body, which can be revoked at any time by the shareholders.

Executive officers are generally excluded from the category of “employees” as far as their service contracts are concerned. They are thus not subject to or protected by labor law statutes, although courts do sometimes analogously apply individual labor statutes to particular situations.

Other Persons

Commission agents are not regarded as employees, as they conduct business at their own risk and are free to determine how to perform activities and to set working hours. The contractual relationship between the agent and the principal is governed by specific provisions of the Commercial Code and the Civil Code.

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5 In Section 5(1) of the Labor Court Act (Arbeitsgerichtsgesetz) and the Works Council Constitutions Act (Betriebsverfassungsgesetz), for example, it is stated that both groups are employees within the sense of the respective Act.
6 Works Council Constitution Act, s 5(3).
However, employment law applies where a commission agent, in the performance of business activities, is dependent on the principal to such an extent that he is practically an employed commission agent, i.e., a normal employee whose salary is computed on a sales commission basis.

Part-time employees and employees with a limited term or similar contracts are subject to special regulations. A part-time employee is someone whose regular weekly working time is less than that of a comparable full-time employee, while a limited-term employee is someone whose employment agreement is concluded for a fixed period of time.

If no regular weekly working time has been agreed, the average regular working time within a one-year period should be examined to determine whether an employee is employed on a part-time basis. The employer should enable his employees to work part-time in accordance with the Part-Time and Limited-Term Employment Act.

Employees under certain conditions may request a reduction or extension of their contractual working time. Employers and employees also may agree that several employees share one workplace (job sharing).

The term of an employment agreement may only be fixed if justified on objective grounds. Where no objective grounds exist, the term fixed may only be up to two years. To be effective, a fixed term should be in writing.

An employment agreement with a fixed term either ends at the expiration of the agreed period or, where the term is limited by purpose, upon achievement of the purpose. Only under exceptional conditions will a fixed-term employment relationship be subject to ordinary termination.

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7 The Part-Time and Limited-Term Employment Act (Teilzeit und Befristungsgesetz) of 21 December 2000 (amended in April 2007) defines the prerequisites for the permissibility of part-time and limited-term employment agreements, and contains provisions for the prevention of discrimination against such employees. For instance, Section 4(1) prohibits the discrimination of a part-time worker due to his part-time work unless there are objective grounds justifying a different treatment, while Section 4(2) contains a prohibition of the discrimination of limited-term employees similar to the rule set out in Section 4(1). Section 5 fully applies to limited-term employees, and states that an employee may not be treated unfavorably because he enforces his rights set forth under the Part-Time and Limited-Term Employment Act. Finally, Section 11 prohibits the termination of the agreement due to the employee’s refusal to switch from full-time to part-time work or vice versa.

8 An employment contract is concluded for a fixed period of time if its duration has been fixed according to the calendar or if it results from the nature, quality, and purpose of the work to be rendered that the agreement is for a limited term.
Where the fixing of the term is not legally binding, the employment agreement will be deemed to have been concluded for an indefinite period of time, and may be ordinarily terminated upon expiration of the agreed term.

**Foreign Employees**

As a rule, citizens of European Union (EU) member States do not need a work permit from the Labor Office (Bundesagentur für Arbeit) to conclude a contract of employment in Germany. They may be employed by an employer in the same way as German employees. Nor do they require an alien’s residence permit from the Aliens Office (Ausländerbehörde) for entry into the country and job-seeking for three months.

If they are employed, they are issued a residence permit upon request for at least five years, unless they apply for a shorter period. The residence permit may not be withdrawn because they are no longer employed following a temporary disability due to an illness or accident or involuntary unemployment.

However, nationals from EU Member States that joined the EU in 2004 (except Cyprus and Malta) are subject to a temporary European Community (EC) regulation effective until 30 April 2011, which restricts their freedom to work in Germany.

Section 284 of the Social Security Code Book III (Sozialgesetzbuch III) requires them to obtain a work permit. The same restrictions apply to nationals from Bulgaria and Romania, but only until 31 December 2011.

Apart from a valid passport or document in lieu of a passport, citizens of non-EU countries or persons who are stateless need an alien’s residence permit and an alien’s work permit.

Freedom of movement in Germany and the right to freely choose the place of occupation, job, and vocational training only applies to Germans. Since the conclusion of the Association Agreement of 1 December 1980, with the EU’s special regulations, these rights also apply in part to Turkish nationals.

Restricted special regulations are equally applicable to asylum seekers, their spouses, and children. Work permits for citizens from non-EU countries should be applied for ahead of the date of entry into Germany, as numerous questions should often be resolved prior to entry.

The expiration of a work permit for a limited period does not result in the employment agreement becoming void. The employment may only be terminated by giving notice. Whether the employee is entitled to a dismissal with notice or an extraordinary dismissal without notice after the work permit

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9 Part-Time and Limited-Term Employment Act, s 16(1).
has expired depends on the circumstances of the individual case, i.e., whether the employer should immediately fill the vacancy.\textsuperscript{10}

An employment contract which has been concluded despite knowing that a work permit is required but with the concerted intention not to apply for such is invalid from the outset. If the work permit has been finally and absolutely refused to a foreign employee, a dismissal with notice is socially justified as the employee will be permanently incapable of meeting his obligations.

If no final and absolute decision has been made with respect to the work permit, the social justification of a dismissal for lack of a work permit should be decided in light of whether the employee can expect that a work permit will be issued in the near future, and that the position cannot be held open for him without considerable operational impairment.\textsuperscript{11}

The residence permit and work permit of a foreigner expires as soon as he is made subject to an expulsion order, and the employer may not continue his employment. Claims for remuneration may exist from \textit{de facto} employment until such employment is terminated.

Any employer who, negligently or intentionally, illegally employs foreign workers without the required work permit will be fined up to €500,000.\textsuperscript{12} If a lessor leases to a third party a foreign employee who does not have the required permission to work, he will be subject to imprisonment for up to three years or a fine.\textsuperscript{13}

\textbf{Terms and Conditions of Employment}

\textbf{In General}

Terms and conditions of employment are dealt with in the individual labor contract, in collective agreements (\textit{Tarifverträge}), the One-Third Participation Act (\textit{Drittelbeteiligungsgesetz}), the Works Council Constitution Act of 1972 (\textit{Betriebsverfassungsgesetz}), or the Acts on Shop Opening Hours Stipulating Regular Working Time and Work on Sundays and Public Holidays (\textit{Ladenschlussgesetze der Länder}).

Collective agreements may be concluded on a national or regional level (collective bargaining agreements) or on a works level in the sense of works agreements (\textit{Betriebsvereinbarung}).

\begin{itemize}
  \item \textsuperscript{10} \textit{Bundesarbeitsgericht, Der Betrieb} 1977, at pp. 917 and 1560.
  \item \textsuperscript{11} \textit{Bundesarbeitsgericht, Der Betrieb} 1990, at p. 2373.
  \item \textsuperscript{12} Social Security Act Book III, s 404.
  \item \textsuperscript{13} Act Regulating the Commercial Leasing of Employees, s 15.
\end{itemize}
Vacation

The Federal Vacation Act (*Bundesurlaubsgesetz*) provides for the employee’s minimum rights and responsibilities with respect to vacation. All vacation rights only arise after six months of employment.

Any leave should comprise at least twenty-four working days, and all calendar days other than Sundays and public holidays qualify as working days. In practice, the law is only applicable in a few cases, as most employees have between twenty-five and thirty working days of holiday per year.

Pregnant Employees

The Maternity Protection Act (*Mutterschutzgesetz*) governs the employment and protection of a pregnant woman and the right to maternity leave. It has undergone two major amendments due to EU Law, resulting in new versions in 1997 and 2002.

The 1997 amendment allowed the dismissal of a pregnant woman as an exception.\(^14\) The dismissal should be in written form and should contain the permissible grounds for dismissal. The 1997 amendment also reinforced the protection of mothers at the workplace by integrating specific health and safety requirements. The 2002 amendment brought about the integration of a new “equal treatment rule” with regard to the average earning, as well as new regulations for women whose employment contract begins during the period in which they enjoy mother protection. It also introduced a provision regulating the relationship of claims to vacation under the Federal Vacation Act.

Sick Pay

The former Sick Pay Act (*Lohnfortzahlungsgesetz*) has been replaced by the Continuation of Remuneration Act (*Entgeltfortzahlungsgesetz*) to adapt German law to European law and to abolish the inequitable handling of different employee groups. Employees within the context of the law refer to workers, salaried employees, trainees, and apprentices.\(^15\)

Every employee whose employment relationship has lasted for at least four uninterrupted weeks is entitled to sick pay up to 100 per cent of his wages for illness (including accidents) for which he is not responsible.\(^16\)

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\(^{14}\) The highest State authority responsible for employee protection or the office designated by it may, in special cases not associated with a woman’s condition during her pregnancy or her situation in the first four months after delivery, declare a dismissal to be permissible.

\(^{15}\) Continuation of Remuneration Act, s 1(2).

\(^{16}\) Continuation of Remuneration Act, ss 3(1), 3(3), and 4.
Such benefit is limited to the first six weeks of the illness, but the period commences anew with the onset of each illness if it is due to an underlying ailment. After expiration of the six-week period, the employee is entitled to receive a sickness allowance (Krankengeld) from his statutory health insurance scheme.

The Continuation of Remuneration Act does not define the term “illness”, but provides that other cases deemed to constitute a non-culpable incapacitation will be an incapacitation due to a non-illegal sterilization or non-illegal termination of pregnancy. Still, the courts have held that illness exists when the employee is objectively unable to perform his duties.

**Other Conditions**

Other conditions in an employment contract are those related to working time, public occupational safety and health, and traffic and transport regulations.

Every employee is required by law to take part in a social security scheme and a health insurance program.

**Discrimination**

**In General**

Although most of the laws on employment contain occasional provisions dealing with discrimination, the most important ones are laid down in the Anti-Discrimination Act of 2006 (Allgemeines Gleichbehandlungsgesetz).

The Anti-Discrimination Act prohibits any discrimination on the grounds of race, ethnical origin, sex, religion or ideology, disability, age, or sexual identity. However, discrimination may be justified in some exceptional cases, such as where being one sex or another is an essential prerequisite for a particular job. If the discrimination is not justified, the contract may be partly void due to the discrimination. The employee also may have the right to petition, refuse to perform his work, or claim damages or compensation. However, a claim to be employed is not possible.

The aggrieved employee should prove the indications that can be assumed to be discriminatory, while the employer has the burden of proving that no violation was committed. Specific persons enjoying protection under the Anti-Discrimination Act include employees, trainees, and freelancers who are “economically dependent”. The most controversial reason of claims concerning discrimination is age. German law, especially termination regulations, allows discrimination due to age to a certain extent, while European law generally prohibits such discrimination.

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17 Continuation of Remuneration Act, s 3(2).
Disabled Workers
The Severely Disabled Persons Act (Schwerbehindertengesetz) has been replaced by the Social Security Code Book IX, which provides that persons are handicapped if their bodily functions, mental abilities, or psychological health will most probably deviate from the condition typical for their age for over six months.

Persons are disabled if the degree of their handicap is at least fifty and their registered domicile, normal place of residence, or employment in a workplace is legally located within the scope of the Social Security Code Book IX.**18**

Handicapped persons with a degree of handicap of 30 to 50 per cent should be placed on an equal footing with disabled persons if they meet the other requirements set forth in Section 2 of the Social Security Code Book IX and if, as a result of their handicap, they cannot obtain or retain a suitable job without such equal treatment.**19**

Employers are required to ascertain whether job vacancies can be filled with disabled persons, particularly those who are registered with the Employment Office as unemployed or seeking employment.

Employers may not discriminate against disabled persons. Disabled persons have a claim against their employer for employment in which they can develop their skills to the greatest possible extent, and for equipment at the workplace with the requisite technical work-aids, taking into account the handicap and its effects on the employment.

The termination of the employment of a disabled person by the employer requires prior consent from the Integration Authority (Integrationsamt).**20**

Collective Bargaining and Worker Participation
Collective Bargaining

*In General*

Article 9, Paragraph 3 of the Basic Law guarantees the freedom to form associations for the promotion of labor and economic conditions.

Agreements which limit or hinder this right are void and contrary to law, and the government does not interfere with these negotiations.

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**18** Social Security Code Book IX, s 2(2).
**19** Social Security Code Book IX, s 2(3).
**20** Social Security Code Book IX, s 85.
Nature of Collective Agreements

Collective agreements are contracts concluded between their parties, stating their rights and duties, and establishing legal norms relating to the conclusion, substance, and termination of contracts of employment.

The Collective Bargaining Agreements Act (Tarifvertragsgesetz) can be considered as the backbone of German labor law given the innumerable agreements in effect for industries and services, where eighty per cent to ninety per cent of all workers and salaried employees are employed.

The huge number of existing agreements can be explained by the fact that powerful trade unions do not compete with each other but work in a special branch of industry. Similar employer associations (confederations) also exist and permanently relate to trade unions.

Each side has parent organizations: most trade unions are represented in the Deutscher Gewerkschaftsbund, while the Bundesvereinigung der Deutschen Arbeitgeberverbände combines the interests of all employer associations. This concentration of forces guarantees that labor and employer organizations have a strong influence in discussions on labor and social legislation.

Collective agreements protect individual workers from employers. They also lead to the stereotyping of contracts of employment and to the transparency of personnel costs. They likewise rule out labor disputes and new demands concerning the points covered at their conclusion while they are in force.

Scope and Application of Collective Agreements

Portions of collective agreements which affect the substance, conclusion, and termination of contracts of employment and joint institutions of the parties only affect contracts which are bound by collective agreements as to time, geographical area, and persons.

Standards relating to operational questions make sense only if they cover the entire firm. They also apply when it is only the employer who is bound by the agreement. The personal application of collective agreements is decided by the person’s union membership and the party concluding the agreement.\(^{21}\) If union members change to a different branch of industry, they are not bound by conditions existing in the new firm unless they first join the relevant trade union. On the other hand, an employer cannot escape from the conditions of a collective agreement by leaving the employers’ confederation as long as the collective agreement is in force.\(^{22}\)

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21 However, an employee is not required to give information about membership in a trade union when joining a firm. He can insist on being treated in accordance with the terms of the collective agreement.

22 Collective Bargaining Agreements Act, s 3(3).
Collective agreements last for at least six months and normally not more than one year, although two-year agreements have been concluded in some cases. The geographical areas covered by collective agreements may be states (Länder) or the whole of Germany, depending partly on the organization of the trade union and the employers’ organization. The areas of activity define the geographical scope of collective agreements.

Internal collective agreements generally had precedence over industrial association agreements, but this has changed in recent years. The Federal Labor Court has ruled that there is no longer a need for uniformity of collective agreements (Tarifeinheit), thus several agreements may be applicable to different employees in one company. Legal standards of collective agreements do not only cover members of the contracting party’s organization, but may cover employees and employers not bound by the collective agreement.

In many areas, only collective agreements covering individual and exactly defined points are generally binding. The procedure of declaring a general application requires both parties to a collective agreement to apply to the Federal Minister of Labor and Social Affairs.23

Preconditions for the declaration of general application are the following: (a) that the employers bound by a collective agreement employ at least fifty per cent of the employees who come under the scope of the collective agreement; and (b) that the declaration of general application is in the public interest.

The effect of the declaration of general application ends when the collective agreement expires, although existing standards remain in force. The Federal Minister for Labor and Social Affairs, or the highest labor authority in a state acting at the request of the Minister, can cancel a declaration of general application in mutual agreement with the collective bargaining committee if this appears advisable in the public interest.

Parties to Collective Agreements

Collective agreements are concluded between trade unions, on one side, and by employer associations and/or an individual employer, on the other side.

During the lifetime of a collective agreement, the parties may not introduce new demands through industrial action, otherwise they may be held liable for damages. However, industrial action aimed at bringing about collective

23 In some instances, the Federal Minister of Labor and Social Affairs may require that this application be directed to the “supreme labor authority of an interested federal state” (oberste Arbeitsbehörde eines beteiligten Landes). This application is always made with the mutual agreement of the collective bargaining committee, which is formed by equal numbers from each side, i.e., three representatives each of the National Federation of Employees and the employer organization. The general application is published in the Federal Gazette (Bundesanzeiger).
agreements on conditions of employment that are not presently covered by the existing collective agreement may be permitted.

The parties also have the duty to enforce agreements. They should use all means available to them under the law to ensure that their members keep to the agreements concluded. They are not required to fight every breach of a collective agreement, but they should prevent the deliberate undermining of such collective agreement.

Clauses of Collective Agreements

Collective agreements consist of two parts. The first regulates issues such as working hours, holidays, periods of notice for resignation or dismissal, piecework terms, bonuses, and continued payment of wages during absence from work. This part has a longer duration than the second.

The second part, which normally lasts for one year, provides for the type and amount of wages or salaries, special Christmas payments, bonuses, capital accumulation benefits, temporary release from work, and working hours. Standard clauses can deviate from statutory requirements, provided they are in the employee’s favor. Unfavorable terms are only permitted when expressly required by law.

Additional standards involving operational questions also may be agreed upon and annexed to collective agreements. These additional clauses are binding for all employees of a firm, while the employer may only be bound by the basic collective agreement.

Worker Participation in Management

Works Council in General

Employee representation is established in all enterprises with five or more employees. A works council should be instituted in all independently operating organizational units (i.e., business or factory), but also can be established in independently operating branches or departments.

The number of members in a works council depends on the number of employees in the organizational unit. It may vary from one to thirty-five members for enterprises with 9,000 employees, while in enterprises with more than 9,000 employees, the number increases by two members for each additional 3,000 employees represented.

The works council should be composed of representatives from the various categories of employees in the enterprise, with both sexes represented according to their proportional numerical strength. The incumbent works council should appoint a three-member electoral board at least ten weeks before the end of its
term. The electoral board prepares separate lists of voters for men and women from information supplied by the employer. Only employees who are listed can vote.24

Lists of candidates should be submitted to the electoral board at least two weeks after the election has been announced. All employees who have been with the works or employed at home for the works for six months are eligible for election. The election is by secret ballot.

The works council’s term of office is four years. It is represented by the chairperson, but he should convene the full council if demanded by one-fourth of its members or the employer. Membership in the works council is terminated by resignation, termination of the employment relationship, or loss of eligibility for the office.

Meetings of the council are regularly held during working hours with full pay for participating members. The meetings are not public, but the employer is entitled to be present at meetings which take place upon request and to which the employer has been expressly invited. Upon request of one-fourth of the council’s members, a delegate of the trade union represented in the enterprise may be invited to attend the meeting, but he does not have voting rights.

Decisions require a quorum of at least half the members and a majority. In case of a tie, the motion is dismissed. All council proceedings are recorded in minutes, which should be signed by the chairperson and one other member, with a list of attending members attached. All expenses arising from these activities should be borne by the employer. He also should provide the necessary offices and materials for the orderly conduct of the council’s business.

Members of works councils are released from work duties to the extent needed for the orderly performance of their function.25 A number of members also are permanently released from work.26 They may not be disturbed or hindered in the fulfillment of their office.

24 All employees who are at least eighteen years of age are entitled to vote, regardless of whether they have German nationality. Another employer’s employees who are deployed in the works are eligible to vote if they have been assigned to the works for more than three months.

25 For instance, release from work should be granted by the employer to enable the members to participate in training courses insofar as these convey knowledge necessary for the activity of the works council. Generally, each member is entitled to three weeks of paid training during each term of office and to four weeks for the first term of office. Even after expiration of their office, members enjoy special protection if they have been released from work for three full consecutive terms as works council members.

26 Works Constitution Act, s 38. The number depends on the size of the enterprise, e.g., in enterprises with 200 to 500 employees, one “full-time” member is released from work. In enterprises with 9,001 to 10,000 employees, the number increases to twelve
Termination of the employment of members of the works council should have the consent of the entire council. If this consent is refused, the labor court decides whether the circumstances justify the termination. The termination should be based on special reasons. If a factory is partly or completely closed down, members of the works council can be dismissed only with the last group of employees.

A secrecy obligation exists for members and their alternates with regard to information gathered during their membership in the council and expressly designated by the employer as confidential. The obligation to keep such information confidential continues beyond the expiration of their term as members of the council.

Rights of the Works Council

The statutory rights of the council can be grouped as follows: (a) rights of information and consultation; (b) co-determination rights; and (c) general rights.

The works council should ensure that all labor laws and regulations, especially safety regulations and collective labor agreements, are strictly observed in the interest of the employees. The works council receives suggestions from employees and consults with the employer regarding the implementation of such suggestions. The law expressly requires the employer to timely and thoroughly inform the works council about certain matters and to discuss their effect on the quality of the work and on the employees. Sections 87 and 99 of the Works Constitution Act are the most important provisions as regards co-determination rights. Under Section 87, the following matters require the approval of the works council: The internal working order of the factory, including general rules on controls of issues as working time, use of telephone for private purposes, and work clothing:

- Daily working time, including breaks and allocation of working hours;
- The temporary reduction or extension of normal working hours;
- Time, place, and method of paying wages or salaries;
- The establishment of rules for vacations and individual time selections for vacations;

members. In works with more than 10,000 employees, one additional works council member will be exempted for every additional 2,000 employees or a fraction thereof. The works council members to be released from their duties will be elected by the works council in consultation with the employer from among its members by secret ballot and pursuant to the principle of proportional representation.

27 Works Constitution Act, s 79.

28 These include plans for new construction, remodeling, or extension of buildings for production, administration, or other factory purposes; technical installations, working methods, or procedures of working areas; matters of personnel banning; present and future personnel requirements; and measures resulting therefrom for the personnel.
• The installation of technical equipment which controls the conduct or performance of employees;
• The regulations concerning industrial security, industrial illness, and health protection in general;
• The administration of social welfare installations within the factory;
• The administration and management housing made available to employees by the company;
• The questions pertaining to the wage structure of the works;
• The amount of piecework remuneration, premiums, and similar performance-related remuneration;
• The procedure for handling suggestions to improve the work and working conditions; and
• The principles regarding the performance of group work.  

These co-determination rights exist only if the matter concerned is not otherwise regulated in laws or collective agreements. In companies with more than twenty employees eligible to vote, the employer should inform the works council prior to every hiring, classification, reclassification, and transfer, and provide it with the requisite application documents and information on the person involved. Under Section 99(2) of the Works Constitution Act, which is the actual co-determination right, the works council may refuse to render consent to the personnel measure if:

• The personnel measure violates a statute, safety provision, or provision in a collective bargaining agreement, works agreement, or court order;
• The personnel measure would violate a guideline pursuant to Section 95 of the Works Constitution Act;
• There is a well-founded concern that, as a consequence of the measure, employees will be dismissed or will incur other hardship, although this would not be justified on operational or personal grounds;
• The employee involved would be disadvantaged by the personnel measure, although this would not be justified on operational or personal grounds;
• An announcement of the vacancy has not been posted in the works as required by Section 93 of the Works Constitution Act; or
• There exists a well-founded concern that the applicant or employee under consideration for the personnel measure would disturb the peace of the works

29 Group work exists if, in the course of the flow of work, a group of employees performs a task assigned to it essentially on its own authority.
through illegal conduct or gross violation of the principles laid down in Section 75(1) of the Works Constitution Act.  

In addition to compulsory co-determination rights, matters such as the employees’ vocational training can be included by voluntary works agreements. The works council should convocate a works meeting (Betriebsversammlung), which is the general assembly of all employees of the factory, at least once every calendar quarter. Works meetings are not public and are presided over by the chairperson of the works council.

Sectional meetings can be arranged if it is not possible to have one meeting with all employees present. For each meeting, the works council should invite the employer or his representative. The employer or his representative reports in this meeting on the personnel matters, social questions, economic situation, and development of the enterprise at least once a year.

**Central Works Council and Corporate Works Council**

A central works council (Gesamtbetriebsrat) should be established in enterprises with more than one works council, i.e., in practice, in all enterprises which have more than one factory. The central works council is comprised of one member from each works council (if the works council has at most three members), or two representatives from each works council (if the works council has more than three members).

The central works council should deal with all matters concerning the entire enterprise or more than one factory of the enterprise which cannot be decided by the individual works council. It is not intended to be superior to normal works councils.

While the establishment of a central works council is compulsory, the corporate or group works council (Konzernbetriebsrat) should only be established if so decided by a qualified majority of the concern’s central works councils.

Each central works council delegates two of its members to the corporate works council. The latter handles all matters regarding the concern which cannot be decided by the central works councils or the works councils in the production facilities.

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30 For instance, there may be a concern that the applicant or employee would violate these rules by engaging in racist or xenophobic behavior.

31 Works Constitution Act, s 88.

32 This is defined in the Stock Corporation Act (Aktiengesetz) as being one dominating enterprise with several independent enterprises centrally managed by the dominating enterprise.
Works Agreements

A works council may not be a party to a typical collective agreement, but it can negotiate with management on certain matters. Agreements resulting from such negotiations are called works agreements (Betriebsvereinbarungen),\(^{33}\) which represent supplements to the collective agreement originally concluded for a particular industry.

To reach a works agreement, the following legal alternatives are available to the employer, depending on the subject matter: (a) he may act alone; (b) he may act only with the consent of a conciliation board; or (c) he may act only if a labor court approves.

Works agreements should be in writing and signed by the employer and the chairperson of the works council. They also are mandatory and directly applicable, and thus cannot be invalidated by contrary individual agreements unless the latter improve the employees’ conditions.

Remuneration and other conditions of employment are normally fixed by the collective agreement and may not be subject to a works agreement, unless the collective agreement expressly permits the conclusion of supplementary works agreements.\(^{34}\)

Works councils and employers are expected to cooperate and to discuss matters at issue with the earnest desire to reach an agreement. However, if consensus cannot be reached, the matter should be resolved by a court ruling or an award rendered by the conciliation board.\(^{35}\)

Although a conciliation board is established whenever needed, a works agreement may establish a permanent conciliation board composed of an equal number of members appointed by the works council and the employer, and of an independent chairperson accepted by both sides (or appointed by the labor court if there is no agreement).

The conciliation board merely acts if requested to do so by the employer and the works council. The award it renders is binding only on consensus of opinion, but such award may take the place of an agreement between the two sides in certain cases (compulsory co-determination).

Economic Affairs Committee

An economic affairs committee (Wirtschaftsausschuss) (the “Committee”) should be established in all enterprises with more than 100 regular employees

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\(^{33}\) Works Constitution Act, s 77.

\(^{34}\) Works Constitution Act, s 77(3).

\(^{35}\) In principle, questions of law are decided by the labor court, while disputes on whether and/or how to regulate matters subject to employee co-determination are resolved by the conciliation board.
(ständig beschäftigte Arbeitnehmer). The employer should thoroughly inform the Committee in advance about the economic matters of the undertaking, such as those concerning:

- The economic and financial situation of the enterprise;
- The production and sales situation;
- The production and investment program;
- The rationalization projects;
- The manufacturing and working methods, especially the introduction of new working methods;
- The questions of environmental protection in the works;
- The reduction or closing of the factory or parts thereof;
- The transfer of the works or parts of the works;
- The amalgamation or demerger of enterprises or works;
- The changes in the works organization or in the object of works;
- The acquisition of the company, if this means the acquisition of supervision; and
- Other matters which materially affect the interests of the employees or the enterprise.

The Committee has three to seven members\textsuperscript{36} who are employees of the enterprise with the necessary personal and technical qualifications and are all appointed by the works council. In practice, all members of the Committee are members of the works council at the same time.

The Committee should meet once a month, with the employer or his representative in attendance. The Committee should report to the works council after each meeting.\textsuperscript{37} In enterprises with more than 1,000 regular employees, the owner should inform all employees in writing at least once a year on the economic situation and development of the enterprise, after prior consultation with the Committee and the works council. The balance sheet should be explained to the Committee and the works council by the management at least annually.\textsuperscript{38}

**Youth Representation**

Factories with at least five employees under eighteen years of age (juvenile employees) or at least five vocational trainees under twenty-five years of age should elect youth or trainee representatives.

\textsuperscript{36} Works Constitution Act, s 107.
\textsuperscript{37} Works Constitution Act, s 108(4).
\textsuperscript{38} Works Constitution Act, s 108(5).
The representative body consists of one person in enterprises with five to twenty juvenile employees, which number increases to fifteen persons in enterprises with more than 1,000 juvenile employees.

Speaker Committees for Managerial Employees

As executive staff or managerial employees are not represented by works councils, the establishment of speaker committees in establishments with at least ten managerial employees is required by the Representative Body for Executive Staff Act.

Speaker committees are only set up on the initiative of those concerned and a vote of approval by a majority of the executive staff. There is no obligation for the employer or anyone else to take such initiative.

All managerial employees have the right to vote for members of the speaker committee. Eligible for election are managerial employees who have been employed in the company for at least six months at election time, except for those who are responsible for negotiating with the speaker committee. The elections are secret and the term of office is four years. Speaker committees in establishments with ten to twenty managerial employees only have one member, while establishments with more than 300 such employees have seven members.

Centralized speaker committees should be established if there are two or more committees in a company, while a group speaker committee may be established if there are two or more central speaker committees.

Unlike works councils, speaker committees have no real co-determination rights. However, the employer is required to fully inform the speaker committee of any proposed measure which would affect the executive staff.

The speaker committee may request for copies of documents touching on the interest of the staff or the opportunity to inspect such documents. It also should ensure that managerial employees are treated fairly by the employer. Individual managerial employees may request the speaker committee to help them in dealing with the employer.

The employer and the speaker committee may agree on guidelines for the content, conclusion, and termination of employment contracts with managerial employees. In general, such guidelines are not compulsory, although it may be agreed otherwise such that individual employment contracts may deviate from

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39 This is a group of employees who, by their employment contract and status, are authorized to engage and dismiss personnel. It also refers to persons holding a special power of procuration and giving them extensive legal powers to act in the name of the enterprise, as well as persons carrying out duties in their own responsibility because of their particular experience and knowledge.
the guidelines only if it is favorable from the employee’s point of view or if the speaker committee consents.

Speaker committees have a number of information and consultation rights as regards changes in remuneration principles or other general conditions of employment. Such general conditions of employment include the distribution of working hours, vacation, or the method of paying salaries.

Failure to inform the speaker committee of the employer’s intention to dismiss a managerial employee and the reasons for such dismissal, as well as failure to hear the speaker committee, render the notice of dismissal null and void. The speaker committee also should be informed once every six months about the economic situation of the company. The employer should inform the speaker committee about any proposed alteration\(^{40}\) which might result in considerable prejudice or changes for managerial employees.

**Participation in the Decision-Making Process**

*In General*

Under German company law, the supervisory board (*Aufsichtsrat*) appoints the members of the management board (*Vorstand*). This makes it easier to include employee representatives (*Arbeitsdirektoren*) in the supervisory board.

Companies with a board of directors (*Verwaltungsrat*) are a combination of active management and supervision in one decision-making body, raising the question of the legal responsibility of members of the board of directors and equivalent institutions in managing the company. The laws on co-determination cover (a) companies governed by the Coal and Steel Co-Determination Act (*Montan-Mitbestimmungsgesetz*), (b) companies with 500 to 2,000 employees,\(^{41}\) and (c) companies with more than 2,000 employees.\(^{42}\)

**Co-Determination in the Coal Mining, Iron, and Steel Producing Industry**

Under the Act on Co-Determination of Employees on Supervisory Boards and Boards of Management of Enterprises in the Coal Mining, Iron, and Steel Producing Industry of 1951 (“Coal and Steel Co-Determination Act”), the

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\(^{40}\) The Works Constitution Act defines “alterations” as reductions of operations in or the closure of the whole establishment, transfer of the establishment or of its important parts, amalgamation with other establishments, important changes in the organization or purpose of the establishment, and introduction of entirely new work methods and production processes.

\(^{41}\) The co-determination in companies with 500 to 2,000 employees was originally regulated in the Shop Constitution Act 1952, which was replaced by the One-Third Participation Act in July 2004.

\(^{42}\) Act on the Co-Determination of Employees (*Mitbestimmungsgesetz*).
supervisory board of the large companies affected has eleven members. These eleven members are elected as follows:

- Four representatives of the shareholders and one additional member (shareholders’ bench);
- Four representatives of the employees and one additional member (employees’ bench); and
- One “additional member” (neutral member).43

The members representing the shareholders are elected by the general assembly, while the representatives of the employees are elected in a rather complicated way. The trade unions represented in the corporation may object to candidates nominated by the works councils, and they may nominate three candidates who can be trade union officials.

The neutral member should be acceptable to both sides, and cannot be a representative or employee of a trade union or a manufacturer’s association. He also may not be an employee or manager of the enterprise, or financially or economically interested in it.

The neutral member is elected by the general assembly, but a majority of the members of the supervisory board is required for his nomination. He has an important role in preventing decisions from being blocked in case of a tie vote. The coal and steel model has a member of the management board called the “labor director” (Arbeitsdirektor)44 who is responsible for personnel affairs. He cannot be elected against the vote of a majority of the employee representatives in the supervisory board, but otherwise has the same position as all other members of the management board.

Co-Determination in Companies with 500 to 2,000 Employees

Under Section 4(1) of the One-Third Participation Act, the supervisory board of enterprises affected by such Act should have one-third employee representation.

The election of the employee members should be held pursuant to the principles of majority voting. The employees and the works councils nominate the employee members to be elected as members of the supervisory board.

Co-Determination in Companies with more than 2,000 Employees

The Co-Determination Act of 1976 affects all companies regularly employing more than 2,000 employees and which have the legal form of a stock corporation (Aktiengesellschaft), a partnership limited by shares.

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43 Coal and Steel Co-Determination Act, s 4(1).
44 Coal and Steel Co-Determination Act, s 13.
(Kommanditgesellschaft auf Aktien), or a limited-liability company (Gesellschaft mit beschränkter Haftung).

The size of the supervisory board depends on the size of the work force. A work force of up to 10,000 employees requires twelve members, which increases to sixteen members for 10,000 to 20,000 employees, while a work force of more than 20,000 employees requires twenty members. Half of the members are elected by the shareholders and the other half by the employees. All employees of all affiliated companies in Germany elect the supervisory board of the parent company.

The employee members of the supervisory board come under three categories, namely: (a) employees working in the company who are eighteen years old and have worked for the company for at least one year; (b) representatives of the trade unions, i.e., officials of all trade unions represented in the company; and (c) senior employees or management or key personnel.

Depending on the size of the supervisory board, these groups are represented proportionally. The election of the employee members does not take place directly but through electors. Employees of companies with less than 8,000 employees vote directly, but they also may opt for the electors’ system.

Health and Safety in the Workplace

Under Section 3(1) of the Labor Safety Act, the employer is required to take all necessary measures for the health and safety of his employees. Not only is he required to keep certain health and safety standards, but he also is required to continuously improve these standards.

The employer should bear the costs of health and safety measures, and no contributions may be imposed on or made by the employees for the purpose of such measures.

Termination of Employment

In General

Termination by dismissal, resignation, or a termination agreement should be made in writing (excluding the electronic form) to be effective. Dismissal is

45 A supervisory board with six employee members has four members working in the company and two trade union representatives. Among the employee members working in the company, there must be at least one senior or management employee. The relationship between employee members and the senior or management employee depends on the numerical relationship between the members of these two groups of employees in the company.

46 Civil Code, s 623.
only effective if and when the notice of dismissal has actually been received by
the employee or he has had the opportunity to take note of its content under
normal circumstances.

The written notice of dismissal can be handed to the employee, but if he is not
present and the dismissal notice should be mailed, only a registered letter with
acknowledgment of receipt (Einschreiben/Rückschein) constitutes proof of
receipt.

The declaration from the employer or the employee should clearly state that it is
a notice of termination, and the risks arising from any discrepancies or unclear
declarations will be borne by the declaring party.

The reason for the dismissal generally does not need to be explained in the
dismissal notice unless required by a collective bargaining agreement. Only in
case of an extraordinary termination should the party terminating the
employment relationship shall give the other party, on demand, the reasons for
the termination.

**Ordinary Termination**

**Notice Periods**

At present, the basic minimum notice period for employment agreements is four
weeks to the fifteenth or the last day of a calendar month. The notice period for
a termination by the employer has the following terms:

- If the employment relationship lasted for two years, the notice period is one
  month to the end of a calendar month;
- If the employment relationship lasted for five years, the notice period is two
  months to the end of a calendar month;
- If the employment relationship lasted for eight years, the notice period is three
  months to the end of a calendar month;
- If the employment relationship lasted for ten years, the notice period is four
  months to the end of a calendar month;
- If the employment relationship lasted for twelve years, the notice period is five
  months to the end of a calendar month;
- If the employment relationship lasted for fifteen years, the notice period is six
  months to the end of a calendar month; and
- If the employment relationship lasted for twenty years, the notice period is
  seven months to the end of a calendar month.

47 Civil Code, s 622(1).
48 Lingemann, von Steinau-Steinrück, and Mengel, *Employment and Labor Law in
Germany*, at pp. 98-99.
Termination periods shorter than those set forth by law may be agreed only in exceptional cases, but generally are not admissible.

Co-Determination Rights of the Works Council

The works council should be heard prior to any proposed ordinary or extraordinary termination of the employee. The employer should fully inform the works council of the reasons for terminating a specific employee to enable the works council to properly form its opinion.

The termination is absolutely ineffective where the works council is not sufficiently informed or heard at all, and should thus be declared invalid by the labor court, regardless of whether or not compelling reasons for the termination exist. If the works council is sufficiently heard but only after the notice has been given by the employer, and although the works council agrees to the termination, the declared termination remains invalid and should be repeated within the required period for notice.

If the works council has misgivings about the contemplated termination, it should inform the employer in writing within one week in an ordinary termination, or within three days in an extraordinary termination, otherwise it is deemed to have consented to the termination.

The works council may object to a proposed termination especially when, in its opinion, the employer has not sufficiently considered the social aspects in selecting the employee to be terminated when employment could be continued at another workplace or after retraining for another job.

Misgivings or objections raised by the works council with respect to a contemplated termination do not preclude the employer from actually terminating employment. However, the employer should attach a copy of the objection to the termination notice and the employee may demand that the employer actually must employ him after the date of termination, until the conclusion of the subsequent labor court proceedings.

Grounds for Ordinary Termination

Pursuant to the Protection against Unfair Dismissal Act, an ordinary termination is only valid if it is justified due to reasons related to the person of the employee, the conduct of the employee or to compelling operational requirements which preclude the continued employment of the employee in the works.

However, the Protection against Unfair Dismissal Act does not apply if the enterprise only has ten or fewer employees or if the terminated employee was

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49 Protection against Unfair Dismissal Act, s 23. In this context, a full-time employee (working forty hours a week) counts as one employee. A part-time employee who
employed for less than six months at the time of the receipt of the notice of termination.\textsuperscript{50}

On the other hand, the Protection against Unfair Dismissal Act applies to employees who work in a business with five to ten employees so long as these employees have been employed since 31 December 2003.

The affected employee should request the Labor Court to declare the dismissal as unlawful within three weeks after receipt of the termination,\textsuperscript{51} otherwise the dismissal becomes valid (curing of defects of title). Reasons related to the person of the employee that would justify termination include the following:

- Deficient physical or mental ability of the employee in light of the demands of his duties. However, the employer should attempt to relocate the employee to a more suitable workplace before termination.
- Serious illness of the employee, in that he failed to report to work due to illness within the preceding three years, recovery is not foreseeable or further time lost is expected, and business operations are seriously affected as a result.

Reasons related to the conduct of the employee that would justify termination include the following:

- Breach of contract;
- Actions toward other employees; and
- Private conduct to the extent relevant to the business of the employer.\textsuperscript{52}

In most cases, valid termination requires prior warning to the employee to stop the objectionable conduct. Termination also is valid if it is necessary for compelling business reasons, with the employer having the burden of demonstrating the following:

- The job of the affected employee has been eliminated, i.e., his employment is no longer required and other means for preventing the termination, such as shorter hours or reduced overtime, cannot reasonably be expected to be in the best interest of the works and the other employees;

\textsuperscript{50} Protection against Unfair Dismissal Act, s 1(1).

\textsuperscript{51} Protection against Unfair Dismissal Act, ss 4 and 7.

\textsuperscript{52} It is generally accepted that commission of a crime gives an employer the right to dismiss an employee. However, the Federal Labor Court recently decided that, where an employee took a bottle deposit of less than €2, his dismissal was unlawful as he was already employed for more than 20 years. In this case, the court stated that the dismissal was disproportionate.
• The corresponding work area can be operated permanently with a reduced number of personnel;
• The employer will reduce the workforce on a continuing basis and not only temporarily;
• The employee cannot be reassigned to another free position within the enterprise;
• A “social selection” (Sozialauswahl) has been carried out to determine who can be dismissed. The selection should be carried out among all comparable employees within the entire works.

The social factors involved (e.g., length of service with the employer, age of the employee, maintenance obligations, and severe disability of the employee) should then be balanced. Employees who meet the least of these requirements and are thus least eligible for “social protection” should be the first to be dismissed. However, certain employees may be excluded from the social selection if they have special qualifications, knowledge, or skills and if their retention is of particular importance to the company.

**Modification Termination**

If the employer does not demand total dissolution of the employment agreement, but only the unilateral implementation of amended conditions of contract, he will often make use of “modification termination” (Änderungskündigung).

A modification termination is an ordinary termination combined with an offer to continue employment on amended contract terms. Since the modification termination is a genuine termination, the employer should comply with the applicable notice periods and hear the works council, and the employee should comply with the three-week period provided for filing a suit against the termination.

However, to prevent the Labor Court from finding that the termination was socially justified, the employee may accept the modification offer under express reservation that the termination is not held socially justified by the Labor Court. Such express reservation should be made until the expiration of the three-week period for filing a suit against termination.

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53 Employees who do not fall under the Protection against Unfair Dismissal Act because they have not completed the six-month “waiting period” (Wartezeit) do not participate in the selection, and are the first to be dismissed.

54 Employees are comparable if they are interchangeable, i.e., they can take over each other’s job immediately or after a reasonable training period not exceeding two or three months.

55 Protection against Unfair Dismissal Act, s 1(3).

56 Protection against Unfair Dismissal Act, ss 4 and 7.
If the Labor Court finds that the modification termination is valid, the employee’s suit is dismissed. If it finds that the termination was not justified, it will hold that the employment agreement continues to exist without modifications.

**Extraordinary Termination**

Extraordinary termination, i.e., termination for good cause, is provided for all kinds of employment. The employment relationship may be terminated without notice by either party if circumstances are present which render it unreasonable to expect the terminating party to continue the employment relationship until the termination period has elapsed.

Section 626(2) of the Civil Code requires the termination to take place within two weeks. The two-week period commences when the party entitled to communicate learns of the circumstances justifying the termination. He should immediately inform the other party in writing of the reasons for the termination upon request. He also has the burden of proof of demonstrating that the two-week period has been complied with.

In this case, the works council also should be heard before the termination is given to the employee. Otherwise, the termination is void if the employee files a suit with the Labor Court within the three-week period. However, the time for the works council’s response in this instance is reduced from one week to three days.

As termination for good cause with immediate effect is always the final step, there should be reasons that generally constitute significant cause, pursuant to which a comprehensive balancing test of the parties’ interests will be undertaken by the Labor Court.

Possible reasons for an extraordinary termination include the following: (a) gross insult or slander of the employer by the employee; (b) bribing or receiving bribes; (c) repeatedly failing to report to work despite a warning from the employer; and (d) competition by the employee, even outside working hours. A conduct-related dismissal for cause generally requires fault on the part of the employee, but the Federal Labor Court has ruled in several cases that innocent conduct may constitute good cause.57

57 Lingemann, von Steinau-Steinrück, and Mengel, *Employment and Labor Law in Germany*, at p. 34. Sometimes, an employment contract or collective agreement states that employees cannot be ordinarily dismissed after they have reached a certain age or have worked for the company for a certain length of time. This is problematic when works should be closed down. Due to the special protection, an ordinary termination for compelling business reasons is prohibited. On the other hand, it seems unreasonable to expect an employer to continue payment until retirement age. Hence, the Federal Labor Court has held that, in such a case, the employment relationship
Severance Pay

Even if an ordinary termination by the employer is held “socially unjustified”, the Labor Court may declare that the employment relationship is dissolved as of the effective date of the ordinary termination with an appropriate severance payment.

The maximum amount of severance pay payable by the employer is a full year’s salary. In calculating the exact amount, the court should consider the length of employment, the economic situation of the employer, loss of possible future income, and the chances of finding a new job.

As a general rule, the Labor Court fixes an amount of 50 per cent of a monthly salary per year of employment as the severance pay to be paid to the employee. In exceptional cases, i.e., where the employee has reached the age of 50 and the employment relationship has lasted at least 15 years, the amount will be up to 15 months’ salary.

When the employee has reached the age of 55 and the employment relationship has lasted at least 20 years, an amount of up to 18 months’ salary will be established. However, this will not apply if the employee has reached the age for regular retirement benefits at the time when the court has found the employment relationship to have been dissolved.

Special Cases

Works council members enjoy special protection against termination. Ordinary termination of such employees is always invalid, and a termination for good cause is only permissible with the consent of the works council.

Ordinary termination of such employees also is invalid within one year after the expiration of their term of office as members of the works council. These provisions are mandatory and may not be amended by contract to the detriment of the employee.

Except for reasons for a dismissal without prior notice, the dismissal of an employment relationship concluded with a commissioner for data protection is invalid. This protection against unfair dismissal remains in force for another year after the commissioner was relieved from his office. Pregnant women and mothers after delivery enjoy special protection against termination. Special
protection is granted to handicapped employees having a disorder of more than
50 per cent.

The Nursing Care Time Act (Pflegezeitgesetz) gives employees the right to be
fully or partly exempted from their employment duties if they wish to look after
close relatives in need of long-term home care, but they are not paid any salary.
However, such employees are specially protected against unlawful dismissal.

Where an employer desires to dismiss a significant number of employees or if
he desires to introduce short-time work, he should notify the Labor Office and
apply for approval within thirty calendar days prior to dismissing:

- More than five employees in works which normally have more than 20 and
  less than 60 employees;
- Ten per cent of the regularly employed employees or more than 25 employees
  in works with at least 60 and less than 500 employees; and
- At least 30 employees in works which normally have at least 500
  employees.\textsuperscript{61}

\textbf{Transfer of Business}

According to Section 613(a) of the Civil Code, termination of an employment
relationship by the former employer or the new owner on account of a transfer
of business will be invalid. This is to prevent the circumvention of provisions
that safeguard labor and employment standards.

However, dismissals on other grounds such as operational reasons are
permissible. The seller can carry out efficiency measures to make the business
more saleable, and such a dismissal would not have been “on account” of the
transfer of business.

The crucial issue in this instance is whether a certain transaction constitutes a
transfer of business or part of business. The case law of the Federal Labor Court
in accordance with the European Court of Justice ruling in \textit{Christel Schmidt}\textsuperscript{62}
defines a business as a “long-term economic unit”, while a part of a business is
an organizational subdivision of an overall business which constitutes an
economic unit in itself. In \textit{Ayse Süzen},\textsuperscript{63} the European Court of Justice gave the
following specific guidelines in assessing whether a transfer of business or part
of a business has taken place:

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\textsuperscript{61} Any dismissal without the Labor Office’s approval is void if the dismissed employee
files a suit against the employer.

\textsuperscript{62} \textit{Christel Schmidt vs. Spar- und Leihkasse der früheren Ämter Bordesholm Kiel und
Conshagen} (14 April 1994), ECR I-1311.

\textsuperscript{63} \textit{Ayse Süzen vs. Zehnacker Gebäudereinigung GmbH Krankenhausservice} (11 March
• Character of the business to be outsourced;
• Transfer of tangible assets;
• Transfer of intangible assets;
• Assumption of employees by the acquirer;
• Transfer of customer base;
• Degree of similarity between the activities carried out before and after the outsourcing; and
• Duration of suspension of the business activity.

There also should be a change in the proprietor of the business, which is strongly indicated by a change in the proprietor’s legal personality. This does not necessarily require a change in ownership of the business assets, as a transfer of the right of use is sufficient. The business or part of a business also should have passed over to the new owner by virtue of a legal transaction and not by law.

Dispute Resolution

German law does not provide for any special kind of dispute resolution in connection with labor law insofar as the individual employment relationship is concerned. As regards disputes in connection with co-determination and/or collective bargaining, the law provides for a conciliation board (*Einigungsstelle*).64

The vast majority of individual disputes come before the Labor Courts, which decide issues within two to three months. There are no stipulations in dispute resolutions for union or non-union members or groups of employees which differ from those of other employees.

Retirement, Social Security, Healthcare, and Old Age Pension Coverage

The statutory social insurance is largely a compulsory insurance system which covers the following principal areas: (a) health insurance; (b) nursing care insurance; (c) pension insurance; (d) workers’ compensation; and (e) unemployment benefits.

Details of the coverage were originally provided under the *Reichsversicherungsordnung*, the Work Promotion Act (*Arbeitsförderungsgesetz*), and the Social Security Code Books. The *Reichsversicherungsordnung* has been replaced by the Social Security Code Book IV, and the Work Promotion Act has

64 Works Constitution Act, s 76.
been replaced by the Social Security Code Book III. The general regulations can be found in the Social Security Code Books I and IV.

**Health Insurance**

Contributions to the health insurance scheme are shared fifty-fifty between the employee and the employer. The amount of these contributions depends on the gross income of the individual employee up to a specific threshold, and they are to be paid in by the employer.

On 1 January 2009, the health fund (Gesundheitsfond) was introduced in order to finance the statutory health insurance. Health insurance companies collect the contributions made by the employers and then transfer the money to the health fund.

The different contribution rates of health insurance companies have been substituted by a single universal contribution rate defined by the federal government. Since 2009, the contribution rate is 14.9 percent, where seven percent is taken by the employer. Benefits from health insurance include payment of medical expenses, hospitalization, and compensation for loss of pay.\(^{65}\)

**Unemployment Benefits**

Unemployment benefits were formerly regulated in the Work Promotion Act.\(^ {66}\) Since 1 January 2004, the former unemployment benefit has been renamed “Unemployment Benefit I”, with a new “Unemployment Benefit II” created by merging the former unemployment assistance and social assistance schemes.\(^ {67}\) The new unemployment benefit is regulated under the Social Security Code Book III. Employees are entitled to unemployment benefits under the following prerequisites:

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65 Workers and employees are entitled to have their full remuneration paid by the employer during the first six weeks of sick leave. They subsequently receive up to seventy per cent of their regular pay from the insurance office. The payment is limited to a maximum of seventy-two weeks in three years. Co-payments should be made by the insured parties for certain services, including pharmaceuticals and hospital and dental care. The statutory health insurance schemes also provide benefits for the prevention of illness and early detection.

66 All employed persons were entitled to unemployment benefits (Arbeitslosengeld), provided they have been working for at least 360 calendar days during a three-year term preceding unemployment. If the unemployed person was no longer eligible for unemployment benefits, he could apply for unemployment assistance (Arbeitslosenhilfe), which was available at a lower rate.

67 People in receipt of Unemployment Benefit II who have been receiving Unemployment Benefit I before entering into the new scheme will receive a staged supplement to partly compensate for financial losses. This supplement will be halved after a year and will expire after two years.
• An application to the local agency in charge should be filed;
• The applicant should be capable of gainful employment, i.e., he would — under normal conditions on the job market — be able to work for at least three hours a day, and he is not unfit for work on a long-term basis because of illness or disability; and
• The applicant should have made compulsory contributions to the employment insurance scheme for at least 12 months.

The amount of Unemployment Benefit II will be set at a fixed rate. There will be additional payments for any children in the recipient’s household and for partners who are in need of financial assistance. Reasonable costs for housing and heating also will be paid.

Recipients of Unemployment Benefit II should now accept every legal job offer that can be reasonably expected regardless of pay, even if the payment is not based on or related to collectively agreed rates. If the recipient refuses to accept such a job offer, his Unemployment Benefit II will be cut by thirty per cent. If he is receiving a compensation payment to bridge the gap from the former Unemployment Benefit I, such payment will be stopped.

**Old Age Benefits**

Old age benefit contributions are generally shared by the employer and the employee.68 The total amount of contribution is transferred by the employer to the insurance office.69 Most employees are eligible for retirement benefits at the age of sixty-five,70 but there are lower age thresholds for the handicapped, women, or persons who may take advantage of early retirement. Employees who are born after 31 December 1963 are eligible for retirement benefits at the age of sixty-seven.

The pension is based on the number and amount of contributions paid, as well as on social factors. It also is dynamically linked to wages and is adjusted to reflect national developments in wages and salaries.

**Workers’ Compensation and Employee Accident Insurance**

Contributions to the workers’ compensation scheme, which is administered by associations set up for all branches of trade and industry (Berufsgenossenschaften), are made solely by employers.

The amount of the contribution is fixed by the Berufsgenossenschaften, taking into consideration the risk of work accidents prevailing in the particular branch,

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68 Social Security Code Book VI, s 168(1).
69 The primary agency of the pension insurance is the federal pension fund (Deutsche Rentenversicherung Bund).
70 Social Security Code Book VI, s 235.
the record of work accidents during the previous business year, and the total annual pay of all employees concerned.\textsuperscript{71}

As the statutory employee accident insurance is financed by the employer alone, there are a number of exclusions that limit the employer’s liability. The workers or employees become eligible for workers’ compensation in case of work accidents which occur during or in connection with their performance of services under their employment contract. This also includes accidents on the way to or from work (Wegeunfälle). There are no special rules relating to benefits for families of workers killed on the job. This matter is governed by the provisions on tort in the Civil Code or by individual contractual agreements.

\textsuperscript{71} Social Security Code Book VII, ss 150-163.
Introduction

Contract of Employment

In General

A contract of employment is a written or verbal agreement under which a person (employee or worker) undertakes to provide services for a fixed or indefinite period to an individual or legal entity for a monthly or daily wage.¹

The salaried person is subordinate or personally dependent on a particular employer. Such dependence is determined by the employer’s right to direct and control the manner, place, and time of work performance, without necessarily involving economic dependence.

The characterization of dependence is not negated when the employee, using his own initiative, performs work outside the employer’s immediate control (i.e., at other premises) but for which the employee remains accountable to the employer.

A contract of employment is distinguished from a contract for the execution of a particular project, which relates to the supply of an end product or service and not to the work itself, and which may be performed by any person or means at the contractor’s discretion.

A contract of employment also is distinguished from a contract for the provision of independent services, where a self-employed professional provides work for remuneration to a client without being under the client’s control and supervision as regards the manner, time, and place of work performance.

These distinctions are important as the provisions of employment law only apply to persons employed under a contract of employment. Thus, labor law does not cover partnership agreements where the partners are remunerated by participating in the profits, mandate agreements where work performed is usually not remunerated, and agency agreements where the agent independently acts on behalf of various principals.

¹ The author wishes to thank Angela Nissyrios for her assistance in this chapter.
Fixed-Term and Indefinite-Term Contracts

A contract of employment may be concluded for a fixed or indefinite term. A fixed-term contract is one agreed for a specified period of time or which terminates upon the occurrence of a certain event or as can be inferred from the nature of employment (e.g., employment for a particular task or seasonal work).

An indefinite-term contract is one agreed for an indefinite period of time or whose duration is not specified and cannot be inferred from the nature and purpose of employment.

Fixed-term contracts may not be terminated prior to their expiration date, other than for a serious reason, but they automatically terminate upon their expiration without being subject to notice of termination and severance pay requirements. The termination of indefinite term contracts is subject to the formalities required by law, i.e., written notice of termination and severance payment.

If a fixed-term employee continues to work under the same terms and conditions without the employer’s objection for a reasonable period after the expiration of the contract and not merely for completing certain tasks, then he is regarded as being employed under an indefinite-term contract.

The renewal of a fixed-term contract may be justified for the temporary replacement of an employee, work of an occasional nature, temporary work peaks, facilitating transfer to similar work or for performing a specific project or program, or work connected to a specific event or relating to the air transport business. Such reasons for renewal should be referred to in or be capable of being implied from the relevant written contract.

The employee is presumed to cover the permanent needs of the undertaking where the duration of successive renewals is more than two years, or where there are more than three successive contracts or employment relationships in a two-year term. In both cases, the successive contracts are converted into indefinite-term contracts, and the employer has the burden of proving otherwise.

Parties to the Contract of Employment

Employer

An employer is an individual or legal entity who employs one or more employees for remuneration under a contract of employment. The employer has a duty to ensure the health and safety of employees in the workplace. This

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3 These pertain to fixed-term agreements or employment relationships between the same parties under the same or similar terms of employment with a period not exceeding 45 calendar days between the two contracts.
4 Civil Code, art 662.
includes determining the nature of work and manner of its performance, complying with workplace requirements, and ensuring the safety of equipment and machinery, which involves a duty to provide employees with appropriate instructions to avert any danger.

He also has the obligation to accept the employee’s services and to engage him in suitable work, to pay the agreed remuneration or wage provided for in the applicable collective agreement or arbitral award, to treat employees equally and without discrimination (except where objectively justified by the nature of the work), and to treat employees with dignity. An employer should notify the employee of the terms regulating the employment contract or relationship, which include the following:

- Identity of the parties;
- Place of work, registered place of business, or domicile of the employer;
- Title, grade, category, and object of work;
- Commencement date of the contract or employment relationship and, in the case of a fixed-term contract, its duration;
- Duration of paid leave;
- Amount of severance pay and length of prior notice of termination to be given by employer and employee;
- Employee’s remuneration and frequency of payment;
- Length of the employee’s normal working day or week; and
- Provisions of collective agreements which apply and determine minimum payment requirements and terms of employment.

The information required under items (5) to (9), above, may be provided by reference to applicable provisions of labor law. The information should be provided to the employee not later than two months from the commencement of employment in the form of either a written contract of employment or other document.

Employees working abroad under an employment contract or relationship concluded in Greece should be provided with a written contract of employment or other document prior to their departure. This should contain additional information such as the duration of work abroad, currency of payment, benefits in cash or in kind during expatriation, and any terms of repatriation.

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6 Pursuant to Presidential Decree Number 156/1994 and the Ministry of Labor’s interpretative circular.
The employee should be notified of any change in the information provided not later than one month from the change, except where the amendment of terms results from a change in applicable labor law provisions.

Employers also have obligations to State social security institutions. The main compulsory social security organization in Greece is IKA-ETAM. The employer’s obligations under IKA-ETAM are contained in Laws Number 1846/1951, Number 2972/2001, Number 3050/2002, and Number 3232/2004, as well as in IKA-ETAM’s Insurance Regulation.

Employers with employees insured with IKA-ETAM are required to register with the Registry of Employers and to pay employer and employee contributions. The employer also is required to keep a special book of new employees.

The employer should submit an Analytical Periodical Declaration (APD) to the competent IKA-ETAM branch which includes the employer’s registration number, the insured persons employed during the period of reference, their titles, days of employment, remuneration, code insurance number, and contributions, in addition to total contributions payable for the period of reference.  

**Employee**

*In General*

Employees refer to persons who are mainly occupied in a shop, office, or business and principally or exclusively provide work that is not physical in nature. On the other hand, workers include persons employed as servants or in the industrial, mining, and agricultural sectors, as well as their assistants and apprentices, whose work is physical in nature.

Persons in a position of management, trust, and supervision also are considered employees, although mandatory provisions on work hours, work on Sundays and other holidays, night work, weekly rest, and paid annual leave do not apply to them.

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7 The employer also should submit, between 15 September and 15 November of each year, a table with the trade name, type, place of operation, and tax registration number of the company, including the name, age, and marital status of employees, their titles, date of employment, prior service, employment card number, IKA registration number, security officer and company doctor, duration of work, breaks, and levels of remuneration.

8 There are four mandatory national holidays (25 March, Easter Monday, 15 August, and Christmas Day) and two national holidays which are optional for the employer (1 May and 28 October). Employees also are not allowed to work before one o’clock in the afternoon on Good Friday. Employees working on national holidays are paid at the normal hourly rate increased by 75 per cent.
Managing directors, members of the board of directors, and general managers of sociétés anonymes are not generally considered as employees, although they are capable of being employees where they follow the management’s instructions.

Seconded Employees

An employer may second an employee on a temporary basis, with the employee’s consent, to another employer. The seconded employee remains an employee of the seconding employer throughout the secondment, and the period of secondment is included in the period of prior service with the seconding employer.

As a general rule, the seconding employer continues to be responsible for paying the employee’s salary and other benefits, while the secondee employer is responsible for additional payment obligations arising from overtime work, work on Sundays, and night work. An agreement to the contrary may be reached between the seconding and secondee employers under which the secondee employer pays all or part of the seconded employee's remuneration.

Part-Time Employees

An employer and employee may enter into or, during the term of employment, may agree in writing to a fixed-term or indefinite-term part-time contract. A part-time employee works on a daily basis but for fewer hours than a full-time employee, and is paid by reference to time worked. The Labor Inspectorate should be notified of the part-time contract within eight days from its conclusion.

Rotational work, which is regarded as a more particular form of part-time employment, also is allowed. Rotational work is different from part-time work in that the employee is employed full-time but for fewer days than normal.

Part-time employment cannot be imposed unilaterally by the employer, while rotational work may be unilaterally imposed by the employer for not more than six months in a calendar year where there has been a decline in activity and after informing and consulting the employees’ legal representatives. The Labor Inspectorate also should be notified of the agreement or decision to implement rotational work. A part-time employment contract should include the following:

Identity of the contracting parties;

- Location of work;
- Company’s seat or employer’s address;
- Duration and period of work, and division of labor;
- Remuneration; and
- Conditions for contract modification.

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9 Law Number 3846/2010, art 2.
Part-time employees may not be treated less favorably than full-time employees as regards wages and may not be remunerated at an hourly rate which is less than that paid to full-time employees for work of equal value. Where work hours are less than four per day, remuneration is increased by seven per cent.

Besides the ordinary wage, the law does not provide for equal treatment in relation to other benefits, although it does provide for equal treatment on a pro rata basis as regards paid annual leave and access to vocational training and social services.

Part-time employees are required to work hours in excess of those agreed where possible and where refusal would be contrary to good faith requirements, except if requested to work additional hours on a regular basis. In this situation, they are remunerated at the normal rate increased by ten per cent.

The termination of a part-time employment contract is regulated by the general provisions on termination of employment contracts. Compensation awarded as a result of termination is calculated on the basis of the duration of employment, the number of monthly or daily wages received or would have been received for the duration of the contract, and other gains received or would have been received during the month prior to dismissal.

Part-time employees providing work on equal terms as other employees are given priority to being employed full-time. Where several part-time employees are candidates for a position in full-time employment, priority is determined on the basis of previous service.

**Temporary Employees**

Chapter D of Law Number 2956/2001 (as amended) regulates temporary employment. A prior written agreement of a fixed or indefinite term is required for the provision of work on a temporary basis that is concluded between a Temporary Employment Agency (the direct employer) and the employee.

The agreement should include the terms of employment, contract duration, terms under which employment is provided to the indirect employers, terms of payment and insurance, reason for assigning temporary work to the employee (which may only be for urgent, temporary, or seasonal needs), and any other aspect related to the provision of work. Temporary employees may not receive remuneration which is less than that payable under the National General Collective Employment Agreement.

Temporary employees may not be employed for more than twelve months by an indirect employer. However, the contract may be extended for another six months without becoming one for an indefinite term where the temporary employee is replacing an individual whose contract is suspended for any reason.

When the employee continues to work for the indirect employer for at least 45 calendar days after the expiration of the temporary employment or if the contract is renewed, then the contract is converted into one for an indefinite term with the
indirect employer. The Temporary Employment Agency and indirect employer are jointly liable to the temporary employee for his remuneration and insurance contributions, except if agreed otherwise.

Foreign Employees

The immigration process in Greece is regulated by Law Number 3386/2005, as amended, which provides that non-European Union (EU) citizens may enter Greece to work for a specific employer and for a particular type of work after having obtained a visa.

Committees established in each region are required to prepare a report on workforce requirements for the region and vacancies per prefecture that may be occupied by non-EU citizens. On the basis of this report, the maximum number of residence permits for work purposes that may be granted each year to non-EU citizens is determined by a Ministerial Decision with reference to the prefecture, nationality, type, and duration of work.

Non-EU citizens cannot work in Greece without a work permit for a specific employer, and a valid employment contract cannot be concluded where the individual does not have a work permit. On the other hand, EU citizens only need a residence permit to work in Greece.

Notification Requirements

Employers should notify the Manpower Employment Organization (OAED) within eight days from the date of employment. Failure to do so results in the imposition of a fine corresponding to ten times the wage of an unqualified worker for each employee whose employment has not been promptly notified to the OAED.

The employer also is required to notify the competent IKA-ETAM branch, as well as to register employees that are insured for the first time with IKA-ETAM’s Register of Insured and to include them in the APD and the special book of new employees. The employer is liable for a charge on outstanding contributions in the event of failure to include new employees in its APD within the set time limits.

Terms and Conditions of Employment

In General

Regulating the Employment Relationship

The employment relationship is regulated not only by the employment contract, but also by mandatory provisions of law, employment regulations, and collective

10 Legislative Decree Number 2656/1953, as amended by Legislative Decree Number 763/1970.
agreements which, although not negotiated at an individual level, override less favorable provisions in individual employment contracts.

**Mandatory Provisions of Law**

There is considerable mandatory legislation which is binding on the employer, including legislation on weekly working time, overtime, rest periods, night work, work on holidays, sick leave, paid annual leave, holiday allowance, and minimum severance pay and notice periods in relation to dismissal.

Any agreement to derogate from minimum legal requirements is not valid, but improvement on such minimum provisions is permissible and encouraged.

**Employment Regulations**

Employment regulations govern various aspects of the employment relationship, including the hiring process, termination, conditions of work, remuneration and allowances, leave entitlement, disciplinary sanctions and procedure, and provisions on illness, accidents, and maternity.

Employers are required to adopt employment regulations where they have more than seventy employees. Enterprises with 40 to 70 employees also may have an employment regulation where approved by the competent prefecture’s committee.

An employment regulation is contractual in character and governs the performance of the employment contract provided that it does not override mandatory minimum provisions of law and, in the case of private businesses, is approved by the Labor Inspectorate. It also should be visibly displayed in a place accessible to employees in order to be valid.

Where a company has a works council, the employer and works council may negotiate the terms of an employment regulation pursuant to Law Number 1767/1988. The subsequent written agreement is submitted to the Ministry of Labor and displayed on the works council’s announcement board. Where neither party wishes to enter into negotiations or where the parties are unable to reach an agreement, the dispute is settled by a mediator or referred to arbitration.

Disciplinary sanctions consist of a verbal or written warning, reprimand, fine of up to 25 per cent of the daily wage or 1/25th of the monthly wage, or suspension without pay for a maximum of 10 days within a calendar month where the employee commits a second serious disciplinary offense. However, the

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11 Legislative Decree Number 3789/1957.
12 Law Number 2639/1999, art 15.
13 Law Number 2224/1994, art 8(3).
14 Law Number 1876/1990, arts 15 and 16.
15 Legislative Decree Number 3789/1957.
employee may not be dismissed for committing a disciplinary offense, and a
term in an employment regulation providing otherwise would be invalid.

Collective Agreements

Law Number 1876/1990 determines the content and categories of collective
agreements as well as the procedure for negotiating and adopting such. It also
contains provisions for their validity, duration, and termination.16

The law provides for mediation and arbitration where the parties are unable to
reach an agreement. The arbitrator’s award has the same effect as collective
agreements and enters into force from the date following the submission of the
application for mediation. There are various types of collective agreements,
namely:

• National general collective agreements, which regulate the terms of
  employment for employees working throughout the country;
• Company-level collective agreements, which include terms of employment for
  employees working in a particular business or enterprise employing at least
  fifty employees and are negotiated by the most representative trade union;
• Sector-level (national or regional) collective agreements, which regulate the
  terms of employment applicable to employees working in enterprises with the
  same or similar scope of activities; and
• Occupational collective agreements (national or regional), which apply to
  employees of the same occupation, irrespective of the nature of the business in
  which they are employed.

Collective agreements take effect from their submission to the competent
authority. Company-level collective agreements are submitted to the relevant
Labor Inspectorate in the area where they are concluded, while national general,
sector-level, and occupational agreements are submitted to the Ministry of
Labor.

Trade unions and employers should jointly adhere to collective agreements,
while trade unions should adhere to a collective agreement that is already
binding on the employer. Adherence is by means of a private deed which is
submitted to the Ministry of Labor and recorded in the special book of collective
agreements.

A decision of the Minister of Labor may extend the coverage of a collective
agreement which is already binding on employers employing 51 per cent of the
employees in a sector or occupation to all employees of that sector or
occupation. When an employer is bound by a collective agreement, its terms

16 It also provides for the establishment of an Organization for Mediation and
Arbitration (OMED), a private entity seated in Athens. The OMED’s board of
directors appoints independent mediators and conciliators for a three-year renewable
term.
automatically apply to individual contracts of employment and substitute individual terms which provide inferior benefits.

When the employment relationship is regulated by more than one collective agreement, the more favorable agreement is applied. Sector-level or company-level collective agreements supersede the terms of occupational collective agreements.

**Remuneration**

Wages are paid to employees in consideration of work performed, and consist in any reward in money or kind paid on a regular basis pursuant to the terms of employment or as agreed in collective agreements.

Discretionary benefits also may be considered as wages when an employee is accustomed to receiving these payments, unless the employer has explicitly reserved the right to withdraw these benefits at any future time.

The basic salary is paid at the end of each month. An additional monthly salary is paid as Christmas allowance, half a month’s salary is paid as Easter allowance, and another half is paid as holiday allowance. The salary is thus payable in 14 installments.

**Working Time**

Presidential Decree Number 88/1999, as amended by Presidential Decree Number 76/2005, adopts minimum requirements for the organization of working time.

“Working time” refers to any period during which the employee is working at the employer’s disposal, and carrying out his activities and duties in accordance with applicable provisions for each category of employees, while “rest period” is any period which is not working time.

The weekly working time may not exceed an average of 48 hours, including overtime over a four-month period. “Shift work” is any method of organizing work where employees succeed each other in the same position according to a certain pattern (continuous or discontinuous), entailing the need for employees to work at different times over a given period of days or weeks.

**Rest Periods**

For each 24-hour period, the rest period may not be less than twelve consecutive hours. When the working day is longer than six hours, employees are entitled to a fifteen-minute break which should not be granted at the end or commencement
of the working day. Employees also are entitled to at least 24 hours of rest per week that, in principle, includes Sunday.\footnote{17}

**Night Work**

A “night worker” is any employee who, during nighttime,\footnote{18} may work at least 726 hours of his annual working time when fewer hours have not been set by collective agreements.\footnote{19} Normal hours of work for night workers should not usually exceed an average of eight hours in any 24 hour period, but night workers whose work involves special hazards or heavy physical or mental strain should not work more than eight hours in any 24 hour period.

Night workers should have a medical examination before their assignment to night work and at regular intervals during their assignment. Night workers suffering from health problems connected to night work they have performed are transferred to suitable day work. Employees who use night workers are required to inform the relevant Labor Inspectorate.

**Overwork and Overtime**

Employees with a weekly working time of 40 hours (five-day workweek) or 48 hours (six-day workweek) may, at the employer’s discretion, work for a further five or eight hours per week, respectively.\footnote{20} These hours are regarded as overwork (not overtime) and are remunerated at the normal hourly rate increased by 20 per cent.

Weekly hours of work exceeding 45 hours (five-day workweek) or 48 hours (six-day workweek) up to 120 hours per year are considered as lawful overtime and are remunerated at the hourly rate increased by 40 per cent.

Work for more than 120 hours of overtime per year is regarded as exceptional overtime, which is remunerated at the normal hourly rate increased by 60 per cent. If the exceptional overtime is not approved by the Labor Inspector, the employee is remunerated at the normal hourly rate increased by 80 per cent.

If the employee has a weekly working time of less than 40 hours, employment of up to 40 hours per week is regarded as additional work and is remunerated at the normal rate.

\footnote{17}{Sunday commences at noon and ends at midnight. For activities entailing work for 24 consecutive hours, Sunday may commence at six o’clock or seven o’clock in the morning and end at the same time on Monday.}
\footnote{18}{This pertains to the eight hours between midnight and six o’clock in the morning.}
\footnote{19}{For purposes of calculating this time, the employee’s daily working time is taken into consideration provided that, during this time, at least three hours are performed between midnight and five o’clock in the morning irrespective of the time of commencement or completion of work and for at least seven consecutive hours.}
\footnote{20}{Law Number 3385/2005, as amended by Law Number 3863/2010.}
Working Time Arrangements

Enterprises with a weekly working time of up to 40 hours are allowed, during periods of increased work, to request employees to work an extra two hours per day in addition to the normal eight hours without additional pay, so long as the extra hours are deducted from hours worked at another time.

Alternatively, the employee may be granted a day of rest or increase in paid annual leave or a combination of reduced daily hours of work and additional days of rest. The period of increased and decreased hours of work may not exceed four months in a calendar year.

In addition, enterprises with a forty-hour workweek may, in the event of work accumulation, agree that 256 hours of work are attributed to other periods that may not exceed 32 weeks in a year with a corresponding reduced number of hours during the remaining calendar year.

During the period of reduced working time, overwork is remunerated at the normal hourly rate increased by 30 per cent, while overtime is remunerated at the normal hourly rate increased by seventy-five per cent (or 100 per cent where undeclared).

Both cases presuppose an agreement between the business and trade union, works council, or employee representative committee. Where an agreement cannot be reached, the matter may be referred to the Organization for Mediation and Arbitration. Employees are not required to perform additional work when they are not in a position to do so, provided that any denial on their part is in good faith.

Paid Annual Leave

Every employee who has completed twelve months of continued employment is entitled to paid annual leave on a pro rata basis. This is calculated on the basis of 20 days’ paid leave for employees with a five-day workweek and 24 days’ paid leave for employees with a six-day workweek.

Paid annual leave for the first calendar year of employment should be granted by 31 December. Paid annual leave is increased by one day for each year of employment after the first, and up to 22 or 26 working days for employees working a five-day or six-day workweek, respectively.

Other Special Leaves and Sick Leave

In addition to annual leave, employees are entitled to other special leaves such as marriage leave, maternity leave, bereavement leave, parental leave, leave for illness of family members, and educational leave.
The absence of an employee from work for long-term illness\textsuperscript{21} is not regarded as a termination of the employment relationship, although the employer may terminate the employment subject to compliance with the requirements for a valid termination.\textsuperscript{22}

The employee is required to notify the employer of illness and provide relevant supporting documentation. An employee who is ill is entitled to one month’s paid leave if he has been employed for at least one year and half a month’s paid leave if he has been employed for ten days to one year.

**Health and Safety and the Workplace**

Employers should ensure the health and safety of employees in every aspect related to their work. The general obligations imposed on employers are wide and include prevention of occupational risk, information and consultation of employees, adequate health and safety training, and having the necessary organization and means.

The laws and regulations relating to the health and safety of workers were recently codified by Law Number 3850/2010. The law contains general building and workplace requirements, protective measures for the prevention of dangers from machinery and from exposure to natural, chemical, and biological agents, as well as certain obligations on manufacturers, importers, and suppliers in relation to the security of machinery.

An employer with more than fifty employees should establish health and safety committees which consult with the employer on a quarterly basis. The members are appointed by the works council (or assembly of employees) and their number depends on the company’s size.

Companies with more than fifty employees also should engage a safety officer and a company doctor. The duration for which their services are necessary depends on the nature of the business and the number of employees.

Employers that violate health and safety provisions are subject to criminal and administrative sanctions. Administrative sanctions may be in the form of fines or temporary or permanent closure of enterprises or branches of activity.

\begin{itemize}
  \item[21] This refers to illness that lasts for one month for employees with up to four years of employment, three months for those with up to ten years of employment, four months for those with up to 15 years of service, and six months for those with more than 15 years of service.
  \item[22] Law 2112/1920, art 5.
\end{itemize}
Termination of Employment

Individual Dismissals

In General

Law Number 3198/1955, Law Number 2112/1920, Royal Decree Number 16/18 July 1920, as amended, and Law Number 3863/2010 regulate the termination of indefinite-term employment contracts.

There are three requirements for a valid termination, namely: (a) a written notice of termination with or without a minimum period of notice; (b) the payment of severance pay; and (c) the non-abusive nature of the termination. The employer is not required to justify the dismissal. In practice, notices to terminate employment contracts do not include reasons for termination.

Dismissal with Notice

Dismissal with notice only applies to employees and not to workers. The minimum notice period is linked to the duration of continued employment with the same employer and has recently been reduced to one month for employees with two months to two years of continued service, two months for those with two to five years’ service, and three months for those with five to ten years’ service.

The maximum statutory notice period is six months for employees who have worked for more than 20 years. Employees that are dismissed with notice of dismissal receive half the compensation they would have received had they been dismissed summarily.

Summary Dismissal

An employer also may dismiss an employee without notice by paying the full amount of compensation. Such employee is eligible for compensation if he has been employed for more than two months on the date of termination.

Compensation is based on the period of continued employment with the employer and the remuneration received the month prior to dismissal, and is increased by one-sixth to account for corresponding Christmas, Easter, and holiday allowances. The employee is entitled to his holiday allowance when paid annual leave has not been taken in the year of dismissal.

Employees who have been continuously employed for two months to one year are entitled to one month’s compensation when summarily dismissed and half a month’s compensation when the termination is with notice. On the other hand, those with one to four years’ continued employment are entitled to two months’ compensation in case of summary dismissal and one month’s compensation when notice has been given.
The maximum compensation payable is 24 months for employees who have been continuously employed for more than 28 years and who are summarily dismissed or twelve months for employees who are dismissed with prior notice.

The compensation for workers also is calculated with reference to the duration of their continued employment with the same employer. For instance, workers are entitled to five days’ compensation when they have been employed for more than two months to a year, and 160 days’ pay for continued employment of more than 30 years.

The maximum ceiling on compensation is currently in the range of EUR 8,000. The monthly remuneration exceeding eight times the daily wage of an unqualified worker multiplied by 30 is not considered in calculating for compensation. However, employees who are founding members of société anonyme companies are entitled to full compensation.

Compensation may be reduced where an employee qualifies for a full pension under a relevant insurance fund. The compensation is 40 per cent of the statutory minimum for employees insured with an auxiliary fund and fifty per cent for employees who are not so insured.

In the event that employees refuse to accept their compensation, such should be deposited by the employer in the Deposits and Loans Fund. There is a six-month limitation period for bringing a legal action in relation to the amount of severance compensation commencing from the date when these claims became due and payable.

Non-Abusive Dismissal

Case law has placed certain restraints on the employer when selecting which employees to dismiss. Employers should take into account various factors, including performance, prior service, financial and family situation, age, and the possibility of securing alternative employment.

When a dismissal is not motivated by a serious reason, it may be declared invalid by a court such that the dismissed employee would be entitled to receive wages in arrears and be reinstated in his previous position.

An employee may succeed in claiming to have been abusively dismissed where the court finds that the dismissal was contrary to good faith and bonos mores or contrary to the social or economic reason for termination. Courts have considered dismissal as abusive when the employee:

- Has claimed wages or other rights in court;
- Claims enforcement of the employment contract by the employer;
- Has referred a matter to the labor inspector;
- Participates in trade union activities;
- Is dismissed as a disciplinary sanction;
• Is dismissed due to pregnancy; and
• Does not accept a unilateral harmful modification of employment terms by the employer.

Courts have held that dismissals are not abusive when related to the employee’s misconduct, such as unjustified absence from work, delays in arrival, or participation in unlawful strikes. Dismissals necessary for economic or technical reasons also are not regarded as abusive. Legal actions relating to the abusive nature of a dismissal and requests for the court to render a dismissal invalid are subject to a three-month limitation period.

Protective Provisions

Law Number 3863/2010 has recently introduced protective provisions for employees aged fifty-five to sixty-four who remain unemployed after the termination of their employment.

Within two months of dismissal, they have the right of self-insurance with the former employer being required to contribute over a three-year period 50 per cent of the cost of self-insurance if the employee is 55 to 60 years of age and 80 per cent of the cost where the employee is 60 to 64 years of age. The number of employees that may be dismissed within the 55 to 64 year age group may not be more than 10 per cent of the workforce.

Collective Dismissals

In General

Law Number 1387/1983, as amended by Law Number 2874/2000 and Law Number 3863/2010, ensures that major redundancies are subjected to proper consultation with trade unions and that the competent public authority is notified prior to dismissals. In collective dismissals, employees are dismissed for reasons not related to the individual employees, and are effected by a company employing more than 20 employees within a period exceeding one month with the following limits:

• Six employees in undertakings or establishments employing 20 to 150 persons; and
• Five per cent and up to 30 employees in undertakings or establishments employing more than 150 employees.

Information

The employer is required to disclose in writing to employee representatives the reasons for the contemplated collective dismissals, the number and description of employees normally employed and to be dismissed, the period over which the dismissals are to be effected, and the criteria for the selection of employees.
Copies of all written communications are submitted by the employer to the prefect and the labor inspector.

Consultation with Employee Representatives

The employer should consult with employee representatives\(^{23}\) to examine the possibility of avoiding or reducing dismissals and mitigating their consequences. The duration of consultation is 20 days and commences from the employer’s invitation for consultation.

The results of the consultation are recorded in minutes which are signed by both parties. The minutes are then submitted by the employer to the prefect or Minister of Labor. When an agreement is reached, collective dismissals are carried out pursuant to the terms of the agreement and take effect ten days after the date of submission of the minutes to the prefect or Minister of Labor.

When an agreement is not reached, the prefect or Minister of Labor may, within ten days from submission of the minutes, extend the consultation for another 20 days at the request of one of the parties, or may decide not to approve all or part of the dismissals. The employer can effect collective dismissals authorized by a decision of the prefect or Minister of Labor. When such decision is not issued within the applicable time limit, collective dismissals are effected as proposed by the employer during the consultation proceedings.

Voluntary Resignation

Employees who voluntarily resign are not entitled to compensation, although they are entitled to paid annual leave and holiday allowance for the year of their departure. The employer is required to notify the Manpower Employment Organization within eight days from the employee’s departure.

Employees retiring with the employer’s consent who have 15 years of service or who have reached the retirement age are entitled to 40 per cent compensation.

Transfers of Undertakings

In General

Presidential Decree Number 178/2002 safeguards employees’ rights in the event of transfers of undertakings, businesses, or parts of businesses. It provides for

\(^{23}\) These are the legal representatives of the trade union(s), or a committee consisting of three or five members (for companies employing 20 to 50 or more than 50 employees, respectively) appointed by secret ballot by the assembly of employees where there is no trade union. The assembly should convene within seven days from the employer’s invitation. When employee representatives are not appointed pursuant to this procedure, employees are represented by a committee of three or five members, consisting of employees with the longest prior service with the company.
the automatic transfer of the employment relationship, with all its rights and obligations, in the event of a transfer of an undertaking.

The transferor and the transferee are required to inform and consult the representatives of the employees affected by the transfer.

**Rights Arising from the Contract of Employment**

The transferor’s rights and obligations arising from a contract of employment or employment relationship existing on the date of the transfer should, by reason of such transfer, be transferred to the transferee. However, the transferor continues to be liable in respect of obligations arising from the employment relationship up to the transfer.

Under this co-liability rule, no time limit is fixed for the period during which the transferor remains liable. The transferor and transferee may have a contrary agreement on their respective liabilities, but such is not binding on third parties or employees. The transferee is required to observe the terms and conditions of any collective agreement, arbitral award, regulation, or individual employment contract.

The rule that the transfer of an entity does not affect employees’ rights does not apply to rights under supplementary company and inter-company pension schemes. The continuation of these pension schemes is at the discretion of the transferee, who may continue the insurance agreement under the same terms and conditions, amend it subject to compliance with a given procedure, or discontinue the agreement prior to the transfer.

The consent of employees is not required in a transfer, unless they decide not to transfer. In such a case, they may be considered as having resigned without being entitled to compensation. When the change of employer involves a harmful modification of the terms and conditions of employment, the initial employer is required to obtain the employees’ consent prior to the transfer or to otherwise terminate the agreement and pay compensation.

If the employer refuses to terminate the agreement, employees with a contract for an indefinite term may terminate the agreement on the ground of unilateral harmful modification of contract terms by the employer and claim compensation.

**Rights Relating to Dismissal**

Although the transfer of an undertaking will not in itself constitute grounds for dismissal, this does not impede dismissals that take place for economic, technical, or organizational reasons entailing changes in the workforce.

In this case, the employer should observe the legal requirements for individual and collective dismissals.
**Obligation to Inform and Consult**

The transferor and transferee should inform the representatives of their respective employees affected by the transfer of the date or proposed date of the transfer, the reasons for such, the legal, economic, and social implications for the employees, and the measures envisaged in relation to the employees.

Such information should be timely given before the transfer is carried out. If the transferor or transferee envisages employment-related changes, they should timely consult the employee representatives with a view to reaching an agreement.

Where a company does not have employee representatives, the employees themselves should likewise be timely provided with the relevant information in writing. The transferor, transferee, or their representatives that fail to comply with information and consultation requirements are liable to pay a fine ranging between EUR 147 and EUR 8,804 for each infringement.

**Privacy Laws in the Workplace**

**In General**

Law Number 2472/1997 on the protection of individuals with regard to the processing of personal data, as amended by Law Number 2819/2000 and Law Number 3471/2006 (“Data Protection Law”), is the main legislation applicable to the protection of personal data in Greece. It is reinforced by decisions of the Data Protection Authority (“Authority”), some of which regulate the processing of employees’ personal data.

Where processing of employee data is not strictly required for the performance of the employment contract, employee consent should be obtained and the Authority should be notified. Otherwise, the employer is not required to do so where data processed is necessary to enable compliance with legal obligations.

**Decisions of the Data Protection Authority**

Under the Authority’s Decision Number 115/2001, the collection of personal data should protect employee privacy in the workplace.

Collection and processing of employees’ personal data is allowed only for purposes directly related to the employment relationship and should be necessary for complying with obligations arising from such relationship. The information should be collected in a lawful manner and for specific and explicit purposes which should be made known to the employees.

The personal data should be adequate, relevant, and not excessive as regards the purposes for which they are processed. The information should be accurate and kept up-to-date and should not be kept for longer than is necessary.
Thus, if an employment relationship is terminated or the employee has not been recruited, the information should be kept in a form which permits identification of data subjects only for the period necessary for defending a claim in court.

Keeping information on a candidate whose application has been rejected should be at the candidate’s request and for the purposes of the company considering the employee for a position at a later stage.

A background investigation on an employee is lawful, provided that the employee or candidate has been notified and his consent has been obtained. The employee or candidate should be informed of the purposes of the processing, the persons that will be contacted, the type of information requested, and the consequences of not consenting.

Data collected in the course of the recruitment process should be limited to what is necessary to evaluate the suitability and capabilities of candidates. Certain employment positions by their nature require the collection and processing of data relating to criminal prosecution and convictions. This is lawful provided that this information is provided directly by the candidate.

Health data may not be collected from sources other than the employee or candidate concerned and should be collected only when necessary to determine the suitability of an employee or a job applicant for current or future employment, for compliance with health and hygiene regulations, or for granting social benefits.

Health data and sensitive personal data (e.g., data related to the criminal prosecution of employees) should be stored separately from other categories of data. Only employees, the controller, and persons specifically authorized by the controller may have access to the personal data. The data should not be stored or coded in a way that would allow employees to be characterized or profiled without their knowledge.

**Employee E-Mail Communications**

The collection and processing of data in relation to communications in the workplace, which includes e-mail, is permitted only when absolutely necessary for organizing and monitoring the completion of a particular task or cycle of work and for controlling cost.\(^\text{24}\)

Recording and processing of all data related to the communication or its contents is prohibited except with the authorization of a judicial authority and where necessary for national security or detection of particularly serious crimes.

Access and recording of data related to electronic communications, such as recipients and contents of electronic communications, is not lawful and may not be used to monitor the conduct of employees.

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\(^\text{24}\) Decision Number 115/2001 and Decision Number 61/2004 of the Data Protection Authority on an employer’s right of access to personal computers of employees.
Monitoring the content of e-mails is prohibited except when justified by specific requirements for security and safety in the workplace and when there is no other means for achieving this purpose. Employers should not rely on employee consent to legitimize processing, as any consent obtained from employees may be undermined by the relationship of dependency.

**Employee Telephone Records**

Employees should be informed that the subscriber receives itemized bills for telecommunication services used in the workplace. The collection and processing of data related to incoming and outgoing calls in the workplace also is permitted only when absolutely necessary for organizing and monitoring the completion of a particular task or cycle of work and for controlling cost.

Processing of the entire number is not allowed. The subscriber or user may require the provider of a publicly available telecommunications service to erase the three final digits of numbers dialed.25

**Employee Internet Use**

Processing of data in relation to employee website access is permissible only in individual cases when the controller has an overriding legitimate interest. Such a legitimate interest may exist when it is necessary to establish conduct prohibited under the employment relationship or regulation (such as accessing websites with pornographic content).

A routine and precautionary collection of data related to employee website access is prohibited under the proportionality principle.

**Closed Circuit Television**

The use of sound and video recording and other similar systems is permitted when necessary to ensure security in the workplace and for protecting individuals and property. Data collected for these purposes may not be used to evaluate employee performance.

The recording of images and sound in public areas is prohibited, except where justified on exceptional grounds at the discretion of the Authority.26 Data should not be kept for more than 15 days except where specific authorization is obtained from the Authority for data to be kept for a longer period in exceptional cases.

25 Law Number 2774/1999, art 5, para 3.
26 Decision Number 1122/26.9.2000 of the Data Protection Authority on Closed Circuit Televisions.
Other Requirements
Employees should be notified of the introduction and use of methods of control and monitoring. They also should be informed of the persons to whom data are transferred or may be transferred and their rights as regards access or objection.

Personal data may not be used against the employee if the employer fails to inform him of the methods of control and monitoring adopted. Employee representatives also should be informed and should be allowed to express their opinion prior to the introduction of monitoring methods.

Transfer of Employee Data outside the European Union
The transfer of data outside the EU is subject to notification and, in certain cases, licensing requirements. The same rules and regulations apply to personal employee data transferred to parent, subsidiary, and associated companies seated in third countries.

Although notifying the Authority of data transfers is always necessary, a license is not required where the transfer is to a country ensuring an adequate level of protection or where other routes for legitimating the transfer have been implemented, such as adherence to safe harbor principles or adoption of standard contractual clauses or binding corporate rules (for intra-group transfers).

Conclusion
The protection of employees in Greece has been achieved by the adoption of significant collective and individual measures. Constitutional provisions, legislation implementing international labor conventions and European Directives, national legislative and codified provisions, as well as dispute settlement procedures guarantee substantial and procedural rights of employees at the individual and collective levels.

Many of the protective provisions are mandatory and employees cannot waive their right to their application. While intended to ensure protection of employees, there also is a degree of flexibility in the law to facilitate the restructuring of enterprises and enable the introduction of alternative working arrangements. Relevant provisions have recently been enhanced in response to the current economic situation.
Introduction

Employment law in Hungary is determined by prevailing economic and social conditions. Over the last century, the government’s role in employment has changed significantly due to political circumstances. Employment law developed relatively late in Hungary compared to that in other European countries, except with regard to collective agreements. The first collective agreement was concluded by printers and printing house owners in 1848.

The maximum working hours was set at nine hours per day in 1840, but this was not mandatory. Organizing a strike was considered a crime, while agricultural day laborers could be apprehended and forced to appear at the place of work. Employee insurance was introduced only at the turn of the century.

The end of the Second World War saw the extended role of collective agreements and the workers’ council. However, the role of collective agreements became a mere formality, mainly ensuring the mobilization of employees to fulfill economic plans. The first Labor Code was enacted in 1951 on the basis of the Soviet sample. Employment relationships were regulated as public servant relationships. The centralized governance provided a disproportionately enormous role to the employer, which was the State.

A new Labor Code was enacted in 1967 to address the change in economic governance. It aimed to facilitate the individual operation of enterprises and to broaden employees’ and trade unions’ rights. The Labor Code of 1967 was modified several times depending on the condition of State governance.

Due to discrepancies generated by privatization in the labor system after 1988, the private and public spheres had to be regulated separately. One of the most urgent issues then was the rebuilding of trade unions and other collective labor law institutions. The law on strike was enacted in 1989, while the law on employment was enacted in 1991 following the change in political regime.

Legislation in 1992 created the basis for the current regulation system of labor law, changing the legal underpinnings of the employment agreement and collective agreements based on the market economy and constitutional norms. Act Number XXII of 1992 ("Labor Code") provides for minimal standards from which parties
can agree to deviate in favor of the employee. The State became the protector of employees’ interests through guaranteed social and health safety.

The provisions of the Labor Code are in harmony with European Union (EU) regulations, particularly with respect to the establishment of employment, types of employment, leasing employees, and prohibition of discrimination. Regulations on health and safety in the workplace also are in harmony with European Council (EC) Directives.

The National Reform Program for Growth and Employment from 2005 to 2008 was generally aimed to create more flexible and family-friendly forms of employment, geographical and employment mobility, and the improvement of labor market situations for the Roma population.

**Legal Relationship between Employer and Employee**

**Definition of Employment**

“Employment” is defined as a relationship of a special hierarchical nature with the cooperation of its parties for the performance of specific work by the employee for a definite fee. Although civil law relationships are not considered as employment relationships, they are very similar. The main characteristics of the employment relationship are determined by case law and the joint Minister of Employment and Finance Guidelines Number 7001/2005.

The most significant feature of employment is the hierarchical relationship. Its other characteristics include: (a) the type of activity or job description, (b) personal performance of work, and (c) the obligation of the employer to employ the employee, and the obligation of the employee to be at the employer’s disposal.

Its secondary characteristics include: (a) the employer’s instructions and supervision, (b) determination of work time and schedule, (c) place of work, (d) wages, (e) use of the employer’s equipment, sources, and materials, (f) ensuring health and safety in the workplace, and (g) a written contract.

No individual feature alone can determine whether or not the relationship is one of employment. The complex agreement and circumstances of the work performance should be considered. The tasks to be performed by the employee are determined and specified in the job description, which tasks should be performed continuously and repeatedly. The employer is entitled in certain cases (e.g., reassignment, posting, and temporary assignment) to require the employee to perform tasks that are not included in the employment agreement.

In reassignment, the employer orders the employee to temporarily work in another position in lieu of or in addition to his original position for reasons related to the employer’s operations.

Posting may arise if, for economic reasons, the employer orders an employee to temporarily work at a place other than the normal place of work on the condition
that the posted employee continues to work under the employer’s direction and instructions.

In temporary assignment, an employee may be required to perform work temporarily at another employer by virtue of an agreement between the employers concerned, provided that there is no consideration of any kind involved in the assignment, and under any of the following circumstances:

• The owner of the other employer also is the owner — in part or in full — of the employer;
• At least one of the two employers holds some percentage of ownership in the other;
• The two employers are connected through their ownership in a third organization.

Employers are required to employ their employees in accordance with the rules on contracts of employment, labor relations, and other relevant legislation. The employee is required to appear at the place and time specified by the employer in a condition fit to work, and to spend the working hours performing work or be at the employer’s disposal for the purpose of performing work during this time.

The employer should provide employees with the information and guidance necessary for carrying out their work, and the employee should perform his work according to the employer’s instructions. The employer may determine the employee’s work time, work order, and schedule within the framework of the Labor Code, unless otherwise provided by a collective agreement. In civil law relationships, the mandator or contractor may only determine internal and final deadlines. However, special categories of employees may determine their own working time and work schedule, such as employees employed in teleworking1 or home work.

Generally, the place of work is the employer’s business premises, but the employee may perform his duties in other places. In civil law relationships, the mandatee or contractee generally may determine the place of work depending on the type of work.

Employers should pay employees regular wages determined by applicable labor laws and the employment agreement. Wages will be paid once a month, unless otherwise prescribed by labor law or the employment agreement.

The employee may use the employer’s equipment, sources, and materials. Otherwise, he should be reimbursed for all necessary and substantiated costs incurred in the course of discharging his work-related obligations, as well as for

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1 This pertains to an employee regularly engaged in activities within the employer’s regular profile of operations at a place of his choice other than the employer’s business premises, using computers and other means of information technology and delivering his work product through electronic means.
other required expenses incurred in the employer’s interests, if the employer has approved them in advance.

Employers should ensure proper conditions for performing work, while the contractor or mandator in civil law relationships is under no such obligation. Employment contracts also should be concluded in writing, while civil law contracts can generally be concluded verbally. The employee is responsible for preparing the written employment agreement.

Establishment of the Employment Relationship

The employment relationship is established by an employment agreement unless otherwise provided by law. An employee can only claim invalidity on the ground of failure to set the contract in writing within thirty days from his commencement of the work.

The employer and the employee can settle any issues in the employment agreement. The agreement should not be contrary to applicable law and the collective agreement unless it stipulates more favorable terms for the employee.

Parties to the Employment Agreement

In General

The employer should have legal capacity, but not the capacity to act. Thus, any natural person can be an employer. Even a minor (person below eighteen years of age) or a person with limited capacity can be an employer, but his legal representative should proceed instead of him. An economic operator also can be an employer.

Any natural person with full or limited capacity to act can be an employee. Persons with limited capacity, i.e., persons between fourteen and eighteen years of age, and persons over eighteen placed by the court under guardianship, may conclude an employment agreement without their legal guardians.

A person who is at least fifteen years of age receiving full-time education in an elementary, vocational, or secondary school may enter into an employment relationship during school holidays. Persons below fifteen years of age and subject to compulsory full-time schooling may be employed for artistic, sports, modeling, or advertising activities with prior authorization by the competent authority.

Employees for a Definite Period

Employees can be employed for an indefinite or definite period. In the absence of an agreement to the contrary, an employment relation is established for an indefinite duration. If an employment relationship concluded for a definite period is

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2 This includes State-owned companies, cooperatives, European cooperative societies, business associations, European public limited-liability companies, water management organizations, forest management associations, and court bailiffs offices, among others.
renewed or extended between the same parties without any rightful interest attached on the part of the employer, and the conclusion of the contract is aimed at compromising the rightful interests of the employee, the employment will be deemed to be established for an indefinite duration.

An employment relationship concluded for a definite period may not last longer than five years, including the duration of an extended relationship and that of another fixed-term employment relationship created within six months from the termination of the previous fixed-term employment relationship.

Where an employment relationship is subject to official approval, it may only be for the duration specified in the authorization. In this case, the duration of the new fixed-term employment relationship together with the previous one may exceed five years.

A fixed-term employment relationship will be considered an indefinite period employment if the employee (other than someone whose employment relationship was established by election or official approval) works for at least one extra day following the expiration of the original term with the knowledge of his immediate superior. However, an employment relation established for a period of thirty days or less will be extended only by the amount of time for which it was originally established.

Part-Time Employees

The employer and the employee may have a part-time employment agreement, where all payments made to the employee in exchange for work should be in accordance with the length of time of the work performed, if remuneration is contingent upon the amount of working time.

If the employee wishes to modify the employment contract in connection with full-time or part-time employment, the employer should, at his own discretion, determine whether to accept the proposal for modification in light of work organization, feasibility, and filling the position in question. The employer should notify the employee in writing of his decision within fifteen days.

To facilitate the change to full-time or part-time employment, the employer should inform the employees in the most appropriate manner and in due time of the positions for which requests for modification of the employment contract can be accommodated.

Leased Employees

In case of lease of an employee, the employee is employed by a lessor employer who agrees to provide him to a lessee employer for a fee. The basic employment relationship between the employee and the lessor employer is established for the purpose of the lease.
An agreement between the employee and the lessor employer will be null and void if it contains a clause to ban or restrict any relationship with the lessee employer following termination of the employment relationship on any ground.

An agreement between the employee and the lessor employer also will be considered null and void if it requires the employee to pay a fee to the lessor employer in the event that the employee wishes to enter into an employment relationship with the lessee employer. Whether the lessee employer has paid any fee to the lessor employer will have no effect on the wage payment obligation of the lessor employer. The employer’s rights and obligations will be exercised jointly by the lessor and lessee employers as agreed, but the employment may only be terminated by the lessor employer, while the leased employees will be subject to the lessee employer’s rules on working arrangements, working time, and rest time.

Foreign Employees

The employment of foreign persons is generally subject to a work permit issued by the local branch of the Public Employment Service, except for the following:

- Persons with refugee status;
- Beneficiaries of subsidiary protection;
- Persons enjoying temporary protection;
- Persons who have been granted immigrant or permanent resident status;
- Persons with the right of free movement and residence (citizens of the European Economic Area and their family members);
- Representatives of foreign companies’ Hungarian representative offices or branch offices; or
- Persons providing sport or science activity for no more than ten working days.

The employer of such foreigners should notify the competent employment authority about the employment relationship before the commencement of employment. The work permit should be issued prior to the conclusion of the employment agreement, as the lack of permit renders the employment agreement void. The employer applies for the work permit.

Applying for a work permit is free of charge. The Public Employment Service may issue individual work permits, collective work permits, and individual work permits based on a group permit. The type of permit also may vary based on the nature of the employee, i.e., if the employee is in a key position or not. Employment law generally does not restrict certain jobs in terms of nationality. However, only citizens may be employed as public servants.

Child Labor

The Labor Code distinguishes between adult employees (over 18 years old) and young employees (under 18 years old), and contains stricter provisions for young employees to protect their interests. These are as follows:
• Young employees with limited capacity to act may conclude an employment contract with the approval of their legal guardian.

• Young employees should not be employed in work that may be harmful to their physical condition or development. The applicable laws determine particular jobs for which young employees may not be employed, or may only perform under specific working conditions or on the basis of a preliminary medical examination.

• Young employees’ working time should not exceed eight hours daily or forty hours weekly. The working time cycle of young persons should not be longer than one week. For purposes of working time limits, the time of work performed for several employers will be accounted for in the aggregate.

• Young employees cannot be used to work night hours, for special work duty, or for stand-by or on-call duty.

Any young employee whose daily working time is over four-and-a-half hours will be entitled to at least thirty minutes’ break. The daily rest period between the end of one working day and the beginning of the next will be at least twelve hours for young employees. They also are entitled to five extra days of vacation each year. The last time such benefit applies will be the year when the young person reaches the age of eighteen.

Executive Employees

The Labor Code distinguishes executive employees from employees in executive positions. Executive employees are the executive officers of a company (if there is an employment relationship between the executive officer and the company) and their deputies. On the other hand, employees in executive positions are other employees placed in positions of key importance for the employer’s operations.

There are slightly stricter rules for executive employees and employees in executive positions concerning work time and remuneration for extra work, the establishment of further employment relationships and incompatibility, termination of the employment relationship, and liability for damages. Thus, if any legal dispute or examination is brought up by the labor authority, the employer has to justify why such a position qualifies as an executive position.

Transfer of the Business

Transfer of employment occurs when an independent unit (e.g., strategic business unit, plant, shop, division, workplace, or any part thereof) or the financial and other resources of the employer are transferred by agreement to an organization or person for continuing or restarting operations, and if such transfer takes place within the framework of sale, exchange, lease, or leasehold or capital contribution for a business association. The transfer of an undertaking or business or part thereof will not in itself constitute grounds for dismissal by the transferor or transferee.

In the event of succession, the predecessor and the successor employers should, within fifteen days prior to the date of succession, inform the local trade union branch (or workers’ council or committee formed from the representatives of non-union employees, where applicable) of the schedule or proposed date of succession, as well as the reasons and their legal, economic, and social consequences to the employees.

The predecessor and successor employers also should initiate discussions for reaching an agreement on other proposed actions that affect the employees. If an employer violates such rights of the workers’ council or the trade union, the workers’ council or the trade union affected may seek remedy in court.

The rights and obligations of the predecessor employer will be transferred to the successor employer at the time of succession. The predecessor employer should inform the successor employer of rights and obligations connected to employment, but failure to supply such information will have no effect on the legal consequences arising from the succession or on the employees’ rightful claims.

The predecessor and the successor employers will be jointly liable for obligations incurred prior to the transfer of the enterprise by succession if such claims are enforced within one year from the transfer. If an employee is ordinarily dismissed by the successor employer within one year from the transfer for reasons connected to the employer’s operations, or his definite period employment is terminated, the predecessor employer will, as a surety, be liable for the employee’s emoluments due upon termination.

**Terms and Conditions of Employment**

**In General**

In addition to the names of the parties and their particulars, the employment agreement also should specify the employee’s personal base wage, job description, and place of employment. Within 30 days from the conclusion of the employment contract, the employer should notify the employee in writing of the following matters:

- Regular work hours;
- Other component elements of the remuneration;
- Date of payment of wages;
- Date of commencement of employment;
- Number of days of paid annual leave and the procedures for allocating and determining such leave;
• Rules governing the notice period in case of termination by ordinary notice;
• Whether a collective agreement applies to the employee; and
• Name of the local trade union branch, and whether there is a workers’ council.

Remuneration

In General

Employees are entitled to a salary from the employer, and any agreement to the contrary will be considered null and void. The principle of equal treatment applies to the remuneration of employees for the same work or for work of equal value.

Personal Base Wage

Unless otherwise agreed, an employee is entitled to a salary corresponding to the personal base wage specified in the employment contract. The wage payable should be established by (a) the performed time, (b) performance, or (c) a combination of both. The personal base wage should be specified on the basis of time.

If the wage is established by performance, performance requirements should be determined on the basis of preliminary and objective surveys and calculations covering the potential to perform 100 per cent of such requirements during regular work hours. The employees concerned should be given advance written notice of performance requirements and performance-based wage factors. Publishing the relevant information in the most appropriate manner will be construed as written notice.

In the event of any dispute concerning performance requirements, the employer has the burden of proving that they were implemented fairly and in good faith. Where fulfillment of the performance requirement is mostly not dependent on the employee, a guaranteed salary also should be established. The personal base wage or the performance wage should be at least the minimum wage, which stood at HUF 73,500 in 2010.

Extra Pay

Extra pay may be established by agreement between the employer and the employee as well as by applicable laws. In either case, it will be calculated based on the employee’s personal base wage, unless otherwise agreed.

Extra pay should be paid for working nights, Sundays, and in excess of the daily working time or over and above the relevant working time cycle.

Absentee Pay

If required by law, the employee’s wage will be supplemented by his absentee pay or, if no work is done, absentee pay will be paid. Absentee pay also will be paid if employment-related provisions prescribe the payment of wages without having any
work performed and without specifying the actual amount of such payment. In particular, employees will be given absentee pay for:

- Working time lost due to an absence caused by performing civil duties;
- Two days upon the death of a close relative;
- Entire duration of compulsory medical examination (including pregnancy tests);
- Entire duration of absence for the purpose of donating blood, or for at least four hours if it takes place outside the workplace;
- Time lost because of a national holiday;
- Duration of vacation time;
- Duration of the labor time allowance for nursing an infant; and
- Duration of being relieved from work as specified by provisions on labor relations.

Where an employee is unable to work for reasons attributable to the employer, such employee will be entitled to his personal base wage for the working time lost (idle time).

**Protection of the Wage**

Unless otherwise prescribed by law, wages should be established and paid in Hungarian legal tender. Wages will not be paid in payment vouchers or in any other form. Payment of wages in kind may be in the form of commodities or services which satisfy the needs of employees and their families. Payment of wages in kind should not exceed twenty per cent of the wage specified in money. Alcoholic beverages or other items detrimental to health should not be provided as payment in kind.

Employee wages should be retrospectively accounted and paid once a month, unless otherwise prescribed by law or by agreement between the parties. If the employment is for less than one month, the wages should be accounted and paid upon termination of the employment relationship.

Unless otherwise prescribed by law or agreement between the parties, wages should be paid by the tenth of the month following the month to which it pertains. If payday falls on a rest day or a legal holiday, the wages will be paid on the last preceding working day. Deductions from wages should only be made on the basis of relevant legislation, a writ of execution, or by the employees’ consent, otherwise the deduction will be void.

**Social Contribution**

Employers may support the fulfillment of employees’ cultural, welfare, and healthcare needs, and the improvement of their living standards. The fringe benefits provided for this purpose should be specified in the collective agreement, but employers also may provide additional support to employees. If any work results in
extensive soiling or wear of clothing, the employer should provide the employee with work clothes.

An employer will be entitled to take over from his employee or provide assistance in the payment of membership dues in a voluntary mutual insurance fund in the form of an employer’s contribution. An employer’s contribution may be granted to employees who are members of a voluntary pension fund, a voluntary health fund, or a voluntary mutual aid fund.

**Hours of Work**

The hours of work for full-time employment will be eight hours a day or forty hours per week, although the law or an agreement between the parties may stipulate less working time for full-time employment. The parties may agree to increase the working time of full-time employment to no more than 12 hours daily or 60 hours weekly for employees working on-call or who are close relatives of the employer or the owner.

The work order, working time cycle, and daily work schedule should be provided for in the collective agreement or, in the absence of such, by the employer. Work may be organized in continuous shifts in the following instances:

- The employer’s operation is suspended for not more than six hours in any calendar day or for reasons and for the duration required by the technology employed in any calendar year, and the employer is engaged in the provision of basic public services on a regular basis;
- Economic or feasible operation cannot be ensured otherwise for objective and technical reasons; or
- Justified by the nature of work.

Working time may be determined in no more than four-month or sixteen-week cycles, unless prescribed in a collective agreement to be longer. Employers should ensure that the work schedule of employees is drawn up in view of the nature of work and in accordance with occupational health and safety requirements. Unless otherwise provided by a collective agreement, the work schedule should be for at least one week and should be made known at least seven days in advance. Otherwise, the last work schedule will remain in force.

The daily working time of employees should not exceed twelve hours, or twenty-four hours in the case of on-call duty, and the weekly working time should not exceed forty-eight hours, or seventy-two hours in the case of on-call duty. The daily working time in a cycle may be determined irregularly, in which case it should be at least four hours. Parties also may agree on a shorter daily working time for part-time employees.
Rest Periods

Daily Rest

If the scheduled daily working time or special work duty exceeds six hours, and after each additional three-hour period, the employee is entitled to a twenty-minute to one-hour break, of which at least twenty minutes should be uninterrupted. Where an employee is entitled to more than one break on a working day, the combined duration of these breaks may not exceed one hour.

Employees will be given at least eleven hours of uninterrupted rest after the daily work and before the beginning of the next day’s work. Those who work in split shifts will be given at least eight hours of uninterrupted rest. However, at least eight hours of uninterrupted rest may be prescribed by collective agreement for employees working on-call, employees working in continuous shifts, employees working in alternating shifts, and seasonal workers.

Weekly Rest

Employees are entitled to two rest days each week, one of which should fall on a Sunday. Where working time is defined in specific cycles instead of on a daily basis, employees may be granted a minimum weekly rest period of 48 consecutive hours (including Sunday) in lieu of the rest days provided by the work schedule.

Work on Sundays is allowed only: (a) if the employer generally operates on Sundays by the nature of the business; (b) for employees working on-call, in continuous shifts, or in three or more shifts, and for seasonal workers; or (c) if working time is defined in specific cycles. Employees may be required to work on national holidays in any of the following instances:

• If the employer operates in continuous shifts or if he operates on such days by the nature of his business;
• Where it is necessary on that day in connection with the provision of trans-frontier services (stemming from the nature of the service, irrespective of work organization), and if working with computers and information technology equipment; or
• In the case of foreign assignment, if work on that day is considered legal under the laws of the country where the employee is posted.

Special Work Duty

Special work duty pertains to any work performed (a) outside scheduled working hours, (b) over and above the working time cycle, or (c) on-call. It also includes on-call duty from arrival at the workplace until work is finished or, if the employee is required to work at various locations, from arrival at the first workplace until work is finished at the last workplace.

3 These include 1 January, 15 March, Easter Monday, 1 May, Whit Monday, 20 August, 23 October, 1 November, and 25–26 December.
Employees may be required to work on special duty only under justified and extraordinary circumstances. Special work duty on legal holidays can be ordered only: (a) if the employee can otherwise be required to work on such day; or (b) in the interest of preventing or mitigating any imminent danger of accident, natural disaster, or serious damage, or of any danger to human life, health, or physical integrity. An employee may be ordered to work in special work duty for not more than 200 hours in any given calendar year, or 300 hours under a collective agreement. Special work duty should not be required from:

- A woman from the time her pregnancy is diagnosed until her child reaches one year of age;
- A man caring for his child as a single parent until his child reaches one year of age; or
- An employee who works under conditions which may be harmful to his health as defined by relevant legislation.

An employee caring for his child as a single parent may be required to work in special work duty only with his consent from the time his child reaches one year of age until he reaches four years of age.

**Vacation Time**

Employees are entitled to vacation time (basic and extra) for each calendar year spent in an employment relationship. The employee is entitled to vacation time: (a) for the duration of being incapacitated to work due to illness; (b) for the duration of maternity leave; (c) for the first six months of leave without pay for caring or nursing a child; (d) for the duration of leave without pay of thirty days or less; (e) for the duration of reserve military service; and (f) for all time not spent in work for which the employee receives absentee pay or his average pay.

The amount of vested vacation time is twenty working days. Employees will be entitled to extended vacation time when reaching a specific age. Young workers are entitled to five extra days of vacation time each year. The last time such benefit applies will be the year when they reach the age of eighteen.

An employee assuming the greater role in raising a child and single parents are entitled to extra vacation time amounting to: (a) two days a year for one child under sixteen years of age; (b) four days a year for two children under sixteen years of age; and (c) a total of seven days a year for more than two children under sixteen

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4 This is increased to: (a) 21 days for employees over 25 years of age; (b) 22 days for employees over 28 years of age; (c) 23 days for employees over 31 years of age; (d) 24 days for employees over 33 years of age; (e) 25 days for employees over 35 years of age; (f) 26 days for employees over 37 years of age; (g) 27 days for employees over 39 years of age; (h) 28 days for employees over 41 years of age; (i) 29 days for employees over 43 years of age; and (j) 30 days for employees over 45 years of age.
years of age. A child will first be taken into consideration in the year of his birth and for the last time in the year in which he reaches the age of sixteen.

Blind employees are entitled to five extra days of vacation each year, while employees permanently working underground or spending at least three hours a day on a job exposed to ionizing radiation are entitled to five extra days of vacation each year. A collective agreement or an employment contract may stipulate further extra vacation time above and beyond these limits.

An employee who commences an employment relationship during the year will be entitled to a commensurate portion of vacation time for such year. Vacation time will be scheduled by the employer after first discussing with the employee.

Employers should allocate one-quarter of the vested vacation time as requested by the employees, except in the first three months of the employment relationship. Employees should indicate their requests for vacation at least fifteen days prior to the first day of the requested leave.

The employee should notify the employer of any circumstance that may constitute unreasonable or substantial detriment to his performance of work in connection with or relating to any personal, family, or other circumstances. In this case, the employer should allocate three working days from the one-quarter of the vested vacation time (for not more than three occasions) at a time specified by the employee, to which the fifteen-day deadline for notification will not apply.

Vacation time will be allocated in the year in which it is due. It is considered so allocated provided that it begins during that year and ends during the next year without interruption, where the portion extended into the following year does not exceed five working days.

Employers should allocate vacation time before 31 March of the year following the year in question in the event of economic reasons of particular importance or any direct and consequential reason arising in connection with its operations, or before 30 June of the year following the year in question if so stipulated in the collective agreement.

In the event of an employee’s illness or other unavoidable restraint affecting him, such allocation should be done within thirty days after the cessation of such restraint subsequent to the year in question. If the employee is prevented from working due to illness or another unavoidable restraint for at least 183 days, the employee must allocate the vacation time within 183 days after such restraint ceases.

Upon termination of the employment relationship, the employee will be financially compensated for any unused vacation time as appropriate. The employer and the employee who returns from leave without pay for caring or nursing a child may

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5 The employee should provide proof of such circumstance upon the employer’s request when returning to work.
agree that the employer pays financial compensation for the unused vacation. Vacation time will not be financially compensated under any other circumstance.

**Sick Leave**

Employees are entitled to fifteen working days of sick leave per calendar year for the period when the employee is incapacitated due to illness, not including accidents at work and occupational diseases as specified by social insurance provisions. The portion of sick leave not used during the calendar year may not be claimed subsequently.

The employee’s incapacity to work should be certified by a physician, in accordance with the provisions on the medical diagnosis of incapacity. Employees will be paid seventy per cent of the absentee pay for the duration of the sick leave.

**Other Time Allowances**

Pregnant women are entitled to twenty-four weeks of maternity leave, which should be scheduled so that it commences four weeks prior to the expected time of birth, if possible. If the child receives treatment in an institute for premature infants, the unused portion of the maternity leave may be used after the child has been released from the institute until the end of the first year following birth. The employee will be entitled to a leave of absence without pay:

- Until the child reaches the age of three, in order to care for the child at home;
- Until the child reaches the age of 10, during the period of eligibility for childcare allowance, provided that the employee cares for the child at home; and
- With a view — in the event of the child’s illness — to providing home care until the child reaches the age of 12.

During the first six months of nursing, a female employee is entitled to two hours of labor time allowance each day, and one hour daily until the end of the ninth month. In respect of multiple births, the labor time allowance for nursing will be commensurate to the number of children.

Upon the birth of his child, a father is entitled to five days of labor time allowance, which the employer should allocate within the two-month period following the date of birth on the days requested by the father. Absentee pay will be provided for the duration of such labor time allowance.

Upon the employee’s request, the employer should allow leave of absence without pay for any extended nursing or home care of a close relative for the duration of care, which should not exceed two years, so long as the employee personally provides such care. Extended home care and its justification should be certified by the physician of the person in need of care.

Upon request, employees will be granted leave of absence without pay of up to one year to build a home for their own use without external resources. Leave of absence
without pay may be requested by the person on whose name the building permit was issued or by his spouse or domestic partner sharing the same household.

**Health Care Coverage**

On the basis of Act Number LXXX of 1997 on the Eligibility for Social Security Benefits and Private Pensions and the Funding for these Services, the rate of social security contribution payable by employers is twenty-seven per cent.

This is comprised of twenty-four per cent pension insurance contributions and three per cent health insurance and labor market contributions, where health insurance and labor market contributions should contain 1.5 per cent of health insurance contributions provided in kind, 0.5 per cent of health insurance contributions provided in money, and one per cent in labor market contributions.

Insured employees are required to pay health insurance and labor market contributions at a rate of 7.5 per cent, where the health insurance and labor market contributions should contain four per cent of health insurance contributions provided in kind, two per cent of health insurance contributions provided in money, and 1.5 per cent in labor market contributions.

**Vocational Training**

Employers should ensure the acquisition of knowledge required for the performance of work. To do so, the employer may conclude a so-called study contract with the employee or he may require the employee to participate in a specific training without concluding a study contract. The employee also may be required to participate in an initial training.

An employee participating in a specific or initial training should do so upon being reimbursed for wages and costs, and should complete the required examinations, unless such would be disproportionately detrimental in light of personal or family reasons.

Act Number LXXVI of 1993 contains the rules on vocational training, while Act Number LXXXVI of 2003 sets forth the vocational training contributions and assistance for the improvement of vocational training programs. Government financial assistance may be granted for training offered or approved by the government employment agency of a person:

- Whose job is expected to be terminated within one year, regarding which his employer has informed him and the government employment agency in advance in writing;
- Who is performing community service work and agrees to participate in training; or
- Who is employed, but whose employment cannot be maintained without further training.
Such persons may be entitled to income supplement or compensation benefits, and reimbursement of training costs.

**Discrimination**

**In General**

**Constitution**

The Constitution\(^6\) establishes respect for the human and civil rights of all persons in the country without discrimination on the basis of race, color, gender, language, religion, political or other opinion, national or social origins, financial situation, birth, or any other ground.

The law provides strict punishment for discrimination, and equal rights for everyone should be implemented through measures that create fair opportunities for all. Everyone has the right to equal compensation for equal work. All persons who work have the right to an income that corresponds to the amount and quality of work they carry out.

**Labor Code**

The Labor Code states that the principle of equal treatment should be strictly observed in employment relations. The consequences of any failure to apply such principle should be properly remedied without violating or harming the rights of other workers.

The principle should be applied in respect of the remuneration of employees for the same work or for work of equal value. Equal value of work will be determined based on the nature of work, its quality and quantity, working conditions, vocational training, physical and intellectual efforts, experience, and responsibilities.

**Act on Equal Treatment and Advancement of Equal Opportunity**

Act Number CXXV of 2003 on Equal Treatment and Advancement of Equal Opportunities (“Equal Treatment Act”)\(^7\) lists the circumstances when direct or indirect detrimental treatment infringes the requirement of equal treatment in labor law. The Equal Treatment Act is in harmony with the following directives, among others:

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\(^6\) Act Number XX of 1949.

\(^7\) The main categories of discrimination protection are gender, race, nationality, mother tongue, disability, state of health, religion or religious belief, political or other opinion, marital status, motherhood (pregnancy) or paternity, sexual orientation or identity, age, social status, economic position, part-time nature or definite period of employment relationship, membership in a representation organization, or other status, attribution, or peculiarity.
Equal Opportunities Plan

The employer and the local trade union branch (or the workers’ council, if there is none) may jointly adopt a program of equal opportunities for a specific duration. Such program should include an analysis of the working conditions of workers considered disadvantaged, such as women, workers over the age of 40, workers of Roma origin, workers with some degree of handicap, working parents with two or more children under the age of 10, and single parents with children under the age of 10. The program should provide for unobstructed access for persons with disabilities to their workplaces and internal regulations for the enforcement of the principle of equal treatment.

Discrimination on the Basis of Gender

The Constitution ensures the equality of men and women in all civil, political, economic, social, and cultural rights. Discrimination on the basis of gender in recruitment, hiring, and terms and conditions of employment is prohibited.

The Equal Treatment Act describes harassment as an act of a sexual or other nature that infringes on human dignity and is connected with a person’s gender. A victim of harassment may turn to the Equal Treatment Authority.

Employees should not be forced to take a pregnancy test or to produce a certificate thereof, unless prescribed by law to determine the employee’s proficiency for the

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8 The analysis should address the wages, career advancement, and training of these workers, and the benefits made available to them, as well as the employer’s goals set for the year to ensure equal opportunities and the means designated to facilitate the achievement of these goals.
position in question. Employees should be relieved from work duty for the entire duration of compulsory medical examination (including pregnancy tests).

From the discovery of a woman’s pregnancy until her child reaches one year of age, she should be temporarily reassigned to a position suitable for her condition from a medical standpoint, or the working conditions in her existing position should be modified as appropriate, on the basis of a medical report pertaining to employment. The new position will be designated upon the employee’s approval.

The wages of a woman temporarily reassigned to a different position or employed under modified work conditions should not be less than her previous average earnings. If the employer is unable to provide a position appropriate for her medical condition, she should be relieved from work and should receive the wages payable for idle time during such period.

A woman may not be required to work at another location without her consent from the time of her pregnancy until her child reaches three years of age. This also applies mutatis mutandis to a man who is a single parent. A woman cannot be required to do special work duty from the discovery of her pregnancy until her child reaches one year of age.

Employers cannot terminate an employment relationship by ordinary dismissal during a treatment related to a human reproduction procedure as specified by law, during pregnancy, within three months after giving birth, or during maternity leave.

**Discrimination on the Basis of Age**

The applicable laws prohibit any discrimination on the basis of age and contain special rules regarding young employees to protect their interests. The Labor Code also contains provisions which protect the interests of older employees. An employer may terminate an employee by ordinary dismissal within the five-year period preceding the date when the employee reaches the age limit for his pension only in particular cases, unless the employee is already receiving some form of pension benefits.

The amount of severance pay specified by the Labor Code should be increased by three months’ average earnings if the employment is terminated by ordinary dismissal or in consequence of the dissolution of the employer without succession within the five-year period preceding the employee’s eligibility for old age pension or old age pension with age allowance.

**Discrimination on the Basis of Physical or Mental Handicap**

Act Number XXVI of 1998 sets forth special rules regarding the employment of disabled persons. Employers should continue to employ workers whose capacity to work has been impaired in the course of employment in positions suitable for their condition.
Disabled persons are entitled to integrated employment. If this is not possible, they are entitled to protected employment, and the relevant costs can be paid from State subsidies. During the recruitment process, the employer should ensure an equally accessible environment to support disabled persons to be employed. The employer also should ensure that the working environment is rebuilt or converted, especially the work tools and equipment necessary for disabled persons to perform work. The employer may request a subsidy from the central budget to cover the costs.

Under Decree Number 3/2002 (II. 8) of the Ministry of Labor and Health, the employer should consider the abilities of disabled employees in the course of the design of the workplace. Employers should ensure that signs necessary for health and safety at work are recognizable by disabled employees.

**Discrimination on the Basis of Race or National Origin**

An employer’s equal opportunities program may contain an analysis of the working conditions of workers considered disadvantaged, especially those of gypsy origin, and protect their employment.

However, if the differentiation is based on an appropriate, proportionate, and real employment requirement arising from the fact that the job is connected to a national or ethnic status, a certain mentality which basically determines the nature of an organization, or the content or nature of a certain job, such differentiation will not be considered an infringement of the principle of equal treatment.

**Discrimination on the Basis of Religion**

Any discrimination on the basis of religion is prohibited. However, if the differentiation is based on an appropriate, proportionate, and real employment requirement arising from the fact that the job is connected to a regional or other belief status, a certain mentality which basically determines the nature of an organization, or the content or nature of a certain job, such differentiation will not be considered an infringement of the principle of equal treatment.

**Collective Bargaining and Worker Participation in Management**

**In General**

With a view to protecting the social and economic interests of employees and maintaining peace in labor relations, the Labor Code governs the relations between employees, employers, and their interest representation organizations.

In particular, it regulates interest reconciliation at the national level, trade unions, collective agreements, workers’ councils, and collective dispute resolutions.
**Interest Reconciliation at the National Level**

The government should discuss national issues on labor relations and employment relationships with the interest representation organizations of employees and employers through the National Council for the Reconciliation of Interests.

The sectoral interest representation organizations of employees and employers should discuss issues on labor relations and employment relationships in the various sectors, subsectors, and special sectors.

**Trade Unions**

Trade unions are organizations of workers whose primary function is the enhancement and protection of employees’ interests related to their employment relationship. A trade union will be considered a representative trade union if its nominees received at least ten per cent of the votes in the workers’ council ballot.

Trade unions are entitled to keep their members informed of their rights and obligations relating to their financial, social, cultural, and living and working conditions. They also are entitled to represent their members before employers and government agencies in matters concerning labor relations and employment. They also may represent their members, if duly authorized, before the court or any other authority or agency in matters concerning their living and working conditions.

The government, local authorities, and employers should cooperate with trade unions to promote their representation activities by providing them with required information and notifying the trade unions of their positions in relation to trade union comments and proposals within thirty days.

Employers should consult the local trade union branch before deciding on any plan for action affecting a large number of employees, such as reorganization, transformation, conversion, privatization, or modernization of the business. If an employer has no workers’ council, the trade union should be informed at least every six months regarding:

- Fundamental issues affecting the employer’s economic standing;
- Plans for major decisions on a significant modification of the employer’s sphere of activities and investment projects;
- Wages and salaries, liquidity related to their payment, the characteristic features of employment, utilization of working time, and the characteristics of working conditions; and
- The number of teleworkers and their job description.

Trade unions are entitled to monitor compliance with provisions pertaining to working conditions. They should notify the competent authorities regarding discrepancies or deficiencies and, if the authorities fail to take necessary actions in due time, should initiate the appropriate measures. The authority conducting the proceedings should inform the trade union of the outcome. A local trade union
branch is entitled to challenge any unlawful action (or failure to take action) by the employer if such directly affects the employees or the interest representation organizations of employees.

Employers should allow trade unions to publish information and notices they regard as necessary, along with data related to their activities, in the employer’s usual manner or in any other way deemed appropriate. Employers should provide labor time allowance for trade union officials, who also are entitled to absentee pay for the duration of the labor time allowance.

Employees should not be required to disclose their trade union affiliation. Employment may not be rendered contingent upon membership in any trade union, on whether the employee terminates his previous trade union membership, or on whether he agrees to join a trade union of the employer’s choice.

**Collective Agreement**

Collective agreements may cover employment rights and obligations, the method of exercising and discharging them, related rules of procedure, and the relations between the parties to the collective agreement.

A collective agreement may be concluded by an employer, an employer interest representation organization, several employers, a trade union, or several trade unions. The trade union or employer interest representation organization, which is independent of the other party in respect of its representation activities, is entitled to conclude a collective agreement.

A trade union is entitled to conclude a collective agreement with the employer if its candidates have received more than half of the votes in the workers’ council ballot. All trade unions represented at the employer may attend negotiations on the collective agreement. Trade unions should cooperate in bringing the negotiations to a successful conclusion.

A collective agreement, in the absence of any extension of scope, applies to any employer who (a) is a party to the collective agreement, (b) was a member of the employer interest representation organization at the time the collective agreement was concluded, or (c) subsequently joined the employer interest representation organization. It also applies to the employees of such employer who are not members of the trade union that is party to the collective agreement.

Neither party has the right to reject a proposal for negotiations for the conclusion or modification of a collective agreement. This will apply to the employer if the trade union presenting the proposal is recognized as representative.

In the absence of an agreement to the contrary, a collective agreement will enter into effect when published. Employers should assist employees to gain access to the collective agreement. Unless otherwise agreed, a collective agreement may be terminated by either party with three months’ notice. Neither of them may exercise the right of rescission within six months from the conclusion of the collective agreement.
Employees’ Participation Rights

Election

Participation rights on behalf of the employees will be exercised by the workers’ council or by the shop steward elected by the employees. A workers’ council should be elected at all employers and at all of the employer’s independent operational facilities (divisions) with more than fifty employees. A shop steward should be elected at an employer or at an employer’s independent operational facility (division) with 15 to 51 employees. If there is more than one workers’ council or shop steward at an employer, a central workers’ council also should be formed simultaneously upon election of the individual workers’ councils.

All workers employed by an employer are entitled to participate in the election of workers’ council members. An election will be declared valid if more than half of those eligible to vote have participated. The persons receiving the most or at least thirty per cent of the valid votes will be considered as having been elected.

There may be three to thirteen workers’ council members ⁹ depending on the number of employees. Workers’ councils and shop stewards are elected for terms of three years. Employers should cover the justified and necessary costs of election and operation of the workers’ council. The limit of such costs will be determined jointly by the employer and the workers’ council. The privileges of a workers’ council and its relations with the employer should be laid down in an operative agreement.

Rights of the Workers’ Council

Workers’ councils have the right of co-determination with regard to the appropriation of welfare funds, and the utilization of welfare institutions and real estate property of a nature as specified in the collective agreement. Employers should consult the workers’ council prior to adopting a decision in connection with:

- Plans for actions affecting a large group of employees, i.e., those related to proposals for the reorganization, transformation, conversion, privatization, or modernization of the business;
- Proposals for setting up a personnel records system, the set of data to be recorded, plans for the contents of the data sheet, and staff policy plans;
- Proposals for employee training, appropriation of job assistance subsidies to improve employment conditions, and drafts of plans for early retirement;
- Plans for actions on the occupational rehabilitation of persons who suffered some degree of health impairment or whose capacity to work has diminished;

⁹ Nominees for workers’ council members should have legal capacity and should have been employed by the employer for at least six months. Persons exercising employer’s rights, close relatives of employer or his executive employees, and members of the election committee may not be elected as members of a workers’ council.
• Draft for the overall annual vacation schedule;
• Introduction of new work organization methods and performance requirements;
• Plans for internal regulations affecting the employees’ material interests; and
• Tenders published by the employer offering financial reward for or in recognition of exemplary performance.

Employers should notify the workers’ council at least every six months regarding:
• Fundamental issues affecting the employer’s economic standing;
• Plans for major decisions significantly modifying the employer’s sphere of activities and investment projects;
• Wages and salaries, liquidity related to their payment, the characteristic features of employment, utilization of working time, and the characteristics of working conditions; and
• Number of teleworkers and their job description.

The workers’ council should present its opinion on the employer’s proposed actions within fifteen days, otherwise it will be construed as having consented to such action. Any action taken by an employer in violation of the workers’ council’s rights will be construed as invalid. The workers’ council may file a for court action for the establishment of such invalidity. Workers’ councils also are entitled to review the employer’s records and registers in connection with their rights.

Workers’ councils should remain unbiased in relation to a strike organized against employers. Consequently, it should not organize, support, or impede a strike. The mandate of workers’ council members participating in a strike will be suspended for the duration of the strike.

**Participation in the Supervisory Board**

If the annual average number of full-time employees employed by the company exceeds 200, then a supervisory board should be established to exercise the control rights of employees. In this case, the employees may participate in the supervision of the company, unless there is an agreement between the workers’ council and the management of the company to the contrary.

The representatives of the employees should comprise one-third of the members of the supervisory board. If one-third of the members is a fraction, the number of supervisory board members will be determined in favor of the employees.

Upon hearing the opinion of the trade unions operating at the company, the employees’ representatives in the supervisory board will be nominated by the workers’ council from among the employees. Persons nominated by the workers’ council will be elected as members of the supervisory board by the company’s

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10 Act Number IV of 2006 on Business Associations.
supreme body at its first meeting after such nomination, unless statutory grounds for disqualification exist in respect of the nominees. In this case, a new nomination will be requested.

Employees’ representatives in the supervisory board have the same rights and obligations as all other members. If the opinion of the employees’ representatives unanimously differs from the majority standpoint of the supervisory board, the minority standpoint will be stated at the meeting of the company’s supreme body.

The company’s supreme body may remove an employees’ representative only if recommended by the workers’ council, unless the latter failed to nominate a new representative or failed to recall a representative subject to statutory grounds for disqualification within the time limit specified in the memorandum of association.

Health and Safety Protection in the Workplace

In General

According to the Labor Safety Act (Act Number XCIII of 1993), all persons working within the territory of Hungary have the right to safe and healthy working conditions. It is the employer’s duty and obligation to implement occupational safety and health requirements. The costs and other responsibilities associated with this obligation should not be devolved to the employees.

Employers should define the manner of implementing occupational health and safety requirements within the framework of legal regulations and applicable standards. They also should give all employees the opportunity to become familiar with regulations on occupational health and safety in a language they understand.

Such regulations should be defined in such a way that they provide adequate protection to employees, other persons in the proximity of workplace, and to persons using their services. Work equipment should be designed so as to preclude the eventuality of accidents and injury when used properly outside of the framework of organized employment. Employers may not provide pecuniary or other redemption to employees in lieu of meeting occupational health and safety standards.

Rights and Obligations

Employers should provide persons with appropriate qualifications to perform specialized occupational health and safety activities, and to enforce the specific provisions of the Labor Safety Act. They also should:

- Provide all necessary instructions and information to employees in due time;
- Routinely review work conditions to conform to requirements, and insure that employees know and observe them;
- Provide employees with suitable work equipment for specific work procedures and with due consideration of related hazards;
• Discuss with employees and/or their representatives the consequences of introducing new technological processes that have a potential impact on health and safety, at the earliest opportunity prior to introduction;

• Investigate without delay irregular events and/or reports related to occupational health and safety upon learning of them, and to take the necessary measures, inform the parties involved, and stop work in the event of an unmitigated hazard;

• Act in accordance with law in case of industrial accidents and occupational diseases;

• Guarantee proper applicability, protection capacity, satisfactory hygienic condition, necessary cleaning, maintenance, and replacement of safety equipment; and

• Take under full liability all necessary steps or measures to prevent or reduce occupational risks and to continuously improve work conditions.

Employers should provide adequate training for employees to obtain theoretical and practical knowledge on occupational health and safety, and to be able to apply such during their employment. Employees may not be assigned to independent positions until the acquisition of such knowledge.

Employees may only report to work in a condition appropriate for the safe performance of work, in compliance with occupational health and safety rules, and following the instructions received in training.\(^\text{11}\)

They may not be discriminated against for demanding that the conditions for occupational health and safety be provided, or for any report they file in good faith regarding the presumed negligence of an employer. This protection also applies to workers carrying out specialized occupational health and safety duties and to those who perform the duties defined by the Labor Safety Act.

Employees are entitled to refuse work if the performance of such would result in direct and grave risk to their lives, health, or physical integrity. Employees should refuse to follow the instructions of employers if such would constitute direct and grave risk to other persons.

\(^\text{11}\) In particular, they should: (a) ensure the safe condition of work equipment in the manner reasonably expected, use such equipment in accordance with the designated purpose and the employer’s instructions, and attend to maintenance duties as assigned; (b) use personal safety equipment in accordance with the designated purpose, and keep them as clean as reasonably expected; (c) wear clothes that do not endanger health and physical integrity during work; (d) observe discipline, order, and cleanliness in their work area; (e) acquire knowledge necessary for the safe performance of work, and apply such in the course of their work; (f) participate in required medical examinations or aptitude tests for specific positions; (g) report any potentially dangerous irregular situations and malfunctions to the employer, and eliminate such as reasonably expected, or request superiors to take the necessary measures; and (h) immediately report any accident, injury, or sickness.
Workers' Compensation and Survivors' Benefits

Compensation for Disabled Workers

In General

Under Act Number LXXXIII of 1997 on the Services of the Compulsory Health Insurance System, accident benefits will be due and payable in the event of an accident at work or occupational diseases. An “accident at work” refers to any accident sustained by an insured person at his workplace while performing work or in connection with his occupation.

It also may be suffered while commuting to and from work and to and from the insured person’s home (accident in commute). It also covers any accident sustained by the insured person while performing work in the public interest or while claiming certain social security benefits. An accident will not be considered to be sustained at work if:

- The injured person was under the influence of alcohol at the time;
- The accident took place while performing work outside the scope of his job description, without authorization, while using a vehicle without authorization, or in connection with any disorderly conduct at the workplace; or
- The accident took place while commuting to and from work and to and from his residence using a route other than the shortest one for no good reason, or if taking any illogical detour.

Any person who deliberately inflicted any injury upon himself, or willfully delayed seeking medical attention or reporting the accident, is not entitled to accident benefits under the health insurance system.

“Occupational disease” pertains to any disease suffered by the insured person as a consequence of being exposed to extreme dangers relating to his occupation. Benefits are provided in the form of (a) emergency medical services, (b) benefits for accident-related injuries and (c) accident allowance.

Accident-related disability benefits also may be provided for disabled workers as pension insurance benefit on the basis of Act Number LXXXI of 1997 on Social Security Pension Benefits.

Emergency Medical Services

Medicinal products, medical aid, and medical care required in any health impairment sustained from an accident at work or occupational disease will be fully subsidized, provided that the applicable rate of subsidy is higher than zero per cent.

Benefits for Accident-Related Injuries

Benefits for accident-related injuries will be payable to any person who has sustained an accident at work during the insurance period or within thirty days after
the termination of insurance coverage, if applicable, that resulted in his becoming incapacitated for work. ¹² These benefits are payable for one year, which may be extended for another year.

It should be paid in the amount of the insured person’s income prorated for one calendar day, comprising part of the health insurance cash contribution, paid for (accounted) work or activities performed during the month immediately preceding the initial day of eligibility for benefits for accident-related injuries, or ninety per cent of such income in connection with accidents in commute.

**Accident Allowance**

Accident allowance is payable to any person who sustained an accident at work and a consequent degree of health impairment of over thirteen per cent, but who is not eligible for accident-related disability or rehabilitation benefits.

Generally, if the degree of health impairment is below twenty per cent, the accident allowance will be paid for two years. If it is over twenty per cent, it will be paid for the entire duration of health impairment.

The rate of accident allowance varies according to the degree of health impairment resulting from the accident at work. The amount of accident allowance will amount to eight, ¹⁰, ¹⁵, and 30 per cent of the average monthly earnings in the sequence of categories.

**Accident-Related Disability Benefits**

Accident-related disability benefits pertain to pension benefits provided independently of the periods of service where the incapacity was the result of an accident at work or occupational disease. It will be paid to a person:

- Whose invalidity occurred primarily due to an accident at work or an occupational disease;
- Who, as a direct consequence of his health impairment: (a) is not engaged in any gainful activity, or (b) lost at least 30 per cent of his income calculated on the average of the four months preceding the time when he suffered the health impairment; and
- Who is not receiving sick pay or benefits for accident-related injuries.

The amount of accident-related disability benefits (sixty, sixty-five, or seventy per cent of the average monthly income) depends on the degree of invalidity and the length of service.

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¹² This means that the worker is unable to work on account of his health condition resulting from an accident at work for which medical treatment is required, or in the absence of medical aid.
Compensation to Survivors

**Widow’s Pension**

A widow’s pension pertains to pension benefits paid to: (a) the spouse of a deceased pensioner or a person with pension rights who does not receive a pension, (b) a domestic partner, subject to specific conditions, or (c) the divorced spouse.

A temporary widow’s pension is provided for at least one year from the spouse’s death to a widow who is entitled to an orphan’s pension due to the death of his spouse while supporting a child under one-and-a-half years of age, until the orphan reaches the age of eighteen months. If the child is suffering from a chronic illness or is disabled, the temporary widow’s pension will be provided up to the child’s third birthday.

After the withdrawal of the temporary widow’s pension, the widow’s pension will be paid to a person who, at the time of his spouse’s death: (a) is of the retirement age prescribed for old age pension; (b) is disabled; or (c) is supporting a child who is disabled or suffering from a chronic illness and is entitled to an orphan’s pension, or supporting at least two children who are entitled to orphan’s pensions.

Any person whose spouse is already entitled to old age pension at the time of marriage is entitled to a widow’s pension only if the marriage (or previous cohabitation) produced a child, or if they lived together for five consecutive years from the marriage, except if the marriage was dissolved before reaching the retirement age and if the couple remarried after the retirement age of either of them.

A divorcee or a person separated from his spouse for more than one year is entitled to a temporary widow’s pension only if alimony was received from the spouse until his death, or if alimony was awarded by a court.

The temporary widow’s pension is sixty per cent of the old age pension or invalidity or accident-related disability benefits to which the deceased person had been or should have been entitled at the time of death. The final widow’s pension may be thirty or sixty per cent of such amount.

**Orphan’s Benefits**

An orphan’s pension pertains to the benefits paid to a child or adopted child of a deceased pensioner, of a person with pension rights who does not receive a pension, or to his foster child, brother, sister, or grandchild, subject to specific conditions.

It will be available to children whose parent has fulfilled the period of service required for old age pension or invalidity benefits, or was receiving old age pension or invalidity benefits at the time of his death. It will be available to a brother, sister, or grandchild (including a great-grandchild and great-great-grandchild) if he was supported by the deceased person in his own home, and if he does not have any relative who is able and willing to support him.
It will be available from the death of the worker until the child’s sixteenth birthday. If the child is attending an educational institution for full-time education, an orphan’s pension will be provided for the duration of studies up to his twenty-fifth birthday. If he becomes disabled within the period of entitlement, the orphan’s pension will be provided for these periods independent of age.

An orphan’s pension also will be granted to a child who: (a) pursues studies as a private student due to an illness or physical or mental handicap, or (b) is below the age of twenty-five and pursues studies within the framework of adult education.

The orphan’s pension is thirty per cent per child of the old age pension or invalidity or accident-related disability benefits to which the deceased person had been or should have been entitled at the time of death. Sixty per cent of the pension and benefits will be paid as orphan’s pension to a child if both parents have died or whose parent is an invalid.

Parent’s Benefits

Parent’s benefits will be available to any parent whose child has died after fulfilling the period of service necessary for entitlement to old age pension or invalidity benefits, or while drawing old age pension or invalidity benefits if: (a) the parent is disabled at the time of his child’s death, or is 65 years of age; and (b) the parent was supported for the most part by the child before his death.

It will be available from the death of the worker for the duration of invalidity. Any parent over 65 years of age will be considered disabled independent of any medical examination. A parent whose child was not disabled at the time of his death is entitled to parent’s benefits only if the parent suffers an accident leading to invalidity within ten years from the time of his child’s death, and if he does not have any relative who is able and willing to support him. The rate of parent’s benefits will be counted as the widow’s pension.

Dispute Resolution

Labor-Related Legal Disputes

For the enforcement of employment claims, employees, trade unions, and worker’s councils (shop stewards) may file charges at the labor tribunal. In general, the employer also may file for legal action to enforce his employment-related claim(s). Labor disputes will be heard by the competent court.

A clause providing for a conciliator in employment-related legal disputes may be included in the collective agreement or employment contract for the purpose of attempting to reach an agreement. Negotiations will be initiated with the conciliator in compliance with the Labor Code. The conciliator should put the agreement in writing. If conciliation produces no results, charges may be filed at court within the given term. A lawsuit may be filed within thirty days of notification of the action, in connection with:
• A unilateral amendment of the employment contract implemented by the employer;
• The termination of the employment relationship, including termination based on mutual consent;
• An extraordinary dismissal;
• A sanction applied on account of the employee’s breach of obligation; or
• A payment order and a resolution for awarding damages, including compensation for inventory shortages.

Collective Labor Disputes

Any dispute arising from or in connection with employment relationships between the employer and the worker’s council or between the employer (or his interest representation organization) and the trade union that does not qualify as a legal dispute will be settled by negotiations between the parties concerned.

Negotiations should commence once the party initiating the talks has submitted his written statement to the other party. The action serving as the basis of the dispute can only be executed after the seventh day of negotiations. The parties also should refrain from taking any action that may jeopardize an agreement.

The parties may jointly request for the services of an independent mediator who is not involved in the conflict. The mediator may ask for information and data from the parties to the extent deemed necessary. Upon conclusion of the negotiations, the mediator will summarize in writing the parties’ positions and the results of the negotiations, and deliver it to the parties.

The parties also may agree to employ an arbitrator. The decision of the arbitrator will be binding if so agreed by the parties in advance in a written statement. The arbitrator may set up a conciliation committee to which the parties will delegate an equal number of representatives. An arbitrator will be employed for disputes in connection with:

• The employer’s obligation to allow trade unions to publish necessary information and notices, along with the data related to their activities;
• The employer’s obligation to cover justified and necessary costs of election and operation of the workers’ council; or
• The worker’s council’s right of co-determination of the appropriation of welfare funds and the utilization of welfare institutions and real estate property, in the event of any disagreement.

An agreement concluded by negotiations or the arbitrator’s decision will be construed as a collective contractual agreement. Unless otherwise agreed, substantiated and necessary costs incurred in connection with the negotiations or the arbitration proceeding will be borne by the employer.
Termination of Employment

In General

Employment relationships established for an indefinite period may be terminated by:

- Death of the employee or the cessation of the employer without a legal successor;
- Mutual agreement;
- Employer or employee by ordinary notice;
- Employer or employee by extraordinary notice with immediate effect; or
- Employee or employer with immediate effect during the probation period.

On the other hand, employment relationships established for a definite period may be terminated for the same reasons except for the third item, above. In addition, they may be terminated (a) upon expiration of the definite period, and (b) by the employer under conditions other than those already stipulated, in which case the employee will be paid one year’s average salary, or his average salary for the remaining period if it is less than one year.

Mutual Consent

The parties may agree to terminate the employment by mutual consent. This can be with immediate effect, or the parties also can agree on a later date of termination.

Termination by Ordinary Notice

Both the employee and the employer may terminate the employment relationship for an indefinite period by ordinary notice. The employer should justify the reason for such termination, unless the employee is a pensioner or an executive as defined by law. The justification should clearly indicate the cause.

In the event of a dispute, the employer should prove the authenticity and substantiality of the reason for termination. Such reason should exclusively be in connection with (a) the employee’s ability, (b) the employee’s behavior in relation to the employment relationship, or (c) the employer’s operations.

Before termination based on the employee’s work performance or conduct, the employee should be given an opportunity to defend himself against the complaints raised, unless such cannot be expected of the employer in view of all applicable circumstances. The notice period should be from thirty days to one year depending on how long the employee has been in the employer’s service.13

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13 Unless otherwise agreed in the employment agreement, the thirty-day notice period will be extended by the following days after the following periods of service with the employer: (a) by five days after three years; (b) by 15 days after five years; (c) by 20 days after eight years; (d) by 25 days after 10 years; (e) by 30 days after 15 years; (f) by 40 days after 18 years; and (g) by 60 days after 20 years.
Where the employer terminates the employment, the employee should be exempted from performing work for at least half of the notice period, in the time and in stages of his choice. He is entitled to his average earnings during this period, but he is not entitled to his average earnings for the period during which he would not be eligible for any wage otherwise.

**Termination by an Extraordinary Notice**

The employer or the employee may terminate an employment relationship by extraordinary dismissal in the event that the other party: (a) is in breach of his substantial obligations arising from the employment relationship, whether willfully or by gross negligence; or (b) otherwise behaves in such a manner that would make the continuation of the employment relationship impossible.

Both should justify the reason for termination by extraordinary notice, and such justification should clearly indicate the cause. In the event of a dispute, the party who terminated the employment should prove the authenticity and substantiality of the reason for termination.

Prior to the employer’s announcement of termination by extraordinary notice, the employee should be given the opportunity to acknowledge the reasons for the planned termination and to defend himself against the complaints raised, unless such may not be expected of the employer as a result of all applicable circumstances.

The right to provide extraordinary notice may be exercised within fifteen calendar days upon learning of the reason for the termination, but should not be exercised more than one year from the occurrence of the cause at the latest, or up to the statute of limitation in the event of a criminal offense (three years in case of an executive employee).

If the employment relationship is terminated by the employee by extraordinary notice, he should be paid his average remuneration for a period equal to that in the event of termination by the employer by ordinary notice. The provisions on severance payment also are applicable. The employee also may claim compensation for any damage incurred.

**Restriction on Termination**

An employer may not terminate an employment relationship by ordinary notice in the following instances:

- If the employee is unable to work due to illness;
- During sick leave for the purpose of caring for a sick child;
- During the employer’s absence without payment for nursing or for providing home care for a close relative;
- During a treatment related to a human reproduction procedure;
• For three months after giving birth, or during maternity leave;
• During the employee’s absence without pay for the purpose of nursing or caring for children, until the child reaches the age of three, irrespective of any leave of absence without pay;
• During regular or reserve army service, from receipt of the enlistment order or notice for the performance of civil service;
• The entire duration of incapacity for persons receiving rehabilitation benefits; or
• In connection with placing a child under mandatory care prior to adoption, six months from the time of placement under mandatory care in respect of the proposed adopting parent — or, if adoption is planned by the spouses jointly — in respect of the parent taking a greater role in raising the child, or the duration of mandatory care if the child is removed from care before the six-month period expires.

These restrictions do not apply to the termination of an employee who qualifies as a pensioner.

Severance Payment and Other Liabilities

In the event of a termination by ordinary notice by the employer and the cessation of the employer without a legal successor, the employee is entitled to a severance payment if the employment relationship has been in existence for at least three years. The severance will amount to one to six months’ average salary depending on the duration of the employment relationship.

Such amount will be increased by three months’ average wages if the employment is terminated within the five-year period preceding the employee’s eligibility for old age pension or for old age pension with age allowance. The employee will not be entitled to receive severance pay if he qualifies as a pensioner on or before the date on which his employment is terminated.

Upon termination of the employment relationship, an employee also will be paid his wages and other emoluments. The employer also should provide him with specific statements and certificates for the length of time he was employed by such employer, any debt to be deducted from his wages (if there is any), and the amount of sick leave taken during the year when the employment relationship was terminated, among others.

Upon termination of his employment or within a year thereof, an employee may request his employer to provide a work certificate which contains the employee’s job title and an evaluation of his work. An employer who terminates an employment relationship illegally will face sanctions determined by the competent court on the basis of the Labor Code.
Worker Benefits under National Unemployment Insurance Programs

Under Act Number IV of 1991 on Job Assistance and Unemployment Benefits, so-called “job-seekers” are entitled to job-seeking assistance in the form of job-seekers’ benefits, job-seekers’ allowance, and reimbursement of expenses.\(^{14}\)

Job-seekers’ benefits may be paid for seventy-three to 270 days depending on the eligibility period. It will be calculated on the basis of the average monthly sum comprising the labor market contribution base the job-seeker has earned during the four quarters prior to becoming a job-seeker. He may receive sixty per cent to 120 per cent of such amount in the first part of the period, and sixty per cent in the second part.

Job-seekers’ allowance may be paid for ninety to 180 days, and amounts to forty per cent of effective mandatory minimum wages.

Retirement, Social Security, Healthcare, and Old Age Pensions

The pension system is based on (a) the pension paid by the National Pension Insurance (a “pay as you go” system), (b) the “pay as you earn system” (mandatory private pension funds), and (c) voluntary pension funds.

An employee will be recognized as a pensioner upon reaching the retirement age for old age pension benefits and achieving the service required to receive old age pension (entitlement to old age pension benefits), or if he is drawing old age benefits before the age limit, old age pension with age allowance, advanced (reduced) old age pension benefits, service pension, early retirement pension, other pension benefits which are treated the same as old age benefits, or invalidity (accident-related disability) benefits.

Payment of such benefits, except the entitlement to old age pension benefit, should commence when awarded upon request of the beneficiary employee. The employee should notify his employer if this provision applies to him.

Employees should have a certain minimum duration of service to become pensioners and should have exceeded a certain age determined by applicable laws. The current minimum amount of old age pension is HUF 28,500 per month.

Full old age pension benefits will be granted to a person: (a) born after 1952 and between 62 and 65 years of age; (b) who has at least 20 years of service; and (c) who is not engaged in a relationship that is subject to insurance under the social

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\(^{14}\) A “job-seeker” is someone who: (a) fulfills the conditions necessary for establishing an employment relationship; (b) is not pursuing studies as a full-time student at any educational institution; (c) is not eligible for old age pension and is not receiving rehabilitation benefits; (d) is not employed nor pursuing any other gainful activity, except being engaged in temporary employment; (e) cooperates with the competent government employment agency to find employment; and (f) has been admitted in the registry of the government employment agency as a job-seeker.
security system from the day when full old age pension is established. Partial retirement pension will be granted to persons who may meet the requirements for full old age pension benefits, but have at least 15 years of service.

Prior to reaching the retirement age for old age pension benefits, advanced old age pension benefits may be claimed by any man over the age of 60 who was born in 1950, and by any woman over the age of 59 who was born in 1952 or 1953, who (a) has at least 40 years of service, and (b) is not engaged in a relationship that is subject to insurance under the social security system from the day when the advanced old age pension is established.

Reduced advanced old age pension benefits may be claimed by persons who may meet the requirements for advanced old age pension benefits, but have at least 37 years of service. Pensioners are entitled to services of the national health insurance system. Hungarian pensioners who move to another EU member State also receive residence benefits in kind and pensions.

Summary of Social Costs

In General

Contributions to social insurance costs are funded by employer and employee contributions based on employees’ personal basic salaries. Approximately 37 per cent of labor costs constitute social costs.

Employers

The rate of social security contribution payable by employers is 27 per cent, with 24 per cent comprised of pension insurance contributions and three per cent in health insurance and labor market contributions.

Employers with more than 20 employees are required to pay rehabilitation contributions if the number of incapacitated workers in their employment is below five per cent of the total labor force. The amount of rehabilitation contribution in 2010 was HUF 964,500 per person each year.

Employees

Insured persons (employees) are required to pay health insurance and labor market contributions at a rate of 7.5 per cent. Health insurance and labor market contributions contain four per cent of health insurance contributions provided in kind, two per cent provided in money, and 1.5 per cent labor market contributions.

The rate of pension contributions payable by insured persons who are not members of any private pension fund is 9.5 per cent. Private pension fund members should pay eight per cent on the pension contribution base as membership fees. By undertaking a unilateral commitment in writing, employers may supplement their employees’ membership contributions, or fund members may supplement their own
membership contributions, by up to 10 per cent of the membership contributions base.

The employer’s commitment should cover each employee to the same extent and under the same conditions. Additionally, the rate of pension contribution to be paid by members of private pension funds is 1.5 per cent.

**Conclusion**

The New Hungarian Labour Code was to be voted on by the Parliament in autumn 2011. The purpose of the modification of several provisions, such as those concerning working time and atypical forms of employment, is to support the reality of an increased variety of working places in Hungary.

The New Labour Code, as proposed, contains new, atypical forms of employment that will make employment relationships more flexible. According to the proposals, the administrative tasks of employers also will be reduced. The suggested modifications regarding termination of the employment relationship and employee’s liability would create a more balanced relationship between the employer and the employee.
Iran

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Introduction

The first national document on labor law in Iran is the Sistan and Baluchestan governor’s decree to protect carpet makers’ rights in 1923, which contained rules on working hours, leaves, minimum wage, and child labor.¹ Legal relationships of employers and workers were later governed by the general provisions of lease of individuals in the Civil Code of 1928 (“Civil Code”). Accordingly, workers were treated as leased individuals and were not granted any specific privileges in labor relations. As a result, the contract of employment was almost filled with the employer’s expectations. Because of several labor accidents during road construction activities, the Provident Fund of the Ministry of Roads was established in 1931 by virtue of its Instruction dated March 1930. The Instruction was later extended to apply to leased individuals and daily wage workers in factories and industrial and mineral units. In 1935, the General Office of Industry and Mines was established.

The Instruction on the Factories and Industrial Institutions was subsequently approved, and contained requirements for the construction of factories, the safety and health protection of workers, duties of employers to teach workers to read and write, and protection of women and sick workers. The General Office of Industry and Mines was later turned into the Ministry of Industry and Mines, which was in charge of labor relationships for several years.

Due to the political and social events of 1941, several political parties and labor organizations were constituted and many workers went on several strikes in Tehran, Isfahan, and oil-producing areas such as the province of Khozestan and northern cities. Workers demanded better working conditions, prompting the approval of the first Labor Code by the Board of Ministers in 1946. However, the Labor Code of 1946 was not legislated in Parliament due to several objections.

In 1949, a committee of experts from the International Labor Organization was invited to Iran. A bill for a Labor Code was drafted through the assistance of the

committee and the cooperation of Iranian experts, and came into force to reduce some legal protections and privileges already granted to the workers. A new Labor Act was legislated in 1958 and was in force until 1990.

The Social Security Act was enacted on 24 June 1975 (“Social Security Act”). It has been amended over the years, but is still regarded as one of the primary labor regulations in Iran. The new Constitution was legislated after the Islamic revolution. It sets forth main principles for labor laws such as freedom of career and occupation, elimination of compulsory work, acknowledgment of ownership and the right to earn wages for work, social security protection, and equal protection of the law.

A new era of labor legislation was shaped after the new Constitution. During the first two decades of the revolution, the Workers Council influenced many of personnel management tasks such as recruitment, selection, promotion, job evaluation, salary structure, productivity bonus, and health and safety.

A new labor bill was sent to the Islamic Consultative Assembly as a result of these social and economic changes. The Labor Law (“Labor Code”) was ratified by the Islamic Consultative Assembly on 27 April 1989, received final confirmation by the Expediency Council on 12 November 1990, and became enforceable on 15 March 1991.

**Legal Relationship of Employer and Employee**

**Definition of Worker**

Under the Labor Code, the parties to a contract of employment are the worker and the employer. A worker is a person who works, at any capacity, at the request of the employer in exchange for receipt of remuneration. The remuneration may include wages, salaries, shares of profit, or other benefits. It may be inferred that workers should be natural persons, although employers can be natural persons or legal entities.

The type of profession one possesses is not important in regarding him as a worker. For instance, a physician who works for a hospital or factory may be regarded as a worker by virtue of law. A worker should carry out his services at the request and for the benefit of the employer. He also is required to follow the employer’s instructions. However, direct supervision or control of the employer over the employee is not required by law. Independent contractors, agents, partners, and directors are excluded from the definition of a worker.

**Independent Contractors**

Independent contractors such as tailors, doctors, and lawyers are not regarded as workers and are not covered by the provisions of the Labor Code on hours of work, minimum remuneration, sick leave, collective bargaining, and health and
safety protection in the workplace.\textsuperscript{2} Agreements made with general contractors are normally considered as lease of individuals and are governed by the Civil Code.

\textbf{Agents}

Agents are subject to Articles 656 to 673 of the Civil Code. The nature and direct effect of a contract of agency is delegation and not the leasing or rendering of services. Agency can be gratuitous or for remuneration.\textsuperscript{3} In contrast, performance of a task and payment of consideration are key elements, and delegation is less important, in lease of individuals or a contract of employment.\textsuperscript{4}

The subject matter of a contract of agency should be the performance of a legal act, while the same is not necessarily true for an employment agreement. For example, an employment agreement can be made for the construction of a bridge or repairing a car.\textsuperscript{5} In contrast to a worker-employer relationship, the principal often delegates decision-making to the agent, who acts as the representative of the principal for the accomplishment of a special task.\textsuperscript{6} The contract of agency is basically revocable and either of principal or the agent may dissolve the contract at any time.\textsuperscript{7}

\textbf{Partners}

A partner who is permitted to administer the property of the partnership is not an employee of the other partners. Instead, it may be inferred from Article 577 of the Civil Code that he should be regarded as their agent. Furthermore, since the partner operates his own business and participates in losses and damages in proportion to his share in the property,\textsuperscript{8} he cannot be regarded as a worker.

\textbf{Directors}

There is a disagreement among Iranian lawyers as regards the status of directors. Some consider directors as agents of the company while others believe that they should be regarded as workers. The majority believe that directors are agents of the company based on Article 24 of the Legal Bill of 15 March 1969, which states that directors of joint-stock companies should be shareholders. They are, in fact, the owners and participate in the loss and benefits of the company. It

\textsuperscript{2} Katouzian, \textit{Specific Contracts} (1997), at pp. 561–566.
\textsuperscript{3} Civil Code, Article 659.
\textsuperscript{4} Katouzian, \textit{Specific Contracts} (1997), at p. 113.
\textsuperscript{5} Katouzian, \textit{Specific Contracts} (1997), at pp. 109–120.
\textsuperscript{6} Civil Code, Article 656.
\textsuperscript{7} Civil Code, Articles 678 and 679.
\textsuperscript{8} Civil Code, Article 575.
also may be inferred from Articles 124 and 125 of the Legal Bill that a director is considered as a representative of the company.

A director who is appointed as a company employee will be entitled to the benefits of the Labor Code, and will still be regarded as a company employee regardless of his removal from the directorship. The General Office for the Supervision and Regulation of Labor Relationships at the Ministry of Cooperation, Labor, and Social Welfare is of the opinion that state directors, who are regarded as the subject of the Law on Determination of Temporary Director(s) enacted on 14 May 1979, are considered as agents and are excluded from the Labor Code. Also, state directors in private companies are normally believed to be agents regardless of whether they might be government employees.

Other Exclusions

The Labor Code also does not apply to individuals who are covered by the Civil Servants Act or other special employment laws and regulations. Workers in family workshops whose work is performed exclusively by the employer and his spouse and blood relatives of the first degree are not governed by the provisions of the Labor Code.9

In the agricultural sector, activities such as cultivation of and benefiting from fruit trees, plantations, forests, pastures, and parks built in forests, animal husbandry, production and raising of poultry and fowls, silk industry, aquaculture, honey bee production, and other operations in this sphere may be exempted from a part of the provisions of the Labor Code upon the proposal of the High Labor Council (HLC) and approval by the Council of Ministers.10

Special Categories of Employees

Young Workers

A worker who is 15 to 18 years old is termed as a young worker. Young workers are required to go through medical examination at the outset of the employment. These medical examinations should be renewed at least once a year and the related documents should be kept in the employment file. In case the physician finds the young worker’s job unsuitable, the employer is required to change it to the extent possible.

Under the Labor Code, daily working hours of young workers are half an hour less than normal working hours of other workers. Employers are prohibited from assigning any type of extra work, nighttime work, and difficult hazardous and dangerous tasks to young workers. They also are not allowed to give work involving lifting of load in excess of the authorized limits without using

9  Labor Code, Article 188.
10 Labor Code, Article 189.
mechanical devices. In case the job is hazardous to the health or moral character of the trainee or youth due to its nature or governing conditions, the minimum age for the job becomes 18 instead of 15.

*Foreign Workers*

Foreign nationals who wish to work in Iran should obtain a work visa and a work permit in accordance with relevant laws and regulations. It is the Ministry of Cooperation Labor, and Social Welfare which issues work permits, according to the information available to it.

Work permits to foreign nationals are issued when there are no qualified Iranian citizens with similar specifications to perform the job in question, when the foreign applicant possess sufficient skills and specialization, and when the expertise of the foreign national is used to train Iranians and eventually replace foreign nationals. Certain groups of people are exempt from these conditions, such as:

- A foreign national who has continuously resided in Iran for at least 10 years;
- A foreign national who is married to an Iranian person; and
- Immigrants from foreign countries (particularly Islamic countries) and refugees, provided they have a valid immigration and refugee card and subject to the written agreement of the Ministry of Interior and the Ministry of Foreign Affairs.

Work permits are valid for one year, although they can be renewed, and are normally valid for the job for which they are issued. In the event that the work relationship between a foreign national and an employer terminates for any reason, the employer should inform the Ministry of Cooperation Labor, and Social Welfare within 15 days of such termination. The employee also should submit his work permit to the Ministry within the same time frame, in exchange for a receipt.

*Contract of Employment*

**Legal Conditions for Validity**

A contract of employment requires a worker to perform a job for an employer in consideration of the receipt of remuneration for a definite or indefinite period.\textsuperscript{11} It may be written or oral, and is constituted by express or implied consent of the parties. A contract of employment is valid so long as the following conditions are met at the time it is made:

- The subject of the agreement should be legitimate;

\textsuperscript{11} Labor Code, Article 11.
• The subject of the agreement should be specified; and
• The law or sharia should not prohibit the parties from possessing property or performing specific work.\(^{12}\)

The employer and the worker should be competent to enter into the contract, i.e., they should be of a legal age, sane, and mature.\(^{13}\) Contracts made by non-discerning minors or insane persons are null and void. Conversely, those contracts made by discerning minors or immature persons are not binding unless their natural guardian or tutor signifies his consent.

For contracts of employment, Article 79 of the Labor Code requires the worker to be at least 15 years old, otherwise the contract will be unenforceable but the worker is still entitled to receive compensation for the job performed.

### Terms and Conditions

**In General**

Other than the parties, the contract of employment also should specify the following:

• Type of work, vocation, or duty that should be performed by the worker;
• Basic salary or wages and fringe benefits;
• Working hours, holidays, and leaves;
• Place of performance of duties;
• Probationary period, if any;
• Date of conclusion of the agreement;
• Duration of the agreement, in case the work is to be performed for a definite period; and
• Other terms and conditions required by custom and practice of the profession or the locality.\(^{14}\)

**Type of Work**

The parties may agree on the performance of a job either of continuous or non-permanent nature. They also may decide on the completion of a specific task. No party is allowed to unilaterally cancel the contract of employment regardless of whether it is made for a definite period or for the performance of a specific work. The employer and the worker should refer to the Dispute Probe Board (**Heiat-e-Tashkhis**) and the Dispute Settlement Board (**Heiat-e-Hal-e-Ekhtelaf**) should any dispute arise in this respect.

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12 Labor Code, Article 9.
13 Civil Code, Article 212.
14 Civil Code, Article 10.
Remuneration

A worker is entitled to receive remuneration called “compensation for the effort”. All that he legally receives in accordance with the contract of employment, whether it is wages, salary, family allowance, housing, food, transport expenses, non-financial benefits, productivity bonuses, annual profit-sharing, or others, are regarded as compensation for the effort.

The wage is a composition of the cash amount, aid in kind, or their total which is paid to the worker. A wage paid on the basis of hours of performance of work is called an “hourly wage”, while a wage based on the volume of work performed or pieces of product manufactured is called a “commission”. If the wage is paid in accordance with the product or the volume of work performed during a fixed period, it is called an “hourly commission”.

Under the Labor Code, the wage and the salary are often referred to as “fixed wages”, which is composed of the total amount of the wages and fixed benefits payable to that job. On the other hand, welfare and motivational benefits such as housing and food allowances, family support, productivity allowances, and annual profit-sharing are not considered part of the fixed wages.

The wage should be paid at regular intervals on working days and during working hours. The method of payment should either be in cash in the currency of the country or through a bank check. Payments should take place after calculation at the end of the day, week, or fortnight in proportion to the hours or days of work performed if required by the contract of employment or the common practice of the workshop.

Wages paid monthly on the basis of an agreement or common practice of the workshop are called “salary” and should be paid at the end of the month. The wages and benefits payable to workers engaged in work on a part-time basis or for hours less than the officially determined working hours are calculated and paid in proportion to the hours of work actually performed.

Minimum Wage

Pursuant to Article 41 of the Labor Code, the High Labor Council is required to annually determine the minimum wages for workers in different parts of the country or in various industries. The High Labor Council should consider the inflation rate published by the Central Bank in fixing the minimum wage.

The minimum wage should be sufficient to meet the needs of the worker’s family. The physical and mental conditions of the workers or specificity of the work are not considered in fixing the minimum wage. Employers should not pay less than the minimum wage, otherwise they will be forced to pay the discrepancy or will be subject to certain penalties.

The minimum wage should exclusively be paid in cash. Payment in kind, stipulated in any form in the contract of employment, will be treated as payment.
in excess of the minimum wage. Only the amount in excess of the minimum wage of the worker may be deducted by a court order against the employer’s claims, but the amount of such deduction should not exceed a quarter of the worker’s wages.

**Assignment Allowance**

An employer also should pay assignment allowance to a worker who is sent on official duty outside the place of service, particularly where the worker has to travel at least 50 kilometers from the original workshop for performance of work, or where he stays at least for one night at the place of performance of the official duty. The assignment allowance should not be less than the fixed or basic daily wage of the worker. The employer also should secure transportation or conveyance allowance for the worker.

**Working Hours**

Paragraph 3 of Article 43 of the Constitution requires the plan for the national economy to be structured in such a manner that the form, content, and hours of work of every individual will allow him sufficient leisure and energy to engage, beyond his professional endeavor, in intellectual, political, and social activities leading to his all-round development, to take active part in leading the affairs of the country, improve his skills, and to make full use of his creativity.

Under the Labor Code, working hours should not exceed 44 hours a week and eight hours a day. However, the employer and the worker may agree on more or less than the statutory hours on certain days. In hazardous and underground jobs, working hours should not be more than six hours a day and 36 hours a week.

If an employee works beyond 44 hours a week, he is entitled to overtime pay at the rate of 40 per cent in addition to his payment per hour. The consent of the employee is required for the assignment of overtime work. Day work is performed from 6 a.m. to 10 p.m., night work is performed between 10 p.m. and 6 a.m., while mixed time work is performed partly during daytime and partly during the night. For every hour of nighttime work, 35 per cent in addition to the wages for normal working hours will be paid, except in shift work cases.

Employees are entitled to leave on all official State holidays and Fridays, which is the weekly holiday for workers. Employees who work on Fridays will be paid an amount equivalent to 40 per cent of the wages in addition to their usual wages for non-utilization of the holiday. Labor Day (May 1) also is considered as part of the workers’ official holidays.

Every worker is entitled to annual paid leave, which includes four Fridays and a total of one month. Workers employed in difficult and hazardous jobs may have an annual paid leave of up to five weeks. However, workers are not allowed to save more than nine days of their annual paid leave every year.
The annual paid leave will accrue to the worker if the contract of employment ends or is terminated, if the worker retires or is completely incapacitated, or if the workplace is shut down. If the worker has died, the annual paid leave will be paid to his heirs. In addition to the annual paid leave, every worker is entitled to three days of leave in case of permanent marriage or death of his spouse, parents, or children. The worker should use the three-day leave immediately upon occurrence of these events.

A worker also is entitled to sick leave. The period of sick leave is considered a part of the service record and retirement of the worker. Female employees are entitled to 90 days of maternity leave. The salary during maternity leave will be paid according to the provisions of the Social Security Act. Maternity leave should be considered part of the employee’s service record. The law requires employers to provide returning employees with the same position.

Probation Period

The parties may agree on a probation period in the contract of employment. During this period, either party may terminate the agreement without giving prior notice and without any obligation for damages. If the work relationship is terminated by the employer, he should pay the salary for the whole probation period. If such move is taken by the employee, he will only be entitled to the salary for the period of performance of the job.

The duration of the probation period should be determined in the agreement. It should not exceed one month for unskilled and semi-skilled workers, and not more than three months for skilled workers possessing high level specialization.

Suspension of Contract

The contract of employment is normally suspended in the following circumstances:

- During the period of active, contingency, or reserve military service, throughout which the worker is not entitled to receive the wages and benefits stipulated in the contract of employment;
- If the workshop or part thereof is temporarily closed due to force majeure;
- There is educational leave for up to four years or other leaves without payment; and
- The period of detention that does not lead to conviction. In this case, the employer should pay on account at least 50 per cent of the worker’s monthly salary to his family until the matter against the worker is finally decided. If the worker is acquitted, he is required to pay the wages and benefits for the detention period along with compensation for losses so inflicted.

The contract is revived after removal of such conditions. The previous service record before suspension is calculated for retirement and wage increase.
purposes. Once the condition giving rise to the suspension of the agreement is removed, the employer is required to allow the worker to return to his job.

If the position is filled or eliminated, the employer is required to provide a similar position for the worker. Failure to do so is considered wrongful discharge and the worker is entitled to file a legal suit before a Dispute Probe Board within 30 days. If the worker fails to report to his employer for work within 30 days after termination of the suspension or in case he fails to bring the action before the Dispute Probe Board within the referred period, he will be deemed to have resigned and is entitled to a termination benefit which is equal to his last monthly wage for each year of service completed.

**Termination of Contract**

A contract of employment is terminated under the following circumstances:

- Death of the worker;
- Retirement of the worker;
- Total disability of the worker;
- Expiry of the duration of definite employment agreements and their explicit or implicit non-renewal;
- Completion of the work in contracts made for the performance of a specific task;
- Resignation of the worker; or
- Unilateral termination of the contract.

A worker can resign only in contracts for an indefinite period. In case of contracts made for a definite period, the worker should give one month’s written notice of his resignation to the employer. However, if the worker withdraws his earlier resignation in writing within 15 days, such resignation will be deemed null and void.

The worker is required to submit copies of his resignation letter and the subsequent letter withdrawing his earlier decision to the Islamic Council of the workshop, the guild society, or the workers’ representative. The contract of employment may be unilaterally terminated by the worker or by the employer. If the worker cancels the contract without any reasonable excuse, he will not be able to claim termination benefits. On the other hand, the employer can claim damages resulting from the wrongful act of the worker.

An employer also may dismiss a worker if he neglects to perform the assigned obligations or breaches disciplinary by-laws of the workplace despite written notices. The employer can terminate the contract upon the assenting opinion of the Islamic Labor Council. However, the employer should pay a sum equal to the worker’s last monthly wage for each year of service in addition to any deferred entitlements. If there is no Islamic Labor Council in the unit, the
employer should obtain the approval of the guild society. In the absence of both, the matter should be referred to the Dispute Probe Board.

Discrimination

In General

The Constitution and the Labor Code prohibit discrimination on the basis of gender, race or national origin, religion, and physical or mental handicap. Nevertheless, there are some positive discriminations and legal support given to special categories of workers such as women and children.

Gender

All workers, men or women, are entitled to the same protection of the law, and equally have the right to freely choose an occupation, provided it is not inconsistent with Islamic principles or public interests and does not violate the rights of others.\textsuperscript{15} Men and women who perform work of equal value should be paid equal wages.\textsuperscript{16}

Nevertheless, women enjoy certain protections under Iranian labor laws. For instance, female workers are prohibited from engaging in difficult and hazardous jobs. Workers who are mothers are given half an hour break every three hours at work to feed their babies, with the breaks included in their working hours. Employers who deny female workers such rights are fined the first time. In case they repeat the offense, they would receive prison terms ranging from 91 to 180 days.

Age

Although all workers irrespective of gender or age should enjoy the same protection of the law, have an equal right to freely choose an occupation, and be paid equal wages for work of equal value, young workers and female workers enjoy some legal protection.

For example, the daily working hours of the young workers are half an hour less than the normal working hours of other workers. Employers also are prohibited from assigning any type of extra work, nighttime work, and difficult hazardous and dangerous tasks to young workers.

Physical or Mental Handicap

There is no legal requirement in respect of discrimination against or protection of workers with physical or mental handicap. On the contrary, physical and

\textsuperscript{15} Constitution, Article 43 and Article 28, Paragraph 2; Labor Code, Article 6.
\textsuperscript{16} Labor Code, Article 38.
intellectual abilities of workers should not be considered for fixing the minimum wage.\(^{17}\)

**Race or National Origin**

All workers irrespective of race or national origin should enjoy equal rights concerning payment and basic legal protections. Nevertheless, the Labor Code provides for certain limitations and formalities in respect of recruitment of foreign nationals.

**Religion**

There is no form of discrimination on the basis of religion in Iranian labor laws.

**Collective Bargaining and Worker Participation in Management**

**In General**

The Constitution and the Labor Code both discuss the right of association and collective bargaining. Accordingly, all workers and employees, except police and military forces, are entitled to form their own associations. The main purpose of collective bargaining is to avoid or resolve vocational problems related to workers and employees and to improve production conditions and employee welfare affairs.

Through collective bargaining, both sides are able to state their own criteria for solving problems and providing the grounds for their participation in finding solutions. During negotiations, both sides should submit the necessary evidence and documents which support their demands.

The subject of negotiations and decisions can be any matter in labor relations, which entails the establishment of regulations and the determination of criteria, provided that existing laws, regulations, and government policies do not prohibit such decisions. Parties may request the Ministry of Cooperation, Labor, and Social Welfare to introduce them to a neutral individual who has expertise in labor matters and who will coordinate and act as an expert during the negotiations.

**Collective Labor Contract**

Under the Labor Code, a collective labor contract is a written agreement that is concluded for setting working conditions between one or more council(s), guild association(s), or legal representative(s) of workers on the one hand, and one or more employer(s) or their legal representatives on the other hand, or between worker and employer associations and high associations.

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\(^{17}\) Labor Code, Article 41, Paragraph 2.
The collective labor contract should be executed in three copies signed by both parties. Two copies should be given to the parties, and the third copy should be submitted to the Ministry of Cooperation, Labor, and Social Welfare within three days for review and confirmation. The following requirements should be met to make legally binding and enforceable collective labor contracts:

- Parties should not stipulate benefits which are less than those provided by labor laws;
- The terms and conditions of the contract should not be contrary to existing rules, regulations, and statutory decrees of the government; and
- The Ministry of Cooperation, Labor, and Social Welfare should confirm the lack of inconsistency of the subject(s) of the contract with the minimum benefits under the Labor Code and other laws, regulations, and statutory decrees of the government.

The Ministry should announce its approval or disapproval within 30 days. Disapprovals should be supported by legal evidence and current regulations. The provisions of a collective labor contract prevail over individual contracts of employment made prior to or after signing of the collective labor contract, except where the individual contracts of employment provide for more benefits than those in the collective labor contract in terms of wages.

If the collective labor contract is made for a specific period, neither party can unilaterally seek an amendment of the contract prior to the expiry of the period, unless in exceptional circumstances and at the discretion of the Ministry of Cooperation, Labor, and Social Welfare.

The enforcement of the collective labor contract is not affected by the death of the employer or a change in ownership through sale or transfer of the workshop in any form, shift in the production line, merger with another institute, or nationalization. Thus, the new employer will be considered as the successor of the former employer in respect of collective labor contracts.

**Health and Safety Protection in Workplace**

Employers or their representatives should observe the health and safety provisions under labor laws, and will be liable if any accident occurs as a result of their non-observance of the safety rules. All employers should observe instructions formulated by the High Council of Technical Safety and the Ministry of Health and Medical Education.

Employers who want to set up a new workshop or expand existing ones should initially present the plan of the work, building plans, and the desired projects in respect of technical safety and labor hygiene to the Ministry of Cooperation, Labor, and Social Welfare for comments and approval.

Employers should submit specifications of equipment intended to be imported or produced in Iran to the Ministry of Cooperation, Labor, and Social Welfare.
They should perform necessary tests through the approved laboratories prior to putting the equipment into operation. Employers also should teach the workers and trainees how to use the equipment and observe their performance to assure observance of safety and hygiene in the workshop.

Employers should open a medical file for workers who are exposed to disease arising out of work due to the type of work involved. These workers should undergo medical tests at least once a year, and the results should be kept in their respective files. Due to the importance of health and safety protection in the workplace, family workshops also are required to observe technical and labor hygiene principles.

**Workers’ Compensation and Survivors’ Benefits**

Under Article 31 of the Labor Code, an employer should compensate a worker when his contract is terminated as a result of total disability. The amount of compensation is equivalent to 30 days of wages at the worker’s most recent rate of pay for each year of completed service.

In case the termination is the result of impairment of the worker’s physical or mental capabilities, the employer should pay an amount equivalent to two months of wages at the worker’s most recent rate of pay for each year of service completed.

These termination benefits are in addition to the monthly pensions paid by the Social Security Organization (the “Organization”). Under the Social Security Act, partially or totally disabled workers and families of workers killed on the job should be paid a monthly pension.

Total disability occurs when there is a decrease in the ability of the insured to work, such that he is unable to earn more than one-third of his previous income by engaging in his former occupation or in other work. On the other hand, partial disability happens if there is a decrease in the ability of the insured to work, such that he is able to earn only a portion of his income by engaging in his former occupation or in any other work.

If the total disability is a result of an employment accident or occupational disease, the insured worker is entitled to receive the pension assigned to total disability, irrespective of the period during which he has paid the insurance contribution.

The amount of monthly pension for an employment-related total disability is equal to one-thirtieth of the average wage or salary of the insured multiplied by the years during which the insurance contribution has been paid, provided it is not less than 50 per cent of his average monthly wage or salary and does not exceed 100 per cent thereof.

Insured persons who have a dependent wife, child, or parent and whose pension is less than 60 per cent of their average wage or salary will be paid an additional
10 per cent of the pension as a contribution, provided the total pension and contribution do not exceed 60 per cent.

An insured worker who has lost his ability to work by 33 per cent to 66 per cent due to an employment-related accident will be paid a monthly pension for partial disability from the Social Security Fund. The amount of pension is equal to the result derived from multiplying the percentage of disability and the amount of the total disability pension. Should the employment accident decrease the ability of the worker by 10 per cent to 33 per cent, a lump sum compensation for loss of use of limb will be paid to the worker. Eligible survivors of workers who are deceased as a result of an employment-related accident or an occupational disease receive a survivor pension in accordance with the Social Security Act.

Dispute Resolution

Labor disputes may arise out of the enforcement of the Labor Code and other labor regulations, training contracts, workshop agreements, or collective labor agreements. Labor disputes should initially be settled through a direct compromise between the employer and the worker or trainee or their representatives in the Islamic Labor Council within the unit, the dispute should be settled through the workers’ guild society or legal representatives of the workers and employees. In case the parties do not reach a compromise, the dispute should be examined and settled by Dispute Probe Boards (Heiat-e-Tashkhis, DPBs) and Dispute Settlement Boards (Heiat-e-Hal-e-Ekhtelaf, DSBs). The DPB is composed of the following individuals:

- A representative of the Ministry of Cooperation, Labor, and Social Welfare;
- A representative of the workers selected by the provincial association for coordination of Islamic labor councils; and
- A representative of the directors of industries selected by the provincial association of employers’ guild societies.

The DPB should invite the parties for a hearing. However, the absence of the parties or their authorized representatives does not impede the DPB from examining and deciding on the case. Each party may present his own witness. Decisions made by the DPBs may be objected before the DSB within 15 days from the date of service, or 10 days in the case of collective agreements. The DSB of a province is composed of the following members:

- Three workers’ representatives, to be chosen by the Coordination Center of the Islamic Labor Councils of the province, the Center of Workers’ Guild Societies, or by the Assembly of Workers’ Representatives of the units of the region;
• Three employers’ representatives, to be chosen by managers of the units in the region; and
• Three government representatives, namely the Director General of Labor and Social Affairs, the Governor, and the Chief of the Justice Department of the locality or their representatives.

Each DSB is appointed for a term of two years. If necessary and having due regard to the volume of work, the Ministry of Cooperation, Labor, and Social Welfare may set up several DSBs in any province. DSBs should send written notices to the parties to invite them for hearings. Absence of either party or his authorized representative does not impede the DSB from examining and deciding on the case, unless it deems the presence of the parties necessary. In this case, parties will be re-invited for another hearing. The DSB investigates the case and makes the necessary decision within one month.

Final decisions of the dispute settlement authorities are binding and effected through the department of enforcement of awards. Verdicts should be enforced through the enforcement department of the court where the workshop is located. The interested party should submit the enforcement request along with the certified copy of the verdict to the enforcement department. DPBs and DSBs are not competent to investigate certain disputes such as claims for nullity of contract of employment and vicarious liability of the employer for the worker’s activities.

Severance and Redundancy Payments

If the contract of employment is terminated because of completion of a definite work or the expiry of a specific agreement, the employer should pay an amount equivalent to one month salary for each year of continuous or alternate service at the rate of the worker’s last salary as severance benefits. In this instance, salary means fixed payments and does not include fringe payments.

Compensation was previously paid only to workers who have been working for at least one year. With the establishment of the Expediency Council on 15 November 2008, workers who have been working for less than a year can now receive compensation. In this case, the amount of severance benefits is calculated in accordance with the performance of the employee. For example, if he was working for three months, he would receive three-twelfths of his last salary. In case the contract of employment was terminated as a result of the worker’s disability, the employer is required to pay 30 days’ salary for every year of service.

However, if the worker’s disability is caused by the working conditions, the employer should pay 60 days’ salary for every year of service. In case of retirement of the worker, the employer should pay 30 days’ salary for every year of service.

(Release 1 – 2012)
Social Security

In General

The Constitution provides that every person should be entitled to social security. Social security should cover retirement, unemployment, old age, disability, being without a guardian, casual misfortune, accidents, and events which necessitate health and medical care and treatment.

In practice, the provisions of the Social Security Act protect individuals who work for wages or salary and those who receive pensions for retirement, disability, or death. Employers are required to insure their workers according to the provisions of the Social Security Act, otherwise they will be subject to penalties.

Insurance Contribution

The insurance contribution is 30 per cent of a worker’s wages or salaries, seven per cent of which should be borne by the insured, three per cent should be provided by the government, and the rest to be paid by the employer. The employer also should pay an extra 30 per cent as unemployment insurance contribution. The insurance contribution in difficult and hazardous jobs is four per cent more than the amount paid in normal jobs.

At the time of payment of the wages, salaries, and benefits, the employer should deduct the worker’s share, add his own required share, and pay all to the Organization before the last day of the month. The Organization will not be exempt from its obligations to the insured if the employer delays or fails to pay the insurance contribution. If the work is entrusted to other persons on a contract basis, the employer should bind the contractor to insure his workers and workers of subcontractors with the Organization and pay the required insurance contributions.

The employer should not pay five per cent of the total value of the contractor’s work, unless the contractor presents a certificate of settlement of accounts issued by the Organization. If the contractor submits a list of wages and insurance contributions of its workers to the Organization in due time, the five per cent withheld will be released at the request of the Organization. In the case of infringement of this legal duty, the guilty employer will be liable for the payment of the specified insurance contribution and the related penalties. The employer is allowed to demand and recover the sum paid from the contractor.

Insurance Coverage

Social security covers the accident, illness, pregnancy, disability, retirement, death, and unemployment of workers. Workers are normally paid pensions, lump sum compensations, marriage grants, and family allowances.
Accidents, Illness, Pregnancy, and Disability

Insured workers or members of their families are entitled to use medical services in case of injuries resulting from accidents or illnesses. These medical services include all kinds of outpatient treatments, in-patient treatments, supply of required medicines, and performance of diagnostic testing. The members of the family of the insured who can enjoy the medical services are:

- The wife of the insured;
- The husband of an insured wife, provided that he is supported by her and is over 60 years of age, or is found by Medical Boards to be disabled;
- The children of the insured, provided they are less than 18 years of age, but unmarried daughters should be under 20 years of age or should exclusively be occupied as students as certified by an official educational institution;
- The children of the insured who are not able to work because of illness or a defect of limb, with their disability certified by the Organization; and
- The parents supported by the insured, provided that the age of the father exceeds 60 years and that of the mother exceeds 55 years, or they are disabled as found by Medical Boards, and should not be receiving any pension from the Organization.

Any insured worker who is undergoing medical treatment or is convalescent and is temporarily unable to work as found by the National Health Insurance Organization (NHIO) should receive sickness benefits, so long as he is not engaged in any work and does not receive any wage or salary.

The insured should be undergoing medical treatment as a result of an accident or occupational disease. He also should need a complete rest or bed rest as certified by a doctor and was working or was on paid leave on the date of his illness. Sickness benefits are paid from the first day the insured is unable to work as found by the NHIO. If the insured is not able to work because of illness and is not confined to bed at the hospital, the sickness benefits are paid from the fourth day. Payment of the sickness benefits will continue until the insured person is able to work and is not disabled.

An insured worker who is supporting a spouse, children, or parents is paid a sickness benefit equivalent to three-fourth of his last wages or salary. Conversely, if the insured does not have supported dependents, he will be paid two-thirds of his last salary or wages.

The Organization pays only the expenses related to medical services, in cases where the employers are bound to pay wages or salaries to sick workers. Under the Social Security Act, a female insured or an insured’s wife is entitled to pregnancy allowance if insurance contributions are paid for 60 days within a year before childbirth, and if she is not occupied with a profession. She also is entitled to medical support such as medical examination, diagnostic testing, and
medical treatments before and after childbirth. The insured may request the Organization to pay the costs of medical support to the insured instead.

Where the female insured or the insured’s wife dies because of childbirth or in case breastfeeding is harmful to the mother, the family will be given dried milk for the baby until the child is 18 months old. If an insured worker is considered to be incurable as diagnosed by his doctor, he should go through further convalescent treatments and may be found by the Medical Committees to be totally or partially disabled.

**Retirement**

Retirement means the state of an insured who is no longer employed because he has reached the retirement age under the Social Security Act. Retired persons should receive retirement pensions. Male workers who are 50 years of age and female workers who are 45 years of age may request for retirement provided they have regularly paid the contribution to the Organization.

Male workers who are 50 years of age and female workers who are 45 years of age who have worked at least 20 consecutive years or 25 non-consecutive years in a region with bad climate or under conditions of difficult employment that is hazardous to health may ask for retirement pension so long as they have paid the contribution in all cases.

Insured persons with a record of paying contributions for a total of 35 years may ask for retirement pension regardless of age. Female workers aged 42 years and with a record of 20 years of employment may retire with a pension equal to 20 days of their monthly wage, provided that they have paid the required contribution.

The amount of the retirement pension should be one-third of the average wage or salary of the insured multiplied by the number of years during which the insurance contribution has been paid, provided that it does not exceed 35/30 of the average wage or salary.

The average wage or salary for the purpose of calculating retirement pension should be the total wages or salary of the insured on the basis of which the insurance contribution has been paid during the last two years divided by 24. Employers also may request the retirement of insured persons from the Organization, in case the insured have continued to work for five years or more after attaining the statutory age of retirement.

**Death**

The Social Security Act allows legal survivors of deceased insurers to receive survivor pensions under the following circumstances:

- Upon the death of the retired insured;
- Upon the death of the totally disabled insured who also was a pensioner;
Upon the death of an insured who, during the last 10 years of his life, has paid the insurance contribution for at least one working year provided that, during his last year of life, he has paid contributions for 90 working days; or

- If the insured is dead due to a vocational accident or disease; or

- Survivors of the insured who has paid at least 20 years of contribution before his death also should be entitled to survivor pensions.

Survivor pensions are only paid to the following persons:

- The permanent wife of a deceased insured, as long as she has not permanently remarried. In the event of second marriage, the pension will be discontinued and will be reinstated upon death of her second husband.

- The children of the deceased, provided that they are under 18 years of age or are exclusively devoted to studying, or are unable to work due to illness or loss of limb as certified by the Medical Committee.

- The parents of the deceased, provided they were supported by the insured and the age of the father exceeds 60 years while that of the mother exceeds 55 years, or they are disabled in accordance with the findings of the Medical Committee and are not receiving a pension from the Organization.

The survivors of an insured woman should be:

- A husband who was supported by his wife and who is more than 60 years old or who is disabled in the opinion of the Medical Committee and does not receive any other pension from the Organization;

- Children of the insured, provided that (a) the father is not alive or is supported by the mother and does not benefit from another pension, and (b) they are under 18 years of age or are exclusively devoted to studying until completion of their education, or are unable to work due to illness or loss of limb as certified by the Medical Committee; and

- Parents, provided that they were supported by the deceased, and that the age of the father exceeds 60 years, and the mother is more than 55 years old, or that, as a result of the finding of the Medical Committee, they are disabled and in any event are not drawing a pension from the Organization.

The amount of pension for the widow of an insured is equivalent to 50 per cent of the pension due to the insured. In case an insured male has several permanent wives, the pension should be divided equally among them.

The amount of pension for each of the children of the deceased insured is equivalent to 25 per cent of the pension due to the insured. Where a child has lost both his parents, his pension will be twice the referred amount. The amount of pension for each of the parents of the deceased insured is equivalent to 20 per cent of the pension due to the insured.
The total pension of the survivors of the deceased insured should not exceed the amount of pension due to the deceased. Otherwise, the share of each of the beneficiaries should be proportionately reduced. If one of the beneficiaries die or is disqualified to receive a monthly pension, the share of the remaining survivors should be increased with due consideration to the classifications set out in the law.

**Unemployment**

The Unemployment Insurance Law, ratified on 17 September 1990, applies to all persons who are covered by the Social Security Law, labor laws, and agricultural labor regulations. However, it does not govern retired and totally disabled workers, self-employed voluntary insured individuals, and foreigners residing in Iranian territory.

An unemployed person is one who has been made redundant for reasons other than his own fault and he is ready for work. Thus, the insured that is unemployed due to unforeseen and natural disasters such as flood, earthquake, war, fire, and others should be entitled to the unemployment insurance benefit.

The unemployment insurance contribution is three per cent of the insured person’s wage and is totally paid by the employer. The insured person’s wage, the method of determining the unemployment contribution and its collection, the obligations of the insured person and the employer, and the manner of dealing with complaints, violations, and other regulations in respect of unemployment insurance is the same as the standards criteria for contributions to other social security benefits. The unemployed insured should meet the following requirements to enjoy unemployment benefits:

- The insured person should have a record of at least six months of contribution insurance payment prior to becoming unemployed. Those who are made redundant due to *force majeure* events should be excluded from this requirement.
- The insured person should inform the Cooperative, Labor, and Social Welfare units of his unemployment within 30 days from the unemployment and should express his readiness to perform a specialized job or similar work. He can refer to the units after 30 days, but he should submit justified reasons along with the findings of the Labor Disputes Board.
- The unemployed insured should participate in literacy and job training courses assigned by the Labor and Social Affairs Unit, the Literacy Movement Institute, or other relevant units confirmed by the Ministry of Cooperation, Labor, and Social Welfare. He should submit the required certificate to the social security branches every two months.

If the worker performs a job with a wage that is less than that of the unemployment benefit, the difference should be paid from the account of the
Unemployment Insurance Fund. The unemployment benefit, like every other social security benefit, is exempt from all taxes.

The period of receipt of the unemployment benefit is based on the same standards used for the contribution payment for retirement, disability, and death. The insured person and his dependents also enjoy the healthcare services mentioned in the Social Security Act while they are receiving unemployment benefits. The insured worker will no longer receive the unemployment benefit if any of the following circumstances occurs:

- Re-employment of the insured person;
- Non-participation of the insured person, without any justifiable reason, in the required literacy and vocational training courses, as reported by the respective unit;
- Refusal by the insured person to accept his specialized job or a job similar to it;
- Entitlement of the unemployed insured person to retirement or disability pension while receiving unemployment benefits; and
- Return of the insured person to the previous job with receipt of the suspended wages.

**Conclusion**

Iranian labor law is quite comprehensive and covers almost all aspects of labor relations, including hiring local workers or foreign staff. It also covers a broad range of contracts of employment. The Labor Code provides the minimum standards that an employer should adhere to when creating an employment relationship.

The law is very employee-friendly. For example, it makes it extremely difficult for employers to dismiss their workers. Labor disputes also are settled by special labor boards which usually rule in favor of the employees.

Due to the growing social and economic changes and pressures from the private sector, the Ministry of Cooperation, Labor, and Social Welfare has drafted a bill to amend the existing Labor Code. The draft is currently under consideration.
# Italy

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Introduction

Sources of Rights

The sources of law which govern employment relationships in Italy are the following:

- The Constitution in Articles 5 and 35–40;
- The Civil Code in Articles 2060–2134); and
- Various laws.¹

Non-statutory governing rules are established in:

- Collective bargaining agreements;
- Shop-level agreements; and
- Individual employment contracts.

Statutory rules governing employment relationships also apply to foreign employees according to private international law principles, subject to public order limitations. Collective bargaining agreements apply insofar as the parties are members of the signatory unions or if they are specifically referred to in the individual employment contract.

Immigration Requirements for Foreign Workers

In General

On 26 October 1997, Italy joined the Schengen system at the end of a gradual process of adjusting to the common visa regime provided by the Convention Implementing the Schengen Agreement. Reinforcement of the common external border followed the parallel and gradual removal of internal border controls.

¹ Law Number 604 of 1966 and Law Number 108 of 1990 on individual dismissals; Law Number 300 of 1970, the "Workers' Charter", establishing, among other things, workers' basic privacy and union rights; Law Number 297 of 1982 on severance compensation; Law Number 223 of 1991 on collective dismissals; Law Number 30 of 23 February 2003 containing the principles of the Biagi Law; and Legislative Decree Number 81 of 2008 on Safety and Health in the Workplace.
allowing complete freedom of movement within all the territories of the
Schengen agreement signatory States and establishing what has become known
as the Schengen Area.

Relevant Legislation

The Ministry of Foreign Affairs, which has statutory powers over the admission
of aliens, issued the ‘Inter-Departmental Decree Number’ on visas on 12 July
2000, pursuant to Section 5(c)(3) of Presidential Decree Number 394/1999 (as
completing the national corpus of legislative sources governing this subject
matter, which includes:

• The Consolidated Act enacting ‘Provisions governing immigration and alien
status’, Legislative Decree Number 286/1998;
• The Regulation implementing the Consolidated Act, Presidential Decree
Number 394/1999; and
• The Ministry of the Interior Directive ‘Defining the means of subsistence for
the entry and sojourn of aliens on Italian soil’ (Official Journal 64/2000).

The sources of law governing the Schengen system are:

• The Schengen Agreement of 14 June 1985 between Belgium, France,
Germany, Luxembourg, and The Netherlands;
• The Convention implementing the Schengen Agreement of 19 June 1990;
• The Italian Accession Agreements, signed in Paris on 27 November 1990;
• The Ratification and Implementation Act, Law Number 388/1993 (Official
Journal 232/1993);
• Council Regulation 539/2001, and amendments, listing the States for whose
citizens visas are compulsory;
• Regulation (EC) 810/2009, establishing a Community Code on Visas (Visa
Code);
• Regulation (EC) 265/2010, regarding the free circulation of long-term visa
(D)-holders; and
• Council Regulation (EC) 1620 (C) /2010, Practical Handbook for processing
visa applications.

The ‘Schengen Area’ comprises the national territories of the countries that
already apply the Convention: Austria, Belgium, Denmark, Finland, France,
Germany, Greece, Italy, Luxembourg, The Netherlands, Portugal, Spain,
Sweden, Iceland, Norway, Slovenia, Estonia, Latvia, Lithuania, Poland, Czech
Republic, Slovakia, Hungary, Malta, and Switzerland.

‘External border’ refers to the perimeter of the Schengen area that aliens may
enter at border crossing points, and to Schengen Area Parties’ land and sea
borders, airports and seaports, provided that they are not internal borders.
‘Internal border’ refers to the common land borders of individual Schengen Area Parties, their airports for internal flights and seaports for regular passenger connections exclusively from or to other ports within the territories of the Schengen Area Parties.

‘Non-aliens’ are nationals of all the countries of the European Union and the European Economic Area: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Lichtenstein, Luxembourg, The Netherlands, Norway, Portugal, Spain, Sweden, United Kingdom Cyprus, Czech Republic, Bulgaria, Estonia, Croatia, Latvia, Lithuania, Malta, Hungary, Poland, Romania, Slovakia, and Slovenia. Aliens are nationals of any other State but Italy.

**Entry of Aliens into Italy**

Admission onto Italian soil through a external Schengen Area border is only permitted to aliens who:

- Seek entry at a border crossing point;
- Are in possession of a valid passport or equivalent recognized travel document permitting them to cross the border;
- Are in possession of documents substantiating the purpose and the conditions of the planned visit and have sufficient means of support, both for the period of the planned visit and to return to their country of origin (or to travel in transit to a Third State);
- Are in possession of a valid entry or transit visa;
- Have not been identified as inadmissible by the Schengen Information System (SIS); and
- Are not considered to be a threat to public order, national security or the international relations of any of the Contracting Parties, under Italian law or the law of another Schengen State.

Aliens already resident in another Schengen State, and in possession of a sojourn permit, are exempt from the obligation to obtain a visa for periods of up to 3 months, on the condition that entry into Italy is not for the purpose of subordinate work, autonomous work or study/internship or study/training. If any one of the aforementioned conditions is not met, the alien may be denied entry by the border authorities even if in possession of a valid entry visa.

**Passports and Equivalent Travel Documents**

To enter, sojourn in or transit throughout the Schengen Area, aliens must be in possession of a passport or other travel document recognized as valid for the purposes of crossing all Schengen States borders. To enter, sojourn in or transit through Italy, aliens must be in possession of a passport or another travel
A foreign national holding a travel document that is not recognized by Italy may be issued a *laissez-passer* by an Italian diplomatic mission or consulate, which will be valid for Italy only, and not permit transit through the rest of the Schengen Area.

**Non-European Union Citizens**

On the basis of the International Labor Organization (ILO) Convention of June 1975, ratified by Italy in 1981, equal treatment and full equality of rights are provided to legally established non-EU citizens and their families. The ILO Convention has been implemented by means of Law Number 943 of thirty December 1986, which establishes new rules and provisions on the employment of non-EU citizens. In 1997, Italy ratified the Schengen Convention, thus introducing two kinds of work visa:

- The Uniform Schengen Visa (*Visto Schengen Uniforme*), which allows to enter Italy for independent or subordinate employment and for a short period of time (up to ninety days), such visa being only valid for those countries which are parties to the Schengen Convention (Belgium, The Netherlands, Luxembourg, Germany, Italy, France, Portugal, and Spain); and
- The National Visa, issued to non-EU citizens who intend to conduct an independent business in Italy or be hired by an Italian company.

The requirements and the procedure for entering Italy for work purposes are the same for both visas.

**Administrative Steps for Subordinate Work**

Non-EU citizens residing abroad are allowed to enter Italy for subordinate work purposes, in the ambit of the annual determination of the number of foreigners (annually set forth by a Decree of the Prime Minister) to be admitted to Italy to

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2 Regulation 810/2009, art 12.
3 The relevant period may be indefinite (but conventionally set at 99 days) or limited to the purposes of the business (up to a maximum of 365 days).
work as employees. The guidelines for their hiring are indicated by the Immigration Act\(^4\) and its implementation rules.\(^5\) The procedure develops as follows:

- The employer, Italian or foreign, files with the “Immigration Sole Teller” (Sportello Unico per l’Immigrazione), which is located at each local Police Office (Questura), a specific nominative request via the Internet.
- The Office will confirm receipt and subsequently ascertain (a) the non-availability of Italian and EU workers with the same professional qualifications as the non-EU worker, (b) that the number of foreigners admitted to Italy to work as employees was not exceeded, and (c) that the Questura has no objections. A temporary immigration permit (six months) is issued in forty days when the employer is summoned and after having verified the employer’s tax return, the employment contract (i.e., that the employment conditions offered by the employer conform to, or, in any case, are not less favorable than, those provided by the applicable collective bargaining agreement), the certificate of registration with the Chamber of Commerce, and the information concerning the Italian place of living of the foreign citizen.
- Within 20 days, the authorization is issued and the employer then files it with the local police Office (Questura), together with a copy of the foreign citizen’s passport.
- The employer sends to the foreign citizen the original copies of the authorization, employment contract, and temporary immigration permit, and the foreign citizen requests from the nearest Italian embassy or consulate the visa for subordinate employment, which is stamped on the passport; the documents are returned within thirty days.
- Within eight days from his entry into Italy, the worker must request from the Immigration Sole Teller the actual permit to stay for work that is limited to the duties for which it has been applied. At the same time, the worker must request the general permit to stay, which is issued in twenty days and is initially valid 9 months for seasonal work, one year for determined-duration agreements, and two years for unlimited-duration agreements. The permit to stay is always renewable if the conditions are maintained and revocable on the contrary. The worker must apply annually for renewal of the permit if he wishes to extend the stay.
- After five years, the worker, giving evidence of his permit to stay, the availability of sufficient income, and adequate housing, may request an EU permit to stay which is unlimited and gives him the possibility to do any kind of work.

\(^4\) Legislative Decree Number 286 of 25 July 1998.
\(^5\) Presidential Decrees Number 394 of 1999 and Number 334 of 2004.
• Once the employee has obtained the permit to stay and work in Italy, he may apply for residence by filing the request at the municipal offices (comune). The entire process may take two to six months.

**Administrative Steps for Self-Employed Work**

*In General*

To enter Italy for work purposes on an "autonomous" basis (including, for example, non-EU individuals holding offices as directors of Italian companies or managers of Italian branches or liaison offices of foreign companies), non-EU citizens must apply directly and personally for a work visa to the Italian consular authorities in their own country, specifying the prospective duties.

The procedure is facilitated by providing the consular offices with certificates and declarations of Italian companies where the peculiar skills and specialization of the worker is indicated, or where the companies certify their intention to collaborate with that worker on an autonomous basis. The process is quite lengthy and must be started at least a few months in advance.

*Foreigners Established in Italy*

Non-EU workers established in Italy have the right to:

• Obtain health and social services;
• Enroll in employment lists specially provided for non-EU workers;
• Enroll in employment lists for Italian workers after twenty-four months from first employment and if the non-EU worker is unemployed or looking for a new position; and
• Be joined by a spouse (together with children regarded as minors under Italian law), but only if the worker has the possibility of ensuring normal living conditions.

Other significant modifications have been introduced by Law Number 189 of 20 July 2002 (the so-called “Bossi-Fini Law”, after the name of the two ministers who proposed it). The major impact of the Bossi-Fini Law is the immediate expulsion of the foreigner if he does not request (within eight days of entry in Italy) the permit to stay.

The expulsion decree is issued by police authorities, but Law Decree Number 241/2004 introduced the further requirement that the expulsion decree must be validated by a Justice of Peace (lowest level judges) within forty-eight hours, granting the illegal immigrant the possibility to defend himself and oppose expulsion. Expulsion is often refused – when challenged in court – on the basis of humanitarian reasons, especially for refugees, women and children. It must be noted that the various immigration procedures are quite lengthy. It takes from six to twelve months to obtain the permit to stay.
Hiring

In General

Private employment agencies had always been prohibited in Italy until the enactment of Law Number 196 of 1997 implementing the EU Directive on temporary staffing services. As a consequence, temporary placement agencies have been allowed to hire and pay employees for working services to be performed in favor of a third-party employer.

Law Number 196 also introduced in Italy the so-called temporary work (Lavoro interinale) and provided more flexibility to the Italian work market. The Law allows the “intermediation of workmanship” that was forbidden by Article 1 of Law Number 1396 of 1960 and was considered a crime. With the enactment of the Biagi Law in 2003, the above general prohibition was canceled and now private recruitment companies may operate on the market after having been registered in a specific list with the Welfare Ministry.

Hiring intermediation is now open to private entities, union organizations, local entities, chambers of commerce, universities (which do not need any authorization), labor consultants, and entrepreneurial organizations. Employers have the possibility to hire directly the employees (including managers or personnel performing managerial tasks) and then simply file a notice to the relevant Employment Office within five days. Enrollment in the hiring register is not compulsory anymore, even though employees looking for a job must register themselves in said register.

The Biagi Law also provided for the enactment of a Labor Exchange made as the Stock Exchange, where the offer and request of workers can meet at national and local level. Its core is formed by a database, which will be accessible online, containing the data of workers available for hiring throughout Italy. Upon hiring, a written contract (or a letter accepted by the employee) has to be entered into. The employee also must sign the authorization for the treatment of his personal data and possibly indicate if he wants his severance compensation invested in particular funds available for the employees.

Disabled Workers

Law Number 68 of 12 March 1999 and its rules of application replaced the old Law Number 482 of 2 April 1968 and deeply modified the scenario concerning the “compulsory hiring of disabled workers”. Law Number 68 introduces new hiring thresholds, namely:

- Employers with 15 to 35 workers must hire at least one disabled worker;
- Employers with 36 to 50 workers must hire at least two disabled workers; and
- Employers who employ more than 50 workers must hire a number of disabled employees equal to at least seven per cent of the workforce.
Law Number 68 establishes general rules and does not abrogate the specific laws governing particular kinds of disabled workers, such as the laws providing the rules for blind switchboard operators, blind masseurs and massage therapists, blind physiotherapists, and blind teachers. These are treated exactly in the same way as other disabled workers.

All employers subject to Law Number 68 are obliged to file an application with the proper provincial office indicating exactly the number of employees, the number and ratio of disabled workers and the number of vacant positions, and the tasks available for disabled workers. Such application is to be considered as a request to hire disabled employees in the event that the required quota is not met.

Such communication is not needed if the situation within the company did not change with regard to the last year. Within sixty days of reaching the number of employees required by Law Number 68 (or, for those already meeting the workforce requirements, within sixty days of hiring the next employee), the employer is, theoretically, obliged to hire the applicable number of disabled workers.

If the employer fails to notify such data, he is sanctioned with a fine of €635.11 and €30.76 for every day of delay. For employers that fail to hire a disabled employee, the sanction is €62.77 multiplied by the number of workdays and vacant positions. The amount of this sanction is adjusted every five years by the Labor and Social Security Ministry. All the fines are assigned to the Fondo per l’occupazione dei disabili (a special fund that subsidizes disabled workers). For the purposes of Law Number 68, the workforce does not include:

- Executives (dirigenti), i.e., those qualified by the performance of management functions;
- Workers with a fixed-time contract, but only if their contract does not exceed nine months;
- Workers belonging to a cooperative of workers to which they are associated;
- Workers who became disabled in the course of their employment, but only if their working capacity is lower than 60 per cent; and
- Workers who became disabled in the course of their employment and their disability derives from the fault of their employer.6

According to Law Number 68, disabled workers are:

- Individuals of working age (over 15 years) who have some physical or sensorial disabilities or deficiencies that reduce by more than 45 per cent their capacity to work;7

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6 In this case, the employer’s responsibility for the employee’s disability must have been ascertained by a final court judgment assessing the employer’s breach of safety and sanitary regulations.
• Persons not fit for work due to previous work accidents who have a diminution of their capacity to work of more than 33 per cent, ascertained by the Italian National Institute for Work Accidents and Insurance and Professional Illness (INAIL) on the basis of the dispositions in force from time to time;
• Blind people;\(^7\)
• Deaf and dumb people;\(^8\) and
• War-disabled persons.

Therefore, disabled persons are allowed to enlist in a special employment list kept by the Provincial Office. Every region, on the basis of the guidelines adopted by the Prime Minister, fixes the criteria to form such list. A nominal request for a specific employee is possible for:

• Every hiring when the number of workers ranges from 15 to 35;
• Fifty per cent of the hiring when the number of workers ranges from 36 to 50; and
• Sixty per cent of the hiring when the number of workers is more than 50.

Disabled employees’ economic and legal treatment must be the same as that of all the other workers according to the law and the applicable collective bargaining agreement. When the employer dismisses a disabled employee, it has to inform the local Labor Office within ten days so that the employee can be replaced.

It is possible for employers to enter into particular conventions with the Provincial Office so as to agree on particular conditions to hire disabled workers. The convention may include programs to facilitate the integration of the disabled workers in the working environment (for example: training with formative purpose, trial periods longer than those provided for by collective bargaining agreements, and so on). The Provincial Office will then work in connection with the local public, health, educational, and formative services in order to take care of the programming, implementation, and verification of the

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7 The degree of disability is evaluated by a medical panel on the basis of a table that contains the various disability percentages, approved by the Ministry of Health according to the international classification of disabilities elaborated by the World Health Organization.
8 Law Number 68 defines blind people as those who are completely blind and those who have residual eyesight of not more than one-tenth on both eyes in spite of sight correction.
9 Law Number 68 refers to those people who are deaf and dumb at birth or who have become dumb after their birth but before learning the spoken language.
interventions made to favor the placement of disabled employees, and the hiring, listing, authorizations, exemptions, and stipulation of conventions.

The employer may ask for a verification of the health conditions of a disabled worker in relation to his position inside the company only in the presence of an apparent aggravation of the disabled worker’s health conditions or a significant change of the work organization. A medical panel will evaluate such health conditions on the filing of an application by the employer. For the same reasons, a disabled worker may ask for the verification of the compatibility of his duties with his health conditions. The development of the relationship is similar to that for employees with no disabilities, including sanctions and termination.

Meaning of Employment

Article 2094 of the Civil Code states that "a subordinate employee is a person who binds himself or herself, for a remuneration, to cooperate in the enterprise by contributing his intellectual or manual work, in the employment and under the management of the entrepreneur". Given that no specific definition of employment exists, case law established a series of indexes in order to ascertain the existence of a subordinate employment relationship. These require that the worker must:

- Be inserted in the organization set by the employer;
- Follow the directions of the employer;
- Work exclusively for a single employer and be subject to his hierarchical and sanction powers;
- Be subject to specific working hours;
- Be paid on the basis of the hours worked; and
- Not bear risk on behalf of the enterprise.

Terms and Conditions of Employment

Form of the Employment Agreement

There is no general provision in the law to the effect that the employment agreement must be in writing. An agreement in writing is, however, required to establish a part-time and a fixed-term work relationship and under all collective bargaining agreements. As a general rule, individual employment contracts may be entered into only for an indefinite period of time. The law makes a presumption in favor of finding that a contract available for a fixed period of time is one made for an indefinite duration.

10 Law Number 104 of 5 February 1992, Article 4.
Legislative Decree Number 368 of 2001 reformed the old law (1962) concerning fixed-term contracts, expanding the possibilities to use such form of employment. Therefore, fixed-term contracts may be entered into for:

- Technical reasons (e.g., qualified personnel for specialized jobs);
- Production and organizational reasons (e.g., unexpected demands of the market); and
- Replacement of personnel on leave of absence.

The situation requiring the fixed-term contract need not to be exceptional, unforeseen, or unexpected as was required previously. Workers on strike cannot be replaced. Prorogation is allowed only once and only for contracts whose duration is less than three years. If the relationship continues for more than thirty days (twenty if the duration was less than six months), the contract becomes of indefinite duration. Successive fixed-term contracts are allowed on the condition that at least ten days pass between one and that following. No specific reasons are required to make fixed-term contracts with the following categories of workers:

- Executives (not more than five years);
- Disabled persons;
- Workers dismissed and granted with mobilità treatment for the unemployed (no more than twelve months);
- Workers in the field of tourism and public services (not more than three days); and
- Workers in the field of air transport and related airport services.

The main distinction between contracts for definite and indefinite terms is that, upon expiration of the contract for a definite term, the employer need not give notice of dismissal to the employee. Severance compensation (see below, below) must be paid at the end of the service of an employee hired for a fixed term.

Italian case law has developed a strong orientation in recognizing the existence of a subordinate employment relationship in the event that the above-cited indices exist, no matter whether the relationship is defined as autonomous by the parties. A person will always have the possibility to ask the courts to recognize his employment relationship.

Content of the Employment Agreement

In General

Collective bargaining agreements usually specify the terms and conditions that must be notified in writing to the employee on hiring. The following must be indicated in the employment letter (lettera di assunzione):
• Job title;
• Duties;
• Place of work;
• Economic treatment;
• Duration of the probationary period, if any;
• Parties’ identities;
• Modalities of payment of the salary;
• Duration of the agreement;
• Date of beginning of the employment relationship; and
• Holidays.

The duration of holidays (as well as the probationary period, salary, working time, and notice period) can be replaced by simple referral to applicable laws and collective bargaining agreements. Individual contracts also must contain stipulations not less favorable to the employee than those contained in collective bargaining agreements and shop-level agreements. Courts will modify an individual employment contract if its terms are less favorable.

Each new hiring must be communicated online to the local Employment Center within midnight of the day before the one in which the new employment relationship will actually start. Failing to do so the employer will be subject to a sanction ranging from €100 to €500 per employee. In case the authorities find that employees are working without formalization whatsoever of the relationship (the so-called ‘work in black’) the sanction will be much heavier, i.e., €1,500 to €12,000 per employee and €150 for each day of actual work per employee. This last sanction absorbs the ordinary smaller one.

Categories of Employees

There are four categories of employees, as follows:

• Dirigenti, qualified by the performance of management functions;
• Quadri, an intermediate category between dirigenti and impiegati, introduced by Law Number 190 of 13 May 1985;
• Impiegati, qualified by the performance of technical-administrative functions; and
• Operai, i.e., blue collar workers.\textsuperscript{12}

\textsuperscript{12} Civil Code, Article 2095.
Collective bargaining agreements provide for different classes of *impiegati* and *operai*. Other categories are provided for by specific collective bargaining agreements, such as *funzionari* and *intermedi*.

Such categories are divided into seven classes ("levels"), each of which is identified by a specific job description with different duties and salary or wage levels. In the industrial sector, the most skilled employees belong to the highest class ("seventh level") and the least skilled to the lowest ("first level"). Commercial sector employees also are classified in seven levels, starting from the seventh level (the lowest) up to the first level, which is immediately below the *quadro* position.

The inclusion in one or another class bears on various aspects of the employment relationship, particularly on the salary level, the length of the vacations and of the notice of termination of the employment contract.

Although the Civil Code provides that a worker must be classified in the job category for which he was hired, the employer may make changes in the employee’s duties where dictated by business needs and in the absence of any restrictive provisions in the applicable collective bargaining agreements. The Civil Code, as amended by the Worker’s Charter, however, prohibits an employer from assigning an employee to duties which lessen his status within the company or which decrease his wages or salary.

The Court of Cassation has held that an employee assigned to inferior duties may refuse the new assignment and terminate his employment contract for just cause. If the new duties qualify under a higher level, the corresponding higher salary becomes payable, but only if the employee was not replacing another absent employee (e.g., due to illness or maternity leave).

**Probationary Period**

Permanent employment can be made subject to a probationary period (*periodo di prova*), provided this is stipulated in writing at the time of hiring. During this period, either party is free to terminate the agreement.

Thus, an employer may dismiss an employee without notice, but severance compensation must be paid. If an employee is then hired permanently, the probationary period must be taken into account when determining the employee’s length of service for seniority purposes.

The length of the probationary period is usually fixed by the applicable collective bargaining agreements. For employees in the industrial and commercial sectors, the probationary period cannot exceed the limits shown in the following schedule:
• Industrial sector — (a) Blue collar workers, 20 working days, (b) Levels II and III, five days, Levels IV and V, three months, and Levels VI and VII, six months; and

• Commercial Sector — (a) Quadri and Level VII, six months, (b) Levels VI and V, 60 working days, (c) Levels IV and V, 45 working days, (d) Levels VI and VII, 30 working days.

For managers in any sector, the probationary period cannot exceed six months. A probationary period may be applied to part-time and fixed-term work relationships as well.

Moving Working Location

Employers can move employees from one working location to another either temporarily or permanently, if business requirements so dictate. Employees who refuse to move may be terminated for cause, unless they can prove objective impediments.

On the other hand, the employee has no right to demand a move even where he can demonstrate great personal need and no hardship or conflict to the employer. However, older employees (over fifty years of age for men and over forty-five for women) can only be moved in extraordinary circumstances.

Working Conditions

Working Hours

Legislative Decree Number 66 of 8 April 2003 (as modified by Legislative Decree Number 213 of 19 July 2004, that also introduced a new mechanism for the employees to take their yearly holidays; see text, below) enacted EU Directives 93/104 and 2000/34 concerning the "organization of working hours".

The Decree provides that a normal working week is forty hours. Different hours can be set forth by collective bargaining agreements; however, the average working week cannot exceed, in any case, forty-eight hours a week, including overtime, to be calculated with reference to a maximum period of four months (extendible to twelve months in certain cases).

According to most collective bargaining agreements, however, the duration of the working week may not exceed forty hours, generally divided into five working days, Monday to Friday, of eight working hours each. In certain cases, an employer can require his employees to work more than eight hours a day, provided that the limit of forty hours per week is not exceeded.

Any extensions to the ordinary working hours must be notified to the Labor Office within thirty days of the expiration of the cited four-month period, but such obligation applies only to production units employing more than ten employees.
Previous authorization is required in case of modifications agreed upon with Union representatives, while extensions of the working hours due to force majeure or exceptional production requirements must be notified within the mentioned term.

As a general rule, each worker has the right to rest for eleven straight hours every twenty-four hours. Workers cannot work for more than six straight hours, after which they are entitled to a pause to recuperate physical/psychic energies, and are entitled to a twenty-four-hour day of rest every seven days of consecutive work. The day of rest should generally coincide with Sunday, but particular cases may allow derogating such principle (for example, for continuous industrial operations requiring seven-days-a-week operations).

Night work must be previously agreed upon with the unions, during a negotiation that cannot last more than seven days. Workers for the night shifts must be physically fit for such work. Their health conditions must be ascertained by the employer through Social Health Institutions.

Female employees cannot be required to perform night work (i.e., from midnight to 5 a.m.). Various sanctions (also of a criminal nature) are provided by Legislative Decree Number 213 of 19 July 2004 for the violation of the rules concerning working time.

**Special Rules**

There are employees to whom the maximum working hours specified above do not apply. Among these are dirigenti and the highest level of impiegati and employees performing functions having a non-continuous nature or mere caretaking/custodial duties and workers in the transportation sector. The ordinary working time may be exceeded due to:

- Exceptional technical or production needs that cannot be faced by hiring new employees;
- Force majeure or in the event that suspending work would result in harm or damage to persons/production; and
- Particular events such as shows, fairs, and other events linked to the production activity (such as presentation of prototypes or new models) which must be previously notified to the Labor Office and company internal union representatives.

Such extraordinary work (different from overtime) must be paid with a higher salary, specifically provided for by collective bargaining agreements.
Fixing of Working Hours

Working hours as fixed by the employer must be shown in a prominent location within the premises, so that access can be assured to all employees (usually they are shown in an appropriate showcase).

The employer must indicate daily in the payroll for each employee the ordinary working hours, the hours worked in excess, overtime, if any, and the relative compensation.

Any modifications to the ordinary working hours must be either previously authorized by the Labor Office or notified to same, usually within twenty-four hours. By way of example, previous authorization is required in case of modifications agreed with union representatives, while extensions of the working hours due to *force majeure* or exceptional production requirements must be notified within the term.

Overtime

Overtime qualifies as additional time that the employer requires its employees to work other than in the cases mentioned above. Overtime can be required only on an exceptional basis. Under statute, overtime must be:

- Agreed upon by the parties. Collective bargaining agreements usually provide that it must be the subject of prior stipulation with the unions and, in some cases, notified to the Labor Office;
- Limited to two daily hours and 12 weekly hours (or an equivalent average duration) over a period not exceeding nine weeks;13 and
- Paid separately and in an amount increased by not less than 10 per cent of the basic pay.

Collective bargaining agreements provide for higher increases (see text, below).

Part-Time Work

Law Number 61 of 2000, as modified by the Biagi Law, gives a general discipline to part-time work. There are three different types of part-time work, namely:

- Horizontal, i.e., less than eight hours every day of the week;
- Vertical, i.e., eight hours for less than five days a week; and
- Mixed, i.e., a combination of the two above.

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13 Collective bargaining agreements also usually fix the maximum overtime an employer can require (e.g., in the commercial sector, 200 hours per year; in the industrial sector, 150, 200, or 210 hours per year, depending on the work performed, but in any case not in excess of eight hours per week or two hours daily);
Workers may enroll in a special employment list of persons searching for part-time jobs; such list, however, is not incompatible with the ordinary employment list. Part-time employment agreements, following the general rule, must be in writing and must report the exact duties of the part-time employees and their working hours. Collective bargaining agreements are crucial in determining the various conditions applicable to part-time working relationships in the various sectors. They can determine:

- The maximum percentage of part-time employees compared to the number of full-time employees;
- The duties of part-time employees; and
- The working hours.

Collective bargaining agreements also may provide for “flexible clauses” to be inserted into the agreement with the employee, according to which it will be possible to vary the period in which the working activity is to be performed, and for “elastic clauses” that allow the employer to extend or reduce the daily working hours. Part-time employees have a right of priority in the event the employer intends to hire full-time workers.

Normally, the possibility of overtime is excluded, but a specific authorization for overtime can be requested of the unions in the event of "specific organizational requirements" or can be provided by the affected collective bargaining agreements. Overtime can be requested only for employees working in the so-called “horizontal” part-time status (a limited number of hours every day of the week) and not those working the so-called “vertical” part-time status (full working days but less than the usual five-day week).

Collective bargaining agreements also set the minimum economic treatment for part-time employees, which indicatively corresponds to one-sixth of the daily salary of a full-time employee per hour. The hourly cost of each part-time employee is therefore substantially higher than that of a full-time employee.

**Salary**

Salary payable to employees is actually made up of several items, as specified by the applicable collective bargaining agreements. In general and under constant interpretation of the courts, it can be said that all sums paid to the employee on a regular basis are considered part of the salary. The main items included in the salary are:

- The base salary;
- The indemnity for cost-of-living increases (suspended in 1992 by means of an agreement between employers’ organizations and the unions in order to diminish the costs of the work force for the companies). Currently, it is included in the base salary; and
• The periodic increases linked to seniority.

If paid on a regular basis, other items of compensation, such as production bonuses, various indemnities, or allowances (e.g., for hazardous or uncomfortable working location, meal vouchers, and compensation for worked holidays), qualify as part of the salary.

These additional items may or may not be provided for by the collective bargaining agreements. Expense reimbursements, on the other hand, are not considered part of the salary. The distinction between items included and not included in the salary is important for the purposes of determining:

• The items that must be accounted for in calculating the amount due as severance compensation; and
• The taxable basis for social security charges and withholding taxes.

No principle of “equal pay” is applicable in the Italian labor system; therefore, employees with the same age, seniority, and skills, working in identical places with the same duties, need not necessarily be paid the same salary (if the minimum threshold is respected).

Minimum Salary

Minimum salary is the same as the base salary mentioned above. It is fixed by the applicable collective bargaining agreements and varies in accordance with the level and age of the employee.

In practice, market salaries usually exceed the base salaries and, in such a case, the contract indicates a “super-minimum”. The contract should indicate whether or not the super-minimum absorbs the automatic increases in the salary that are granted from time to time.

Thirteenth (Christmas Bonus) and Fourteenth-Month Bonus

Collective bargaining agreements of industries usually provide for the payment to employees of an extra compensation at Christmas time. In the commercial sector, another bonus is paid on 1 July each year.

Their amount is equal to the monthly salary. When the employment is terminated at any time during the year, the employee is entitled to receive a pro rata share of such thirteenth and fourteenth-month bonus.

Equal Opportunity

Laws Number 498/2006 and Number 59/2008 provide that a female employee is entitled to the same treatment and opportunities (including compensation) as a male employee, provided that duties performed are identical or of equal value.
Payment of Salary

It is common practice on the employer’s side to pay salaries by means of bank checks, cashier checks, or bank transfers; this practice has been upheld by the Supreme Court.

Overtime Compensation

Article 2108 of the Civil Code provides that overtime and night work must be compensated by an increase of salary. Collective bargaining agreements usually regulate different kinds of overtime, as follows:

• Overtime work performed within the limit of forty-eight hours per week;
• Overtime work performed between eight and ten hours daily or 48 and 60 weekly hours for non-continuous work; and
• Holiday and night overtime work performed beyond the limits as described above.

The percentages by which the regular hourly salary must be increased in case of ordinary overtime, and holiday and night work differ depending on the applicable collective bargaining agreements. By way of example, in the commercial sector, the percentages are as follows:

• Ordinary overtime — Fifteen per cent from the 41-hour up to the 48-hour per week and 20 per cent over the 48-hour per week;
• Holiday work — Thirty per cent; and
• Night work — Fifty per cent.

Holidays

Weekly Day Off

All employees must have one paid day off a week, which is usually Sunday. However, the weekly day off must mandatorily be taken after six working days. In practice, almost all employers spread weekly working hours over five days (Monday to Friday).

Official Holidays

Official holidays are 1 January, 6 January, 25 April (Liberation Day), Easter Monday, 1 May (Workers’ Day), 2 June (Republic Day), 15 August, 1 November, 8 December, Christmas Day, and Boxing Day (26 December). In addition, the local Saint’s day is considered a holiday by collective bargaining agreements.

Employees who work on holidays falling on a week day are entitled to compensation, in addition to the regular salary, for the worked hours at the rate
applicable to holiday work. Workers between 16 and 18 years old are forbidden to work on holidays. If a Sunday is worked, the employee is entitled to a compensatory day off in the week.

**Paid Vacations**

The length of paid vacations for employees is fixed by the applicable collective bargaining agreements on a yearly basis, and varies depending on level and seniority. An employee cannot waive his right to paid vacations. No minimum seniority is required to be entitled to paid vacations.

If the employee has worked less than twelve months, the length of paid vacations to which he is entitled is pro-rated to the months actually worked. Paid vacations to which the employee is entitled are calculated on the basis of the time actually worked (a fraction of a month in excess of 15 days is considered a full month), and the following also is accounted for:

- Absence due to illness;
- Absence due to maternity;
- Leave for marriage;
- Paid days off; and
- Probationary period.

Legislative Decree Number 66 of 2003 introduced specific rules governing the way holidays have to be “consumed” by employees. In the past, it was rather customary, for certain employees, to accumulate days of holidays, not taking them for years and getting the correspondent indemnity upon termination of the employment relationship. This practice (commonly accepted even though the previous principle was that all holidays had to be taken in the same year) was negative because, on one side, even if the employer could be happy that an employee did not go to holidays and stayed in the company working, the cost of the indemnity in lieu of holidays was quite higher than a normal working day and, eventually, the cost could be very significant.

In addition, the lack of holidays could be used by the employee to sue the employer for damages (even though the existence of actual damages has to be proven in court by the employee).

On the other side, the basic purpose of holidays, i.e., allowing the employee to rest for a longer period of time, recharging the batteries, staying with his family, and avoiding the tensions of the workplace, would have been by-passed (leaving room for the related negative consequences), allowing the employee to avoid holidays or preventing him from enjoying them. Case law has stated that holidays cannot be waived by the employee.

Legislative Decree Number 66 of 2003 states that a minimum period of holidays of two weeks (not necessarily consecutive) must be taken in the year (1 January – 31 December) where such holidays mature. The following year — in addition
to the compulsory two weeks of that year — the employee also can take the remaining two weeks of the first year. These latter must be taken, in any case, by 30 June of the next (third) year.

As it is possible to derive from the above, the maximum period for each worker to obtain holidays is thirty months. Therefore, the indemnity in lieu of holidays survives only for those holidays that have not been taken in the cited time span at the moment in which the employment relationship comes to an end. The employer that does not oblige his employees to respect such rules is sanctioned with a fine ranging from €100 to €600 for each violation in most cases. It increases from €400 to €1,500 if the violation refers to more than five workers or for a period of at least two years. It increases €800 to €4,500 if the violation refers to more than 10 workers or for a period of at least four years.

Company Rules and Disciplinary Sanctions

In General

Rules established by the employer with regard to work organization in the enterprise are not subject to any public authority’s prior approval. However, the employer’s discretion in establishing "company rules" is not unfettered, since work organization must be consistent with the preservation of health and safety of working conditions and employees’ individual and collective rights.

Work Organization

The employer has a discretionary power as regards matters such as modifying employees’ working hours and duties (as long as the new duties are not of a lesser importance than the old ones) and fixing the timing of paid vacations. If the employee disagrees with these changes and regulations, and refuses to comply with them, he may be made the subject of disciplinary sanctions and even dismissal.

However, since employees’ personal and collective rights cannot be disregarded by the employer, if the employer disciplines an employee for refusing such a change, he may be sued by the employee before the Labor Court. Violation of an employee’s rights include moving the employee to a different location without serious reasons or for retaliation purposes, downgrading employees’ duties or salary, requiring employees to work beyond the maximum working hours as established by law, and taking actions affecting employees’ personal, political or union rights.

Disciplinary Sanctions

Employers are forbidden to apply disciplinary sanctions other than those expressly provided by the law. These sanctions include oral warning (which typically is applied by means of a letter for the record), written warning, a fine,
which cannot exceed four hours’ pay, suspension of the employee for a period not exceeding ten days, dismissal with notice, and dismissal without notice. The gravity of sanctions applied must be consistent with the actual seriousness of the employee’s misconduct. The following are the main procedural rules applying to disciplinary sanctions:

- All sanctions must be affixed to the premises in such a way as to allow employees’ access to same, under penalty of the disciplinary sanction being null and void;
- The employer must start timely disciplinary proceedings by informing the employee in writing of the misconduct he is alleged to have committed;
- The employee has the right to file a defense either in oral or written form within the term provided by applicable collective bargaining agreements and, in any event, within not less than five days;
- Sanctions can be applied only after the time for challenging sanctions has expired or if the employee’s explanation is not accepted;
- Disciplinary proceedings must be commenced within a reasonable time from the moment when the employer becomes aware of the employee’s misconduct;
- Most collective bargaining agreements provide that repeated application of minor sanctions justifies dismissal. Therefore, even minor disciplinary sanctions, having little immediate effect, are usually objected to by the employee;
- The so-called "conservative" sanctions (i.e., all those mentioned above, excluding dismissal) cannot be imposed before ten days have elapsed from receipt of the employee’s justification or expiry of the term the employee was given to file a defense;
- The application of disciplinary sanctions can be challenged either before the Labor Court or before a special Labor Arbitration Panel; and
- The Labor Court or Arbitration Panel can (a) confirm the sanction, (b) reduce it (if it is not consistent with the seriousness of the employee’s misconduct), or (c) cancel the sanction (if the prescribed procedure has not been followed, or the misconduct with which the employee has been accused is not proved by the employer).

A conservative disciplinary sanction cannot be taken into account (for all purposes) after two years from application.

Sick Pay

Employees who have successfully completed their probationary period are entitled, in case of illness or accident, to maintain their job position for a certain period of time as indicated in the applicable collective bargaining agreement (periodo di comporto). Usually, such period of time is equal to 180 days within one calendar year.
In the period of absence, the employee is entitled to receive a daily indemnity equal to a percentage of his average daily pay. For the first three days, the indemnity is fully paid by the employer while for the following days it is paid by the social security institution (INPS) in a percentage of the so-called ‘average daily salary’ and precisely: from the fourth to the twentieth day of sickness INPS pays 50 per cent of the average daily salary, while form the twentieth to the one hundred and eightieth INPS pays 66.66 per cent of the average daily salary.

Maternity Leave and Pay

Law Number 151 of 2001 revised the scenario concerning maternity leave, although not changing its basic structure. During absence for maternity (or paternity), the employee can be replaced by another using a fixed-term contract. Initial term may start from one month before the date the absence starts. Pregnant employees cannot be made redundant until the moment in which the child becomes one-year old. Exceptions to such principle are termination for cause, winding up of the company, expiration of the term for which the employee was hired, and negative outcome of the trial period.

Violation of the above provisions is punished with various sanctions, from administrative fines to imprisonment. In the event that it is the mother wishing to resign, her resignation is valid only if confirmed before the Labor Office. All of the above principles apply to the father if he is on paternity leave.

Maternity leave is mandatory during the two months preceding expected delivery date and the three months following delivery or during the last month preceding expected delivery date and the four months following delivery (in this case, a doctor must certify that there are no risks for mother and fetus). Such period can be extended, by medical certification, in case of medical complications affecting the pregnancy, prejudicial working conditions, or fatiguing working activity. This last condition also gives the mother the possibility to abstain from work up to seven months after delivery.

The father has the right to abstain from work to take care of the newborn only in the first three months after delivery and in the case of death or serious disability of the newborn’s mother or if the newborn is exclusively entrusted to him.

The right to abstain from work may be exercised by both parents at the same time for a determined period during the first eight years of their natural son or twelve years for an adopted son. The duration of such an abstention is set at ten or eleven months, to be subdivided between parents as follows:

- For the mother, six months (continuous or fractionated); and
- For the father, six months (continuous or fractionated) or seven months where he has abstained from work in the first three months of the newborn’s life.
However, if there is a single parent, the parent may abstain from work for ten months (continuous or non-continuous). Mandatory leave is taken into account for all purposes regarding seniority. Discretionary leave is not taken into account for the purpose of calculating entitlement to vacations, thirteenth and fourteenth-month salaries, and severance compensation.

During mandatory leave, the employee receives 80 per cent of the average daily salary directly from the employer who, in turn, charges INPS. During discretionary leave, the employee is entitled to thirty per cent of her salary. If the father is entitled to discretionary leave in the mother’s place, he will receive the relative indemnity.

In case of certified illness of the child, the parents are entitled to be absent from work with no time limit until the child is three-years old and, when the child is three to five, a maximum of five working days per year per parent. In these cases, parents are not paid.

Confidentiality and Restraints against Competition

In General

As a matter of principle, any personal experiences gained by an employee through an employment relationship can be freely used in later jobs. However, agreements aiming to restrict the use of acquired experience are normally valid, provided that they do not completely forbid the employee from using his qualities and experience in subsequent employment. Certain legal requirements for such agreements also must be met.

Confidentiality

During employment, the employee may not disclose information concerning the organization and production methods of his employer. After termination of employment, the employee can use his experience, but he must keep confidential any trade and scientific secrets that he has acquired during his employment.

This duty of confidentiality only applies to information that can be identified as secret, and not to knowledge that the employee might have learned from a different source. In other words, experience can be used, while secret information cannot. The unlawful disclosure of professional secrets or disclosure of scientific or industrial secrets are criminal offences punishable either by a fine or by imprisonment of up to two years. Since such acts are criminal offences, agreements aiming to ensure the maintenance of confidentiality are obviously valid.
Non-Competition

Non-competition agreements\textsuperscript{14} are enforceable, but they must be limited in their duration. They cannot exceed three years from termination of employment for all employees with the exception of executives, for whom the limit is five years. Their validity is subject to compliance with the following conditions:

\begin{itemize}
  \item The agreement must be in writing;
  \item An adequate compensation must be agreed; and
  \item The object, duration, and geographic scope of the restriction must be specifically determined.
\end{itemize}

The aim of this provision is to allow the parties to agree freely upon the restriction, but to avoid the possibility of an employee being prevented from using his professional capacities by an unreasonably restrictive clause. Several court decisions have stated that non-competition agreements are void if they do not leave the employee with the possibility to apply for another job and/or if the compensation for the restriction is not comparable with the suffered loss of earnings arising from it.

Solicitation of Customers, Employees, and Suppliers

Solicitation of customers, employers, and suppliers also can be restricted. However, the agreement must comply with the same formalities as non-competition clauses. If the ex-employee is guilty of solicitation of clients, customers, or suppliers of his ex-employer, as a competitor, he can encounter the sanctions for unfair competition.

"Gardening Leave"

“Gardening Leave” occurs where an employer requests an employee not to attend work, but continues to pay him. An employer can always waive an employee’s obligation of the work performance during the notice period, but he is still under a duty to continue to pay the employee. In this case, the employee is free to begin another job immediately.

Transfer of Business

The automatic transfer principle enshrined in the EEC Business Transfer Directive 77/187 was already provided by the Civil Code in Article 2112. The Article applies where there has been a transfer of an entire business organization of an enterprise, or the transfer of an independent division of such an enterprise or a lease of a going concern and, in general to all transactions (including mergers and acquisitions) that \textit{de facto} constitute a transfer of a going concern.

\textsuperscript{14} Civil Code, Article 2125.
Only the sale of pure assets or a change in a company's corporate structure (e.g., from partnership to a limited company) do not constitute a transfer of a going concern subject to the automatic transfer principle and the related provisions of law.

In 2003, Article 2112 was modified so as to refer to “any operation that, pursuant to a contractual assignment or merger, implies a change in the ownership of an organized economical activity [...] pre-existing to the transfer and maintaining after the transfer its own identity, disregarding the kind of contract used to perform the transfer”. The rule, therefore, applies to mergers and acquisitions even though technically they do not constitute a transfer of a going concern, but simply a continuation of it.

Article 2112 of the Civil Code provides that employment contracts with the transferor automatically continue with the transferee. Employees transferred maintain their seniority rights together with their existing terms and conditions of employment. If the parties apply a different agreement, a separate treatment can be maintained until the end of the validity of one of the agreements, but the more favorable will prevail.

If the transferee is not already bound by an existing collective bargaining agreement, he will be bound by the provisions of the transferor’s collective bargaining agreement. The transferee is jointly liable with the transferor for all employees’ claims existing at the time of transfer and related to the employment relationship. However, it should be noted that the liability of the transferee can be waived with the consent of the relevant trade union, either directly or by way of settlement signed before the Labor Office. Article 2112 does not apply to enterprises subject to bankruptcy, controlled administration, or similar proceedings if the business has ceased activity. Employees whose contracts do not continue with the transferee will have priority to any new jobs created by the transferee in the following year.

In order to implement Directive 77/187, Article 47 of Law Number 428 of 29 December 1990 introduced a consultation procedure for employers and unions. When a transfer of business involving more than 15 employees is planned or when more than 15 employees are employed by the seller of the business, the seller and the purchaser must give a joint notice in writing to their respective internal and/or external union representatives, 25 days in advance with respect to the envisaged closing date.

Upon written request of the unions (to be transmitted to the parties within seven days of receipt of the above notice), the seller and the purchaser must start, within the following seven days, a joint consultation with the unions. These negotiations will be deemed to be completed if an agreement is not reached within ten days from their start. The parties’ infringement of the above consultation requirement may be regarded as being "anti-union conduct" for the purposes of Article 28 of the Workers’ Charter, aimed at preventing the employer from taking initiatives against the unions. Pursuant to Article 28, the
unions may seek a court order addressed to the employer to “remove the effects” of such conduct. According to the most recent case law, the “removal of the effects” also can entail the nullity of the transfer of business. Failure to comply with such order is prosecutable under criminal law and punishable with a fine or imprisonment of up to three months.

Article 2112 of the Civil Code was modified in 2003 by the Biagi Law so as to provide a joint responsibility between transferor and transferee of a going concern for the payment of salaries and social security contributions when the transferor and transferee enter into an agreement pursuant to which the transferee uses the transferred going concern to perform services in favor of the transferor.

### Discrimination

#### Equal Treatment

Italian laws dealing with "equal treatment", i.e., Law Number 215/2003 and Law Number 216/2003, prohibit all types of discrimination based on a person’s sex or marital status or pregnancy in respect of appointments, transfers, promotion, dismissal, or other less favorable treatment. The laws apply to all types of business and at all levels within an organization. They also apply to issues such as compulsory retirement ages, no night work for women, and the right of both men and women to have time off work when their children under three years of age are sick, and equal family allowances are paid to husbands or wives. Italian laws also cover the following:

- Refusing to offer employment;
- Refusing to employ a woman on the grounds that the job involved heavy lifting, where there was no collective agreement permitting such discrimination;
- Subjecting women to a pregnancy test before employing them;
- Dismissing a woman on grounds of her pregnancy;
- Ignoring the period when an employee was on maternity leave when calculating that employee’s period of continuous employment for the purpose of ascertaining seniority for promotion purposes;
- Granting different qualifications for men and women doing substantially the same work; and
- Refusing to allow a father to have time off work to look after a sick child (where the mother was also working).

Italian law also prohibits sex discrimination on an indirect basis, e.g., by the choice of selection criteria or discriminatory arrangements for deciding who should be offered a job, for example that applicants must be over a specified
height. However, an employer can resist an indirect discrimination claim if it can be shown that the criteria or arrangements are justified by non-gender reasons.

There also are certain exceptions provided in the legislation. The most important is where women can be refused a job on the ground that the duties are heavy, but this exception is only applicable where it is provided for in a collective bargaining agreement. Other exemptions include offers of employment in the fields of fashion model or the arts or entertainment where being a member of one sex is essential to the type of work that the job entails.

When the non-discrimination rules have been violated, the employee or the trade union are entitled to request the local courts to order the employer to cease the discrimination and remove its effects. The court order is automatically provided with a levy for enforcement that cannot be revoked until the court has issued its final decision on the matter. If the employer persists with the discriminatory behavior in breach of the court’s order, there is the possibility of criminal sanctions (fines or even imprisonment). There is no maximum to the compensation that the court can award to the employee who has suffered from sex discrimination.

However, he must prove losses and other damages suffered in accordance with normal principles of evidence applicable under Italian law. Italian courts have drawn a distinction between the selection procedures and discrimination at the time of hiring. In the former case, the courts have normally ordered the employer to refrain from discriminating so that all applicants have the same chance of being selected for the job in question. In the latter case, the courts have tended to order the employer to employ the person subjected to discrimination.

Non-Discrimination

Italian law provides that "women are entitled to the same compensation as men if they perform the same job of equal value". This principle of equal pay between male and female employees also is enforceable through Article 119 of the Treaty of Rome, which is directly binding in Italy; the Equal Pay Directive, which Italian courts have held is directly applicable in Italy; and ILO Convention Number 100, which is enforced in Italy.

The concept of "equal value" is not expressly defined, but most courts and legal commentators take the view that it relates to professional and job skills, and not to their economic profitability. Where employers seek to classify or evaluate jobs, they must not choose criteria for doing so which are unique to men or women. Even where such criteria are not chosen, employers must not apply criteria in such a way that they indirectly discriminate against women.

The vast majority of employees in Italy have their terms and conditions governed by collective bargaining agreements negotiated by trade unions. When the Italian courts come to consider the merits of job classification criteria
contained in a collective bargaining agreement, they are confronted with principles that usually have been negotiated with trade unions that should (in theory) ensure that the criteria adopted do not discriminate against women. However, most legal commentators in Italy take the view that there is no limitation on the court’s power to investigate whether collective agreements directly or indirectly violate the "equal pay" principle. Thus, in practice, collective agreements tend to assess whether jobs are of equal value, although the courts have the power to intervene to make the assessment, if they wish to do so.

If an employee’s contract or a collective agreement has infringed the "equal pay" principle, the offending part is treated as null and void. In addition, the employee may be entitled to be paid compensation in respect of the pay differential in question for a period back to the date when the discrimination first occurred. There is no maximum on back pay. In addition, the court can award further compensation in respect of damage suffered by the employee, if such damage can be proved. Should the employer disrespect the court order, criminal sanctions may be applied.

**Equal Opportunities for Men and Women**

Sex discrimination on the workplace is forbidden as far as access to a job, salary, and professional qualifications are concerned. Legislative Decree Number 198 of 2006 introduced specific descriptions of what is considered discrimination:

- Acts causing a prejudicial effect on workers because of their gender (direct discrimination);
- Acts which may cause a disadvantage towards workers with respect to workers of the opposite gender (indirect discrimination);
- Less favorable treatments due to pregnancy, maternity or paternity; and
- Sexual harassment such as undesired behavior related to sex with the purpose or effect to violate the dignity of a worker.

All such acts are considered null and void on the basis of Article 15 of the Workers’ Charter of 1970 that prohibits all discriminatory acts. The affected employees may seek recourse to the labor court or use specific conciliation procedures set forth by collective bargaining agreements. Violations concerning Discriminations in the ambit of access to a job, professional formation, equal salary, qualifications, duties, career and pensioning will be sanctioned with a fine ranging from €250 to €1,500.

Legislative Decree Number 198 also introduced a rule stating that if a female worker is fired within a year from the date she marries, such termination is considered null and void unless based on a serious breach by the worker,
winding up of the company, termination due to the expiration of the fixed term employment relationship. Resignations in the cited period are null and void unless confirmed by the worker before the Provincial Labor Office.

All employers employing more than one hundred employees must report to the unions – at least every two years – the working situation within the company with regard to equal opportunities issues. Failing to do so implies a fine ranging from €103 to €516.

Legislative Decree Number 198 also created a National Committee for the Realization of Equal Opportunity Principles, whose activity is to realize all initiatives aimed at the removal of all discriminatory acts and all other obstacles limiting de facto the equality of women on the workplace.

Collective Bargaining and Workers’ Participation

Collective Bargaining

Unions "represent" employees, engage in collective bargaining at the national, regional, and local levels, and have gained de facto recognition of their role in Italian labor relations by explicit reference to their activities in the Workers’ Charter.

The courts still refuse to recognize the unions as bona fide parties to legal actions brought by unions on behalf of the employees that the unions purport to represent and, therefore, individual employees have to come forward to sue on their own behalf to protect their rights. The courts, in adjudicating the rights of individual employees, have extended the reach of their decisions broadly to bind all company employees similarly situated. In adjudicating rights based on the collective bargaining contracts negotiated by the unions with the employer on behalf of employees, the courts have looked to the bargaining contract as a guide to decision-making, regardless of the stipulations contained in the individual labor agreement.

This approach is particularly followed in salary cases, where the employee challenges the rate of pay received for the services rendered. In these cases, salary provisions contained in the collective bargaining agreement are used as parameters to establish what a fair remuneration is. In addition, once the issue has been adjudicated for one employee, all other similarly situated employees will likewise benefit from the decision.

In such scenario, collective agreements entered into after 3 October 1959 are legally binding only upon employers and employees who belong to the employer and employees’ organizations signatories to the agreements and those which have chosen to adopt them, although the courts always make reference to the terms of non-binding collective agreements in order to establish minimum constitutional standards for the protection of workers’ interests.
After 2010, employers have been trying to challenge the old ‘industrial’ approach of negotiating national collective bargaining agreements to be valid for the generality of companies in a determined sector. According to the employers’ associations, the inequalities affecting Italy (especially when comparing the North and South regions) render local agreements more effective in detailing the employees’ rights to be protected and needs to be served, it being undeniable that employment conditions dramatically differ from region to region and that Italian labor legislation is already protective of employees. The approach is strongly opposed by the unions on the reasoning that it affects the principle of equality of workers and because it undermines the power of the unions.

However, an employer and his employees, when entering into individual agreements, may agree on conditions more favorable to the employees than those stipulated in the relevant provisions of the applicable collective agreements, but the employer may not curtail the minimum rights of the employees set forth in the collective agreements.

Articles 19 et seq. of the Workers’ Charter introduced the Rappresentanze Sindacali Aziendali (company union representatives) and regulated various forms of industrial democracy, such as workers’ meetings and referenda, union information, union contributions, and availability of premises for union activity. The Rappresentanze Sindacali Aziendali are meant to represent employees in their relationships with employers in enterprises having fifteen or more employees. The Rappresentanze Sindacali Aziendali are the workplace representatives of unions in the productive units, with the purpose of organizing the union’s force and preventing unfounded claims spread among the employees.

The Rappresentanze Sindacali Aziendali may be set up by employees affiliated with those unions with the largest representation or those signatory of collective bargaining agreements applied in the productive unit. Members of the Rappresentanze Sindacali Aziendali cannot be moved to another plant unless the union agrees and can have paid time-off not less than eight hours per month, plus an unpaid extra eight days a year, for participation in drafting collective bargaining agreements or union conventions. The above must be granted to at least one member of each of the Rappresentanze Sindacali Aziendali set up in enterprises employing 200 employees or more.

**Workers’ Participation in Management**

Workers’ participation in management has been a rare situation in Italian companies. Such participation was — and still is — seen as potentially dangerous by employers, mainly because the attitude of the employees towards the management is generally critical.
For small family enterprises, Article 230 bis of the Civil Code expressly provides for all employees to participate in the fundamental decisions which might affect the life of the enterprise, such as profit destination, production targets and means, and ceasing of the business, on a majority basis. In general, the situation changed with the enactment of Legislative Decree Number 74 of 2002, which brought into Italy the principle of workers’ consultation in management. Decree Number 74 provides for the institution of an European Company Committee (Comitato Aziendale Europeo, CAE) or, as an alternative, of a procedure to inform and consult the workers of companies (or group of companies) having “European Union dimensions”, i.e., having at least 1,000 workers in member states and at least 150 in at least two member states.

Responsibility for the creation of a CAE or the alternative procedure is given to the management of the company, obliged to start a specific negotiation with the unions that will appoint for such task a specific “delegation”, composed of one member for each state where the company is present, plus one, two, or three further member for each country where 25, 50, or 75 per cent of the entire workforce is employed, respectively.

In the event the management does not take initiatives, a request to start the negotiations for a CAE can be made by at least 100 workers of at least two different companies (in case of a group of companies) or by the unions. The goal of the delegation is to determine, in confrontation with the management and through a written agreement, the field of action, the composition, the duties, and the duration of the CAE or, as an alternative, the procedures to inform and consult the workers. All delegation and CAE members, together with their consultants, are bound by a three-year confidentiality duty regarding all information qualified as confidential by the management.

If, within three years of the beginning of negotiations, no CAE is formed, a compulsory CAE may be formed, with generic rights to be informed and consulted by the management. Such compulsory CAE may vary from three to thirty members, who have the right to meet at least once a year with the management to discuss the economic and financial situation of the company, the likely evolution of the company’s activities, and of occupation, investments, organization, working methods and production processes, production transfers, collective redundancies, reduction of personnel, and closing down of businesses. The CAE has the right to be informed of all extraordinary activities and events. CAE expenses must be paid by the employer.

In case of violations, a 30-day consultation period is provided, at the end of which the Labor Ministry will convene the parties, ascertain the situation, and try and reach a common understanding. Should that fail, the Ministry may order certain accomplishments to bring the situation in line with law and even impose administrative sanctions from €5,165 to €30,988.

In case the enterprise is a European corporation, the CAE principles do not apply but, according to Legislative Decree Number 188 of 2005, a specific
organ representing the workers must be created aiming at informing and consulting with the employees of the European corporation. In a one-year period, the representatives of the employees will negotiate with the employer an agreement containing all the rules concerning the operations of the organ representing the employees. All expenses must be paid by the employer.

Health and Safety in the Workplace

Ensuring Safety

The employer is responsible for any injury or damage caused to his employees in the performance of their duties, unless he gives evidence of having used the necessary precautions required to prevent such damage. The Consolidated Provisions on Work Accidents (Testo Unico sugli Infortuni sul Lavoro), enacted through Legislative Decree Number 81 of 2008, specify precautions to be mandatorily taken in industrial and commercial enterprises to avoid accidents. The employer must issue written and oral directions and warnings for compliance by employees with the precautions, and the employer is entitled to apply disciplinary sanctions to employees who do not comply with accident prevention regulations. The employer’s non-compliance with any accident prevention regulation constitutes a criminal offence. Provision of insurance cover for accidents in the workplace is compulsory under Italian law.

Particularly dangerous activities, such as those involving asbestos or radioactive materials, are governed by specific pieces of legislation that do require particular authorizations and peculiar infrastructures and employees’ protection. Such legislation is in line with the latest EU requirements.

Legislative Decree Number 8 of 2008 integrates all the existing rules concerning the prevention of the risk of accidents in the workplace and provides the employees with specific rights, imposing obligations on the employers. Detailed mechanisms of health and safety protection in the workplace also apply to Italian employers with regard to the safety of equipment and components used in the workplace and the safety on building sites.

The effect of such provisions on Italian employers is material since they provide for the appointment of safety officers inside the company, for the premises to be modified for the protection of the employees, for verification of the application of the applicable rules, and for the application of heavy sanctions in the event of lack of fulfillment.

The system, in addition to specifying the duties of the subjects involved, especially with regard to the evaluation of risk, outlines an industrial relationship model based on the cooperation between employer and employees with regard to health and safety protection at the workplace. Such approach requires not only a technological prevention, but also an organizational
prevention and a conscious involvement of the employees and their representatives.

The basis for a correct approach in this area is the Document for the Evaluation of Risks (*Documento Valutazione Rischi*) that describes the exact situation of the company and refers to all areas giving specific indications of the degree of risk of each one. On the basis of such document, the employer must plan the measures of prevention and protection appointing the responsible employee for the application of such measures and the related services. Such services include medical assistance for which a doctor has to be specifically appointed, the establishment of all the procedures in case of emergencies, and the education of the employees with regard to safety matters. The violation of safety dispositions is heavily sanctioned also with criminal consequences.

**Survivors’ Benefit**

The survivors of a worker who dies while employed, regardless of whether the death was job related, are entitled to obtain the worker’s severance compensation and, in addition, the indemnity in lieu of notice. The payment of this latter to the survivors, which has no logical justification, is motivated by a desire to provide the family of the deceased worker with additional money.

**Dispute Resolution**

**Individual Level**

Law Number 533 of 11 August 1973 changed Part IV of the Civil Code of Procedure, which deals with the regulation of "Individual Labor Controversies". This step was taken as a result of the particular tensions in the labor market at that time and to assure a more efficient process of dispute resolutions.

Before going to court, the worker has the possibility of formally starting a conciliation procedure in order to settle the controversy in an extra-judiciary manner. Should the worker decide not to follow such procedure, he may file a suit against the employer before the competent labor judge (*Tribunale del Lavoro*). Specific and strict deadlines are provided with reference to the possibility of making new requests to the judge, to the setting of the hearings, to the taking of evidence and to the issuing of the judgment.

The judgment may be appealed to a panel of three judges within the same tribunal. The burden of proof is mainly on the employer. However, each single collective bargaining agreement provides for arbitration procedures that tend to avoid starting a lawsuit before the *Tribunale del Lavoro*; such procedures apply to all the employees also if they are not union members. In addition, employment contracts with the *dirigenti* normally include arbitration clauses.
Collective Level

The resolution of disputes at a collective level is instead regulated by the Workers’ Charter. Article 28 provides that the unions may ask the Tribunale del Lavoro to issue provisional orders binding the employers, in the event of "behavior which prevents or limits the exercise of the union freedom or activity or the right to strike", i.e., “anti-union behavior”.

Termination of Employment

In General

As a general rule, termination of an employment relationship for indefinite duration is subject to notice by the employer (in case of dismissal) or by the employee (in case of resignation). In either case, the employee is entitled to severance compensation. The length of the notice periods and the amounts of severance compensation vary in accordance with the employee’s length of service and level in the enterprise. The notice period starts running from either the first or the sixteenth day of each month.

An employer or an employee may elect to terminate the contract without prior notice but, in this case, he must pay to the other party an indemnity equivalent to the salary otherwise payable during the period of notice. In such a case, the contract is deemed to remain in existence during the notice period, even though the employee has been allowed or required to leave prior to expiration of the notice period. A female employee cannot be dismissed in her first year of marriage.

Dismissal

In General

The rules of the Civil Code covering dismissal have been replaced in practice by Law Number 604 of 15 July 1966, the Workers Charter of 1970, Law Number 108 of 11 May 1990, and Law Number 223 of 23 July 1991. The restrictions on dismissals found in the laws do not apply to employees who qualify for old age pensions or who are over age 65, or to employees during the probationary period (up to a maximum of six months’ trial). Dismissals made on the basis of political or religious belief, membership in a labor union, or participation in union activities, including strikes, are void. The following types of dismissal are available to the employer:

- Individual dismissal without need of showing just cause (giusta causa) or valid reason (giustificato motivo);
- Individual dismissal for just cause;
• Individual dismissal without just cause but for some other valid reason; and
• Collective dismissal.

**Individual Dismissal without Just Cause or Valid Reason**

This type of dismissal is applicable only to employees who qualify for old age pensions or who are over sixty years of age but did not inform the employer, at least six months before becoming sixty, of their intention to keep on working until the age of sixty-five or until they reach the top pension level as provided by law; employees during probationary period; and managers.

**Individual Dismissal with Just Cause**

An employee may be dismissed with just cause where his misconduct "makes the prosecution of the employment relationship impossible."\(^{15}\) Examples of just cause are theft, riot, fights, and serious insubordination. In these cases, an employee may be dismissed without notice and without indemnity in lieu of notice. However, pursuant to a strict interpretation of Article 7 of the Workers’ Charter, a special procedure must be followed before the dismissal.

Any dismissal due to the employee’s fault must be preceded by a formal notice sent by the employer, where the facts charged to the employee are detailed. The employee will have five days to reply, and only after his justifications are examined or after such term expires, can the dismissal be notified within five days if the justifications contained in the reply are not accepted by the employer. All the conduct of the employees that might give rise to a sanction must be specifically listed and the list must be shown to the employees within the company’s premises.

As an alternative, a copy of the applicable collective bargaining agreement is to be given to each employee. Any violation of this procedural rule makes the dismissal null and void. The employee must receive severance compensation (to be considered for all practical purposes as deferred compensation).

**Individual Dismissal without Just Cause, But for Valid Reason**

A valid reason for dismissal is, according to Law Number 604 of 15 July 1966, either a serious breach of the contract by the employee, or any objective reason relating to the company’s organizational requirements.

A serious breach of the employee’s duties has been found by the courts in case of failure to follow material management directions, material damage to machinery and equipment, execution within the factory premises of work for the employee’s benefit or for the benefit of third parties, unjustified and repeated absences, repeated absences on days subsequent to holidays or vacation, imprisonment, introduction of new equipment which requires different

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\(^{15}\) Civil Code, Article 2119.
specialization or a lesser number of workers, closing of branches or product lines which makes it impossible to use redundant personnel for other duties, and repeated sickness which frustrates the correspondence between work performed and salary paid.

In these cases, the employee is entitled to receive notice and severance compensation. An employer’s failure to show just cause or valid reason will render the notice of dismissal null and void. The employee can challenge the grounds for dismissal within sixty days of the date he received notice of the reasons for discharge. The employee may file an action before the Labor Courts, file a challenge under any applicable collective bargaining agreements procedures, or seek recourse to the union and have it raise the issue informally with the employer on his behalf. The employee is obliged to start his or action in the Labor Court within 270 days from the date in which same employee challenged the ground for dismissal; otherwise, the statute of limitations apply with regard to his/her possibility to sue the employer.

In the absence of discharge procedures outlined in either collective bargaining agreements or the individual employment contract, the employee may file an action for conciliation with the Labor Provincial Office but must do so within twenty days of the date he received notice of the reasons for discharge. If the mediation attempts fail, the parties may voluntarily agree to submit the matter to arbitration. There is nothing to prevent an employee from first seeking recourse to the Labor Office and then, if dissatisfied, requesting the trade union to take up the matter.

**Employment Guarantees**

Law Number 108 of 11 May 1990 has substantially amended Article 18 of the Workers’ Charter. The relationship between Law Number 604 of 15 July 1966, the Workers’ Charter, and Law Number 108 of 11 May 1990 is complicated. The employee is entitled to the protection provided by the above-mentioned laws when it is found that no "just cause or valid reason" existed for his discharge. The type of protection depends on the size of the employer.

A “real guarantee of employment” is available when the employer employs more than fifteen employees in the territorial area or more than sixty employees. Under Article 18 of the Workers’ Charter, as amended by Law Number 108 of 11 May 1990, an employee discharged without just cause or valid reason is entitled to re-instatement and compensation for unlawful dismissal equal to any wages or benefit lost from the date of dismissal to the date of re-instatement in his workplace but, in any case, not less than five months’ salary.

In this case, the concept of salary is that outlined by the law with regard to Article 2120 of the Civil Code that provides that the for the calculation of the severance compensation all the sums paid to the employee in a determined year.
must be taken into account with the only exception of expenses reimbursement. In the event of variable payments (such as bonuses), the average of the last three years will be taken into account.

The employee is entitled to demand, within 30 days from the date of the judgment declaring the dismissal unlawful, a payment of an additional compensation equal to 15 months’ salary in lieu of re-instatement. The employee who does not return to work within 30 days from the date the employer notifies the employee that he may return to work, or who does not demand the additional compensation in lieu of re-instatement, may be dismissed by the employer.

An “obligatory guarantee of employment” is available when the employer employs up to fifteen employees and in any other circumstance (except the three cases referred to above, to which the rules of the Civil Code are applicable) in which the real guarantee of employment is not applicable. This is the protection granted by Law Number 604 of 15 July 1966, as amended by Law Number 108 of 11 May 1990.

In these cases, following a court decision stating that the dismissal is not based on just cause or valid reason, the employee is entitled to reinstatement or an indemnity equal to not less than two and a half months’ salary and not more than six months’ salary. The exact number of months of salary is determined by the court, taking into consideration the size of the enterprise, the worker’s seniority, and the other circumstances surrounding the dismissal. The maximum indemnity can be increased in particular circumstances.

**Collective Dismissal**

The general provisions concerning collective dismissals have been modified by Law Number 223 of 23 July 1991, which adjusted them to EU Directive 75/129. Collective dismissal is defined in Article 24 as the case when undertakings consistently employing more than fifteen individuals dismiss at least five employees working in one or more production units in a period of four months (120 days) as a result of "a reduction or a transformation of activity or type of work". Law Number 223 expressly states that the provisions regarding collective dismissals also apply to undertakings ceasing activity (whereas the provisions formerly in force allowed the employer to use "multiple individual dismissals" in this case, an individual dismissal for each of the employees of the company that was to be wound up).

Law Number 223 requires an employer intending to effect a collective reduction of personnel to first notify labor unions and shop workers’ committees specifying not only the number, position, and professional skills of redundant employees (but not their names) and the time schedule for implementation of dismissal, but also the technical, organizational, and production reasons justifying the dismissal and the possible means of reducing any negative social impact. At the same time, the employer also must pay an anticipation equal to
one month of the unemployment benefit (indennità di mobilità) for each employee to be made redundant to the Social Security Authorities.

Within seven days from receipt of such notification, unions are entitled to start consultation with the employer in order to examine the reasons justifying the dismissal and to find any possible alternative solution to avoid dismissals (e.g., the possibility of using the personnel for different tasks and positions). This procedure cannot last more than forty-five days. The employer must then give the Labor Office written communication of the result of the consulting procedure and, in the event of a negative outcome, the reasons therefore. A similar communication can be sent by the affected workers’ unions.

In the event an agreement is not reached, the chief of the Labor Office calls the parties together a second time in order to examine the problems again and to attempt to mediate an agreement. This second procedure must be exhausted within thirty days. Only when an agreement is reached or, in the negative, at the conclusion of the above procedures, will the employer be allowed to dismiss the employees, by giving written notice. The employer also must send a detailed list of the dismissed employees to the Labor Office specifying name, place of residence, qualifications, position in the company, age, and family status of each, as well as the criteria adopted in selecting redundancies, such as family conditions, seniority, and technical and production requirements, the application of which must necessarily follow such order.

The employer also must pay a contribution to the Social Security Authorities, payable in installments, equal to nine times the initial monthly unemployment benefit. From this sum, the amount anticipated upon starting the whole procedure, as mentioned before, shall be deducted. In case an agreement is reached with the unions with regard to the reduction of personnel, the contribution is reduced to total only three times the monthly unemployment benefit.

Dismissed employees have the right to be rehired when the employer hires new employees with the same duties as those dismissed within the calendar year. Law Number 223 provides that the procedure for collective dismissals may take up to three months and the financial burden imposed on the employer (significant, especially if an agreement with the unions is not reached) requires careful evaluation.

Dismissal of Executives

An employer wishing to dismiss a manager must indicate the reasons in writing (usually a serious breach of duty, giustificato motivo), giving the manager a term of notice, the length of which depends on the employee’s length of service and is established by the collective bargaining agreement applicable to the sector in question.
The manager must work the entire period of notice and, if during the notice period he becomes ill, the count of the days’ notice is suspended and continues at the end of the period of sickness. The employer’s failure to give notice entitles the manager to receive an indemnity payment "in lieu of notice" equivalent to the salary which would otherwise have been payable during the notice period. The employer is not required to give notice only under very special circumstances ("just cause"), such as theft by the manager, unfaithful behavior (e.g., conflict of interests), or other fundamental breaches of duty on the part of the employee, which make it impossible to continue the relationship, though temporarily. If the manager wishes to resign, he also must give notice to the employer, but the length of the period of notice is usually equal to one-third of that applicable in the case of dismissal by the employer.

As already stated, upon termination of the employment, all employees, including managers, are entitled to severance compensation (TFR), which is calculated according to a statutory formula, accrued on the books on a yearly basis and reflected in the employer’s yearly balance sheet. As a general indication, TFR is calculated as one month of the global salary for each year of seniority, being de facto a deferred compensation. The TFR is payable to the manager under any circumstances, in addition to the indemnity in lieu of notice payment, if any, and the additional indemnity (see text, below), if any.

The basic salary to be taken into consideration (for all purposes, not only for TFR) includes the value (to be calculated by payroll agents or labor consultants) of all the fringe benefits of the manager (which are considered as compensation in kind), such as car, laptop, mobile telephone, house, and insurance, with the only exception of being expenses reimbursement. So far as bonuses are concerned, only the average of the bonuses paid to the manager in the last three years (pro rated if less) is to be considered as a part of his last yearly salary.

Should the employment relationship of a manager be terminated without just cause or valid reason (or if the employer fails to indicate the reasons for the termination of employment), the wrongfully dismissed manager is not entitled to be rehired, but he does have the right to challenge the reasons indicated by the employer in the notice of termination, by resorting to the Labor Court (or to an arbitration panel) under the provisions of the applicable collective bargaining agreement. A specific letter challenging the termination is to be sent to the employer within sixty days from the termination date, and the case must be started within 270 days from the date in which the executive challenged the ground for dismissal; otherwise, the statute of limitations apply with regard to the possibility to sue the employer.

It is the responsibility of the employer to prove the validity of the reasons he has given for the termination of employment (which must correspond to those previously indicated in the notice of termination and which may not be changed, but only enlarged upon, during the proceedings).
If the arbitrators or the Labor Court find that the dismissal was not justified, they will award the manager (in addition to the indemnity in lieu of notice) an additional indemnity (*indennità supplementare*), the amount of which, under the collective bargaining agreement applicable to industrial enterprises, may range from a minimum equal to the indemnity in lieu of notice (from eight to 12 months), plus two to 20 monthly salaries; under the collective bargaining agreement applicable to commercial enterprises, the indemnity may range from that for in lieu of notice (six to 12 months) to a maximum of 18 monthly salaries.

In addition, some automatic adjustments (i.e., additional monthly salaries) will apply, if the manager’s seniority is more than 10 years, under the applicable collective bargaining agreement, depending on his age, but only if the manager is between 46 and 56 years old for industrial companies (the adjustment may reach seven further monthly salaries if the manager is 51 years old), and between 49 and 60 years old for commercial companies (in this case, the adjustment may reach nine further monthly salaries if he is 54 or 55 years old).

**Resignation**

An employee who wishes to terminate a contract for an indefinite duration must give notice to his employer. The notice required varies according to length of service and category of the employee.

An employee also may terminate the contract without prior notice but, in this case, he must pay to the employer an indemnity equivalent to the salary otherwise payable to him during the notice period. Nevertheless, if resignation is due to a just cause, no notice is to be given and the employee is entitled to receive the above indemnity.

**Severance Compensation**

Severance compensation is calculated on the basis of the employee’s salary, by computing not only his basic salary, but also any other compensation periodically paid, e.g., commissions, regular bonuses, and thirteenth and fourteenth month-payments (but excluding what is paid by way of reimbursement of expenses and *una tantum* compensation, i.e., exceptional payments made occasionally during the relationship).

According to Law Number 297 of 29 May 1982, severance compensation is equal to the amount resulting from adding, for each year of service, the global *de facto* salary paid during such year, and then dividing the sum by 13.5. During each year of service, the above sum divided by 13.5 is accrued by the employer on the company’s books and, on 31 December of each year, it is re-valuated by an interest rate of a fixed 1.5 per cent, plus seventy-five per cent of the cost of
living index for the given year. Salary includes the equivalent amount of all fringe benefits granted to employees.

**Notice Period**

As a general rule, termination of an employment relationship for an indefinite duration is subject to notice by the employer (in case of dismissal) or by the employee (in case of resignation). In either case, the employee is entitled to severance compensation. The length of the notice periods vary in accordance with the employee’s length of service and level, as shown in the following table, which refers to employees of industrial white collar workers:

- **Up to five years of service** — (a) Levels I–IV, 30 calendar days, (b) Level V, 45 calendar days, and (c) Levels VI and VII, 60 calendar days;
- **From five to ten years of service** — Levels I–IV, 45 calendar days, (b) Level V, 60 calendar days, and (c) Levels VI and VII, 90 calendar days; and
- **After 10 years of service** — Levels I–IV, 60 calendar days, (b) Level V, 75 calendar days, and (c) Levels VI and VII, 120 calendar days.

For blue collar workers, the length of the period of notice is as follows:

- **Up to five years of service**, six days;
- **From five to 10 years of service**, nine days; and
- **More than 10 years of service**, 12 days.

An employer or an employee may elect to terminate the contract without prior notice but, in this case, he must pay to the other party an indemnity equivalent to the salary otherwise payable during the period of notice, and the contract is deemed to remain in existence for all purposes (e.g., periodic increases in salary, cost of living increases, and vacations) during the notice period, even if the employee has been allowed or required to quit prior to expiration of the notice period.

**Retirement, Health Care, and Old Age Pensions**

The social security and medical assistance program for the aged are related in Italy to former employment status of workers. People who are retired receive a monthly payment from the State, whose amount is linked to the salary the workers got before retiring and for which the employer has been paying social security contributions for the entire working life of the employee. In addition to this they receive almost free medical assistance. The entire pension and medical assistance structure is constantly under revision in order to lessen the outrageous costs of social security and health care.

Social security insurance covers sickness, unemployment, family allowance, tuberculosis, old age, disability, and survivor insurance and is administered by
INPS. Contributions are paid partly by employees and partly by employers. Industrial accident and professional disease insurance, which is administered by INAIL, is paid entirely by the employer.

Employees who have successfully completed their trial period cannot be dismissed during the period of absence due to illness or accident, unless such absence exceeds a certain number of days (usually 180) within a calendar year (periodo di comporto) as provided by the applicable collective bargaining agreement. After such a period, the employee who is still absent can be dismissed with the payment of the indemnity in lieu of notice plus the severance compensation. When an employee is absent because of illness or accident, he is entitled to receive an indemnity paid partially by INPS and partially by the employer. For executives, the indemnity is entirely paid by the employer.

Summary of Social Costs and Taxes

The employer’s social security contribution rates vary, depending on the status of the employee and the sector in which the employer is operating. The indicative appropriate (rounded up) rates, applicable in average, are as follows:

- Industrial sector — (a) Blue collar workers, 41 per cent, (b) white collar workers, 39 per cent, and (c) managers, 36 per cent;¹⁶ and
- Commercial sector — (a) Blue and white collar workers, 39 per cent, and (b) managers, 36 per cent.¹⁷

The above contribution rates apply without reference to minimum or maximum remuneration levels. They also are payable on benefits in kind. Starting from 1998, a new tax called IRAP (Imposta sui Redditi delle Attività Produttive, tax on income from productive activities) was introduced to replace various minor taxes and duties due by employers.

Its rate is 3.9 per cent, but each Italian region has the possibility to raise it or diminish it by a further one per cent. It is applied with reference to the activity and dimensions of the company, without any specific reference to actual income parameters, penalizing in particular companies with a significant number of employees.

For companies, a sole tax rate (IRES) of 27.5 per cent is applied; for individuals, the applicable tax rates are:

- Twenty-three per cent for income between 0 and €15,000;
- Twenty-seven per cent for income between €15,001 and €28,000;

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¹⁶ The employee’s social security contribution rate is approximately 9.5 per cent.
¹⁷ The employee’s social security contribution rate is approximately 9.5 per cent.
Thirty-eight per cent for income between €28,001 and €55,000;
Forty-one per cent for income between €55,001 and €75,000; and
Forty-three per cent for income beyond €75,000.

Collection of Employee Data

In General

The limitation on collection of data concerning employees was more strictly defined following approval of Legislative Decree Number 196 of 30 June 2003, now known as the “Privacy Code”. The Civil Code provides for the surveillance of an employee’s behavior. However, such right is strictly limited because of the need to protect the freedom, dignity, and privacy of employees who are normally considered the weaker party in an employment relationship and, as such, could be easily subject to an employer’s intrusion into their private lives. Article 8 of the Workers’ Charter provides as follows:

“Prohibition of Investigation of Opinions. The employer is forbidden from carrying out investigations, also through third parties, regarding the employee’s political, religious or trade-union opinions for the purposes of hiring personnel and concerning facts irrelevant to the purpose of evaluating his professional aptitude."

This provision aims at ensuring that an employee’s privacy is protected and avoiding possible discriminations on the part of the employer, by prohibiting the latter from intruding into the privacy of his employees, unless within the limits strictly necessary to evaluate an employee’s ability to carry out a certain job.

Labor Courts have stated that the protection of an employee’s right to privacy prevails in connection with those facts or aspects concerning his private life which are not specifically connected with his duties while, on the contrary, such right to privacy would be disregarded when knowledge of those facts or aspects serves the employer for the sole purposes of ensuring the performance of an employee’s professional duties. In other words, investigations carried out by or on behalf of an employer are forbidden if they relate to facts that are not of use in demonstrating an employee’s training and competence and his compatibility with the specific duties entrusted to him.

On the basis of the grounds outlined above, case law has considered requests for information on specific facts or aspects concerning an employee’s private life lawful only in case of particular employment relationships. The Worker’s Charter provides for two kinds of judicial consequences for non-compliance, namely:
• Criminal charges with a fine from €154 to €1,549 (which can be multiplied by five in very serious cases) and/or imprisonment from fifteen days to one year with possible publication of the judgment; and
• Civil sanctions consisting of reimbursement of the damages suffered by the employee as a consequence of the investigations.

**Instruments for Data Collection and Their Legality**

The reform of the Criminal Procedure Code (1989) repealed a section that provided that those persons having a legitimate interest could request a certificate detailing a third party’s criminal record. The power of an employer to request such certificate was in any event limited, pursuant to the provisions of Article 8 of the Worker’s Charter, to those cases only where a request for a copy of such a certificate was justified by the particular nature of an employee’s duties.

In addition, Law Number 675 of 31 December 1996, which is generally applicable and exceeds the specific scope of the collection of data concerning employees by the employer, introduced a series of specific requirements for the collection and use of data of individuals. Pursuant to Law Number 675, a subject who owns and maintains a data base must inform the Public Authority of his intention to process information collected in the data bank, ensuring the observance of certain computer system security measures. The data processing operations must have been previously approved in writing, at the time of the collection of the information, by the person to whom the data refers.

A particularly strict authorization requirement and a limitation of use are provided for with regard to the collection and use of data concerning a person’s most intimate sphere, such as those concerning health, religion, sexual habits, and political opinions (so-called “sensitive data”). Even the use of data whose relevance to problems concerning employment relationships is evident must be accompanied by a report to the Public Authority.
Latvia

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Introduction

Since its entry into the European Union (EU) in 2004, Latvia has been harmonizing its labor legislation with EU Directives. The government consults with labor unions, the State Employment Agency, and industry experts to prepare draft amendments. It then issues a special annotation about the planned amendments before legislative approval. Employment issues in Latvia are dealt with by the Labor Law and Chapter 15 of the Civil Law. The following basic rights are guaranteed by the Labor Law and the Constitution:

- The right of a person to freely choose an occupation and workplace corresponding to his abilities and qualifications. Compulsory employment is prohibited, but enlistment to prevent catastrophes or their consequences or employment pursuant to a court order is compulsory employment.
- The right to receive compensation for work performed that is not less than the minimum set by the State. Every employee has a right to weekly days of rest and annual paid vacation.
- The right of employees to enter into a collective employment agreement and their right to strike. The State should protect the freedom of labor unions.
- The right to social assistance necessitated by age, employment incapacity, unemployment, or other reasons stipulated by law.


The State Labor Inspectorate regulates employment relationships and labor protection. It has jurisdiction to investigate and fine labor law and occupational health and safety regulation violators. It mainly serves as a free watchdog for employees and labor unions with respect to their grievances against employers.
Legal Relationship between Employee and Employer

Legal Nature of Employment Relations

Latvian employment law is mostly based on the law of private contract, providing for the freedom of parties to contract as they wish. Nevertheless, the scope of contractual freedom is limited by special rules which may be attributed to public law, and which are primarily intended to protect employees’ interests by imposing mandatory duties on employers with respect to working conditions, work regime, and compensation.

Types of Employment Contract

Section 28(2) of the Labor Law defines an employment contract as an agreement in writing between an employee and employer where the employee undertakes to perform a specified job and to comply with internal work procedures and the employer’s instructions, while the employer undertakes to provide compensation and appropriate working conditions for the employee. An employee may contract with several employers if it is not contrary to law, any applicable collective labor agreement, or any agreement between the parties.

To set the groundwork for the drafting of an employment agreement, the employee should present to the employer his (a) passport; (b) diploma or other document evidencing educational or professional skills, if so requested by the employer where the employee is hired for a position requiring special skills; (c) tax book; (d) any other documents which may be required; and (e) visa or residence permit and work permit if such is necessary in accordance with provisions of legal acts. This provision is not applicable to EU citizens and persons who have free movement rights under Regulation (Ec) Nr. 562/2006 of the European Parliament and of the Council of 15 March 2006. An employment contract should be in writing, with each party having an original signed version, and should contain the following:

- Employee’s name, surname, personal identification number, and place of residence, and employer’s name, registration number, and legal address;
- Commencement date of the employment relationship;
- Expected term of the employment relationship;
- Place of work performance;
- Occupation of the employee and general characterization of the work;
- Amount of remuneration and time of payment;
- Daily or weekly work time of the employee;
- Length of annual paid leave;
- Term of termination notice (subject to the agreement that it is not an indefinite term);
• Reference to an applicable collective agreement, if any; and
• Incorporation by reference of employment policies issued by the employer.

Employment contracts may be for a definite or indefinite term. Indefinite term contracts are the rule, with only specifically permitted exceptions, such as those for specified short-term work (i.e., seasonal or casual work which is normally not performed in the company, and temporary work for replacing an absent employee). The period for such term contracts may not exceed three years.

**Employee Rights and Obligations**

The Labor Law sets out certain employee rights, including the right to:

• Work under just and safe working conditions;
• Receive additional pay for additional work;
• A rest break if work lasts for more than six hours, and to leave the workplace during the break unless otherwise stated in the contract, collective agreement, or job regulations;
• Leave the workplace for a short while, but to immediately report this to the employer;
• Annual paid vacation;
• Child care leave;
• Have labor contracts with several employers unless prohibited by the collective agreement or labor contract;
• Submit complaints to management; and
• Unilaterally terminate employment upon one month’s notice to the employer, unless a shorter notice is set in the collective agreement or labor contract, or upon immediate notice in the case of urgency.¹

Employees are required by law to:

• Exercise due care in the performance of their duties during established working hours;
• Take care to eliminate or reduce existing or potential obstacles to normal work in the enterprise;
• Exercise care for the employer’s property;
• Eliminate or reduce potential or actual losses to the enterprise;
• Immediately report to the employer any obstacles to work performance, potential losses, or actual losses;
• Undergo health tests when required under any applicable collective agreement or legislation; and

¹ During a probation period, termination may be on three days’ notice.
• Keep secret such information that has come to their attention, where the information is a commercial secret.

The employee also is responsible for any of his employer’s losses caused by his unlawful actions, those caused maliciously or by his unlawful actions not related to the job agreed, and those attributable to him exercising bad intent or gross negligence.

**Special Categories of Employees**

*New Employees on Probation*

Section 46 of the Labor Law grants an employer the right to set a probation period for a new employee, during which the employer may evaluate whether the employee is capable of performing the job before he will be considered a permanent employee.

The imposition of a probation period does not require the employee’s consent, but should be stated in the employment contract. Probation periods cannot be set for persons under eighteen years of age, and should not exceed three months. Disability or other justifiable cause for an employee’s absence from work should not be counted when calculating the three-month probation period.

Section 47 of the Labor Law allows the employer to terminate the employee during the probation period without having to substantiate cause if the employee has failed to satisfy the probation requirements. If a probation period expires and the employer allows the employee to continue working, the employee is deemed to have satisfied the probation requirements.

*Foreign Employees*

Foreign employees are either residents of EU member states or residents of third countries. As every EU national has the right to work and live in Latvia in accordance with the EU policy of free movement of workers, the information below is applicable only to the employment of non-EU citizens.

An employer who cannot find a suitable employee in Latvia may employ a foreign national. Such employer should announce a vacancy, agree on the content of the employment contract, and produce an invitation to work.

The invitation to work should be submitted to the Office of Citizenship and Migration Affairs (OCMA) at the relevant branch office where the employer or the actual workplace is located. In turn, the OCMA may issue the work permit, short-term visa, or temporary residence permit. The work permit will generally be issued upon approval of the invitation to work.

If a foreign national arrives in Latvia pursuant to an employment or undertaking agreement, the employer should certify the invitation for the guest worker with the OCMA. Except for certain limited exceptions which may apply in the case of an accredited representative of a representative office registered in Latvia, a
foreign citizen or person without citizenship may only work in Latvia if he has been granted a residence permit or visa allowing him to do so.

**Child Labor**

Persons under eighteen years of age may not be employed in heavy or hazardous work or work harmful to their health or morals. Employees below the age of eighteen who are working with shortened daily work time should not be paid less than the minimum salary set by the State. They also cannot work on state holidays, or be engaged in night and overtime work.

Under the Labor Law, persons below fifteen years of age may not be hired for permanent work. Children from the age of thirteen may be employed outside of school hours in exceptional cases, if one parent has given written consent and the State Labor Inspectorate has issued a special permit for performing light work that is not detrimental to their safety, health, morals, and development. A child performer may be employed in cultural, artistic, sporting, and advertising activities. Such employment should not interfere with the education of the child.

**Part-time Employees**

Upon consent of the parties to an employment agreement, the employer may set a shortened workday or workweek. A shortened workweek is mandatory if so requested by a full-time or part-time employee under the following circumstances:

- Where the employee is pregnant;
- Where a woman employee is working within one year following childbirth;
- Where a woman employee is working within a period during which she is breastfeeding her child;
- Where the spouse of the employee has a child of fourteen years of age or less; and
- Where a male employee is a single parent who has a disabled child of up to 18 years of age.

Being a part-time employee is not a ground for restricting the calculation of the employee’s annual vacation or length of service, or for any other limitation of employment rights. The employer should transfer the employee from regular work time to part-time, if there is such possibility, upon request of the employee.

**Transfer of Employees**

A transferred employee is defined by the Labor Law as one who performs work in another country for a specified period and not in the one in which he is regularly employed. The following provisions of the Labor Law apply to any
employee who is transferred to work in Latvia, regardless of the choice of law set out in the employment agreement:

- Maximum work time and minimum rest period;
- Minimum annual vacation period;
- Minimum salary and rates for overtime worked;
- Provisions on securing a workforce, especially through work placement agencies;
- Safety, health protection, and hygiene at work;
- Protection measures for persons under eighteen years of age, pregnant women, and women after childbirth, and provisions on their work and employment; and
- Prohibition against discrimination.

The employer should notify the State Employment Agency about the employee before transferring him to work in Latvia.

**Impact of Business Reorganization or Ownership Transfer on Employment Relations**

The general rules regarding business reorganization are set out in Council Directive 2001/23/EC of 21 March 2001 (“Directive 2001/23/EC”). Section 3(1) provides that the transferor’s rights and obligations arising from a contract of employment or an employment relationship existing on the date of a transfer should, by reason of such transfer, be transferred to the transferee.

Directive 2001/23/EC does not indicate that additional steps, such as offers to the employees or acceptance of such offers, are necessary to execute the transfer of employees to the acquiring company.

This is confirmed by Section 118(1) of the Labor Law, which considers employees to be automatically transferred to the acquiring company from the effective date of reorganization. None of the companies under reorganization or cross-border merger are required to submit offers to the employees or receive confirmation for the transfer.

Following the transfer, the new employer may only change the employment contracts of the newly transferred employees as long as the changes comply with the Labor Law and the employees accept such changes. If the employees do not accept the offer, they will continue to be employed under the same employment contract but under the supervision of the transferee.

Where the terms and conditions related to the employee are included in a collective agreement, they cannot be unilaterally terminated. However, the new employer is obliged to follow the terms and conditions of the seller’s collective
agreement (where such agreement exists) for one year from the date of the transfer.²

Terms and Conditions of Employment

In General

Parties to an employment contract generally may set their own terms and conditions, but the contract should be in writing and should specify the job title of the employee. Where there is uncertainty over what duties the employee may have in the course of employment, the contract should describe the job as broadly as possible to avoid constructive dismissal claims by the employee.

Regular daily work time may not exceed eight hours, and a regular weekly work time may not exceed forty hours, or thirty hours for employees exposed to special risk. A workweek is generally for five days, although it is possible to specify a workweek of six days. It is possible to agree on part-time work that is shorter than the regular daily or weekly work time.

An employer with more than ten employees is required to adopt a Policy Manual³ after consultation with representatives of the employees. The working procedure regulations should be adopted no later than two months from the date on which the company has commenced its activities.

The employer should ensure that all employees become acquainted with the Policy Manual. It may be advisable to obtain written acknowledgment of familiarity with the content of the Policy Manual from each employee.

On the workday immediately preceding a public holiday in the case of a forty-hour workweek, the employee is entitled to work one less hour, unless agreed otherwise. On a workday immediately preceding a public holiday in the case of a six-day workweek, the hours of work may not exceed six.

Unless otherwise required due to the nature or condition of the business, night shift work⁴ should be for one less hour of work per night than the day shift work, except where the work is performed by an employee already availing himself of a statutory reduction in hours of work.

A minor, pregnant employee, or parent or guardian having custody of a child up to the age of three may not be forced to work during the night shift. Additional

² Labor Law, s 118.
³ A Policy Manual should include: (1) The beginning and end of work time, breaks, and length of the workweek; (2) Organization of work time; (3) Date, place, and manner of payment of work remuneration; (4) General procedures for granting of leave; and (5) Labor protection measures.
⁴ This is work between 10 o’clock in the evening and six o’clock in the morning.
categories of reduction of hours of work pertain to persons having custody of a child of up to fourteen years of age, or a disabled child of up to 16 years of age.

**Holidays and Vacation**

If an employee works during a public holiday,\(^5\) he should be paid double the hourly or daily wage specified. Every employee has the right to annual paid leave for a period of not less than four calendar weeks, excluding holidays. Annual paid leave should be granted at a specified time in accordance with the agreement between the employer and the employee.

Annual paid leave in the current year may be granted in parts, but one part of the leave in the current year should not be less than two uninterrupted calendar weeks. In exceptional cases, part of the leave may be transferred to the subsequent year.

An employee may request for annual paid leave for the first year if he has worked for the employer for an uninterrupted period of at least six months. Employees working under heavy conditions have additional vacation entitlements. A woman with three or more children of up to sixteen years old, or with a disabled child, is entitled to three extra annual vacation days.

**Remuneration**

The Cabinet of Ministers periodically adjusts the minimum monthly wage, currently set at LVL 200 (€ 285) per month, with the minimal hourly wage rate being LVL 1,189 (€ 1,698). For teenagers it is LVL 1,360 (€ 1,942) per hour.

Where an employee is transferred to a lesser position, he will maintain his prior rate of compensation, unless he is given one month’s prior notice of the position and remuneration change. An employer has the duty to specify equal work remuneration for men and women for the same kind of work or for work of equal value.

An employer may organize a time salary system or a piecework salary system. A time salary is calculated in accordance with the actual time worked, irrespective of the amount of work done. On the other hand, a piecework rate is calculated in accordance with the amount of work done, irrespective of the time within which it was done.

An employee who, in addition to the contracted basic work, performs additional work for the same employer has the right to receive additional remuneration. A supplement also may be specified for employees who perform work in special circumstances associated with an increased risk to their safety or health.

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\(^5\) The following are the public holidays in Latvia: New Year's Day, Good Friday, Easter and a second Easter day, 1 May (Mother's Day), Summerfest, 23 June (Ligo Day), 24 June (Jani Day), 18 November, 25 December, 26 December, and 31 December.
An employee who performs night work should receive a supplement of not less than fifty per cent of his specified hourly or daily wage rate. If a lump sum payment has been agreed upon, a supplement of not less than fifty per cent of the piecework rate for the amount of work performed should be given to such employee.

An employee who performs overtime work or works on a holiday should receive a supplement of not less than 100 per cent of his hourly or daily wage rate. If piecework pay has been agreed upon, a supplement of not less than 100 per cent of the piecework rate for the amount of work done should be given. An employer should pay work remuneration not less frequently than twice a month, unless the employer and employee have agreed on payment of once a month.

**Progressive Discipline**

Where an employer wishes to discipline an employee, the employer must follow a system of progressive discipline. In accordance with section 90 (1) of the Labor Law, if an employee breaches the obligations set out in its employment agreement, the employer has the right to issue either a written reprimand or warning to the employee. Such document should contain information about the employee’s performed violation. Before issuance of the written reprimand or warning the employee is required to submit a written explanation to the employer regarding the respective issue. Employers are well advised to keep written notes of disciplinary measures, and where possible, have receipt of them acknowledged in writing by the employee.

A written reprimand or warning can be issued only within a period of one month after the employee has committed the violation. If the employee has not performed any violations within a year of receiving a written reprimand or second level warning from the employer, then prior instances of a written reprimand or second level warning are considered void.

Being given a number of reprimands or warnings may be sufficient grounds for termination of employment.

**Exclusion Clauses**

Section 84 of the Labor Law allows for the inclusion of non-competition clauses in employment contracts where so agreed by the parties. Any such clause should set out the type, extent, place, and time of restriction on competition and the compensation payable to the employee for observance of the restriction.

The restriction on competition should not be more than two years from the date of termination. To keep the restrictive covenant enforceable, the employee should be paid monthly compensation for observance of the restriction.

The parties may agree on a lump sum payment, but it should be set out that such payment is deemed full advance payment for the monthly compensation payable during the period of the restriction. From a risk management perspective for
employers, it may be preferable to pay the compensation on a monthly basis instead of payment in advance.

The restriction on competition may only apply to the field of activity in which the employee was engaged during the existence of the employment relationship. To be enforceable, the restrictive covenant should not be so severe as to amount to a bar against employment of any kind.

Confidentiality Clauses

In accordance with Section 83(1) of the Labor Law, an employee is liable for his unauthorized disclosure to third parties of information that is considered a business secret of the employer. However, such liability will only arise if the employer has precisely set out which information is considered a business secret.

The parties may agree that the confidentiality clause will still remain in force after termination of the employment relationship. It is now increasingly common to include a confidentiality obligation that survives the termination of the employment contract.

Performance Standards

The Labor Law does not specifically provide for any notification period for the employee if case of any change in performance standards.

However, the employer is responsible for introducing his employees to performance standards. The employer should thus ensure that the employees have been informed about any changes in performance standards.

Discrimination

The Labor Law and related legislation have been harmonized with EU Council Directive 2000/78/EC which establishes a general framework for equal treatment in employment.

The principle of equal rights, set out in Section 7 of the Labor Law, prohibits differential treatment towards employees in the same or similar circumstances on the basis of their race, skin color, gender, age, disability, ethnic or social origin, property or marital status, religious or political conviction, or other circumstances. In addition, Section 29 of the Labor Law sets out circumstances in which differential treatment is prohibited.

“Differential treatment” means any direct or indirect unequal treatment, and includes any encroachment upon a person’s rights or instruction to treat him differently on the grounds stated in Section 7 of the Labor Law.

In some cases, differential treatment of an employee on such grounds may be justified where a particular age is an objective and genuine precondition for
achieving a legitimate aim. However, the Labor Law does not specify what is meant by “objective and genuine” and the issue has not been judicially considered.

The prohibition against age discrimination is not limited to a particularly old or young age. However, the Labor Law sets the minimum employment age at fifteen years (or thirteen years in exceptional cases) without stipulating a mandatory maximum age limit.

**Collective Bargaining and Worker Participation in Management**

Employees may seek to protect their interests directly or through organizations such as labor unions or elected employee representatives. The Labor Law sets out procedures for the selection of a labor organization to represent a unit of employees in collective bargaining. It prohibits employers from interfering with this selection, and the employer should bargain with the appointed representative of its employees.

The Labor Law also establishes procedural guidelines on good faith bargaining, but does not require either side to agree to a proposal or make concessions. Proposals that are violative of the law may not be subject to collective bargaining.

**Health and Safety Protection in the Workplace**

An employer is required to organize a labor protection system that includes:

- Evaluation of work environment risks and determination of necessary labor protection measures to prevent or reduce such risks;
- Internal supervision of the work environment, i.e., identify any high risk areas or jobs at the workplace from an occupational health and safety perspective and advise relevant employees of any risk or protective measure necessary to avert risks;
- Establishment of labor protection organizational structures; and
- Ongoing consultations with employees to involve them in occupational health and safety improvement.

An initial health examination and periodic health examinations are required for persons whose work is closely associated with a possible risk to the health of other people and who are employed in:

- Businesses and organizations involved in any of the stages of circulation of foodstuffs;\(^6\) and

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\(^6\) Except for the production of grain-milling products, yeast, starch, and starch products; distilled alcoholic beverages; ethyl alcohol from other fermented materials; wine,
• Businesses and organizations which provide services involving close contact between individuals, such as hairdressing and cosmetology salons, swimming pools, saunas for public use, solariums, tourist lodgings, accommodation facilities, pre-school and general education establishments, and vocational educational establishments.

An employee, on the basis of an order of the employer, should undergo a health examination where provided for by a collective agreement, or where the workplace constitutes a threat to his or another person’s safety or health.

A night shift employee has the right to undergo a health examination before he is employed in night shift work. He also has the right to subsequently undergo regular health examinations not less frequently than once every two years. An employee who has reached the age of 50 years has the right to undergo regular health examinations not less frequently than once a year.

Persons under 18 years of age may be hired only after a prior medical examination. Upon reaching the age of eighteen, they should undergo a mandatory medical examination once a year.

Workers’ Compensation

An employee who terminates his employment due to his employer’s non-performance of all necessary labor protection measures, thus endangering his safety and health at the workplace, has the right to receive compensation from the employer that should not be less than six months’ average earnings.

However, the State Labor Inspectorate should confirm such alleged non-performance by the employer.

Dispute Resolution

In case of a dispute between the parties to an employment contract, Article 25 of the Labor Law provides that they may start off with a conciliation commission that is mandated to settle the matter. If the dispute is based on a matter governed by the terms of the collective agreement, the initial step of having a conciliation commission review the matter is mandatory.

In addition to the ever-present Labor Inspectorate, the employee also may have recourse to the Office of the Ombudsman, which often provides support to employees with respect to pleadings and participates in the negotiation process between the disputing parties in order to come to a settlement.

Besides the parties directly involved in the dispute, additional parties may be granted standing in a specific hearing or may be compelled to participate as third
parties. Under the Civil Procedure Law, a management representative responsible for the decision to terminate or transfer an employee may be compelled by a Latvian court to participate as a third-party defendant in a wrongful dismissal case brought by an employee.

The Civil Procedure Law also provides that unions, state enterprises, and other organizations or individuals may submit claims on behalf of a plaintiff. State authorities may be invited as participants to proceedings by a Latvian court, or may have intervenor rights under certain conditions to participate in furtherance of the performance of their duties, to provide their viewpoint to the court, or to defend the interests of an individual or the State.

**Termination of Employment**

**In General**

Employment may be terminated upon mutual agreement, contract expiration, unilateral resignation with notice, or for important reasons without notice. An employer may unilaterally terminate probationary employees without cause prior to the expiration of their probation.

An employer cannot terminate an employment contract during a period of temporary incapacity of an employee, or when an employee is on leave or is not performing the work due to other justifiable reasons. An employer also is prohibited from giving notice of termination to a pregnant employee or a woman following the birth of her child for up to one year. Accrued unutilized vacation days should be compensated upon termination.

**Termination of a Fixed-Term Contract**

The employer may terminate a fixed-term contract through a written notice of non-renewal. Such termination does not give rise to severance pay liability.

If the employee happens to be on sick leave through the expiration of the contract, mandatory sick leave payments survive the termination of the contract.

**Notice and Severance**

An employee may give written notice of termination of an employment contract one month in advance, unless a shorter time limit is provided by the contract or collective agreement. He also may terminate the contract before expiration of the period for a notice of termination if he has good cause.

The contract also may be terminated by agreement of the employer and employee before expiration of the period for a notice of termination. The employer, on the other hand, may give written notice of termination only on the basis of circumstances related to the conduct of the employee or his abilities, to economic, organizational, or technological measures, or to measures of a similar nature in the undertaking in the following cases:
The number of employees is being reduced, such that the employer should commence consultations with employee representatives and notify the State Employment Agency not later than 60 days in advance;

The employee lacks the necessary competence to perform the contracted work, triggering the employer’s right to terminate upon one month’s notice;

The employee is unable to perform the contracted work due to the state of his health as certified with a doctor’s opinion, triggering the employer’s right to terminate upon one month’s notice;

The employee who previously performed the relevant work has been reinstated, triggering the employer’s right to terminate upon one month’s notice;

The employer is being liquidated, triggering a right to terminate upon one month’s notice;

The employee has significantly violated the employment contract or the specified working procedures without justified cause, thus giving the employer the right to terminate upon 10 days’ notice;

The employee, in performing work, has acted contrary to moral principles and such action is incompatible with the continuation of employment, thus giving the employer the right to terminate upon 10 days’ notice;

The employee has grossly violated labor protection regulations and has jeopardized the safety and health of other persons, thus giving the employer the right to terminate upon 10 days’ notice;

The employee, in performing work, is under the influence of alcohol, narcotic substances, or toxic substances, triggering the employer’s right to terminate him without notice; and

The employee, in performing work, has acted illegally and has lost the trust of the employer, triggering the employer’s right to terminate him without notice.

If an employer intends to give notice of termination on the basis of the sixth through tenth items, above, such notice should be done within one month from the date of detecting the violation (excluding the period of temporary incapacity of the employee or when he has been on leave or has not performed work due to other special reasons), but not later than six months from the date the violation was committed.

If notice of termination has been given on the basis of the first through fifth items, above, the employer should grant sufficient time for the employee to seek other work, upon request of the employee. The length of such time should be specified in the employment contract (or, if applicable, collective agreement).

Parents or the State Labor Inspectorate may request in writing the termination of the employment of a person who is under eighteen years of age. Within five days after such request, the employer has a duty to terminate the employment and pay compensation to the employee in an amount not less than one month’s
average earnings. The death of an employer also may constitute a basis for termination of employment if the fulfillment of the employee’s obligation is closely and exclusively related to the employer personally.

Termination usually triggers a severance pay requirement. The amount of severance pay depends on the period of time that the employee has worked for the employer. In cases of termination by the employer, the employer should pay severance where the termination is based on any of the following grounds:

- Where the employee lacks the necessary competence to perform the contracted work;
- Where the employee is unable to perform the contracted work for health reasons;
- Where the employee who previously performed the relevant work has been reinstated;
- Where the employer is in liquidation;
- Where the number of employees is being reduced; or
- Where an employee terminates his employment contract without giving notice in circumstances where he has good cause.

The amount of applicable severance pay is as follows:

- One month’s average earnings if the employee has been working for the relevant employer for less than five years;
- Two months’ average earnings if the employee has been working for the relevant employer for five to 10 years;
- Three months’ average earnings if the employee has been working for the relevant employer for 10 to 20 years; and
- Four month’s average earnings if the employee has been working for the relevant employer for more than 20 years.

A collective agreement or the terms in the employment contract may provide for a greater amount of severance pay. Average earnings should be calculated on the basis of the employee’s salary during the previous six months. It also may include supplementary payments, payments provided for in an applicable collective agreement or employment contract, and any bonuses.
**State Social Insurance Program**

**In General**

The legal framework of the State social insurance program is outlined in the law “On State Social Insurance”. Social insurance includes State pension insurance, unemployment insurance, work accident insurance, disability insurance, maternity and illness insurance, and parents’ insurance. The non-discrimination principle should be observed when providing social insurance. Social insurance is mandatory for:

- All employees who have reached the age of fifteen and are employed by an employer who is a domestic or foreign taxpayer;
- All persons caring for a child who is younger than eighteen months;
- All persons receiving unemployment benefits;
- Non-working disabled persons;
- Persons caring for a disabled child;
- Persons receiving maternity, paternity, or sickness pay;
- Persons caring for an adopted child;
- The spouses of diplomatic personnel residing abroad;

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7 It defines social insurance as the aggregate of State-organized assistance for persons or their wards against risk from loss of income due to illness, disability, maternity, unemployment, old age, workplace accidents, or professional illness of the insured, together with additional expenses resulting from the death of the insured or his ward. It also regulates the scope of the legal rights and obligations with respect to State social insurance of the following persons: (1) An employer; (2) An employee, who may be: (a) a person who has employment relations with an employer; (b) a member of the Saeima (parliament) or the Cabinet of Ministers, a State (municipal) representative, a member of the executive board (valde) or supervisory council (padome) of a company, State probation service voluntary employee, or other officer of a company having a position entitling him to compensation; (c) an independent contractor who is not registered as a personal income taxpayer with respect to income from business activities or a corporate income taxpayer; (d) an official with a special service rank in the Ministry of Internal Affairs and prison administration, or a military person who works for any structural unit of the Ministry of Defense; (e) a State civil servant; (f) an authorized representative of a foreign merchant who, not being in a legal employment relationship with such merchant, represents activities that are associated with the branches of the foreign merchant; (g) a convicted person who performs work in imprisonment; or (h) an employee of a micro-enterprise; and (3) A self-employed person, who cannot be regarded as an employee but who receives income as a person performing individual work.
• The spouses of military personnel residing abroad, except when the soldier participates in international operations, military educations, or maneuvers or is on business trip and self-employed; and
• Foreign employees.8

Social insurance services are financed from the respective special budgets that are administered pursuant to the law “On Budget and Finance Management”. Employers, self-employed persons, and foreign employees are required to register with the State Revenue Service Taxpayers Register. The employer should register an employee until the last date of the month in which he has commenced his work with the employer. The tax base of mandatory insurance payments is as follows:

• For the mandatory contributions of an employer and employee, all calculated employment income from which personal income tax should be deducted without deducting the non-taxable minimum, tax concessions, and eligible expenses for which the taxpayer has the right to reduce his taxable income.
• For a self-employed person’s mandatory payments, income from the production of goods, work performed, services provided, and creative or professional activities. The Cabinet of Ministers sets the minimal amount.
• For a foreign employee’s mandatory payments, taxable income of a domestic taxpayer derived from paid employment.
• For the mandatory contributions of a person who has entered into a work performance contract, sharecropping contract, or contract of carriage provided for in Part IV, Section 15, of the Civil Law and has not been registered as an economic activity income taxpayer, the reimbursement as specified in the contract.
• For the mandatory contributions of an authorized representative of a foreign merchant, his remuneration.
• For the mandatory contributions of a member of the Saeima, a local government councilor, a member of the Cabinet, a member of the board of directors or council of a commercial company, head clerk, controller, a volunteer probation officer of the State Probation Service, and other persons holding a position that gives the right to remuneration, the reimbursement as specified.

Costs of the Social Insurance System

In accordance with applicable legislation the maximal and minimal amounts of the mandatory insurance payments for 2011 are as follows:

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8 A foreign employee is one employed by a foreign taxpaying employer, who is in Latvia for 183 days or longer during any twelve-month period that starts or ends during the taxation year.
• During the period of 1 January through 31 December the maximum mandatory payment object is not determined;
• The minimal mandatory payment object for the self employed is 12 minimal monthly salaries, ie, 2400 LVL (€ 3428) per year.

The mandatory insurance rate for the employees is 35.09 per cent of the payment base if the employee is insured with all types of the social insurance. The payment of the mandatory insurance rate is to be divided between the employer and employee in the following proportions: An employer pays 24.09 per cent; and (b) An employee pays 11 per cent.

For the year 2011, if the employee is insured under all types of the social insurance, the allocation is as follows:

• State pension insurance -25.56 per cent;
• Unemployment insurance – 2.56 per cent;
• Disability insurance – 3.02 per cent;
• Maternity and illness insurance – 2.27 per cent; and
• Work accident insurance - 0.31 per cent (payable fully by the employer);
• Parents insurance- 1.37 per cent.

**Conclusion**

Following Latvia’s entry in the European Union the government has made efforts to harmonize Latvia’s legislation with that of the European Union legal system. Labor Law has only in recent years become a prominent focus for the EU especially with respect to work week regulation and benefits regulation. In Latvia, organized labor as an institution is still in the process of finding its way. At present it frequently suffers from lapses in judgment as to what issues it should and should not pursue in representing its constituency or individual members. It is hoped that with the passing of time, it will focus more on fair representation based on dialogue and an understanding and an appreciation for the spirit of law.

In order to promote employment and integration of the unemployed into society, the State Employment Agency together with European Social Fund (ESF) has developed a special program for the employers. Within the scope of the program, qualifying employers may be eligible for limited co-financing from the state with respect to the hiring of unemployed persons. Depopulation due to immigration from Latvia is a concern and if not abated, is likely to drive up skilled labour costs as the pool from which employers may select employees continues to shrink.
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Introduction

System of Government and Economy

Luxembourg is a constitutional monarchy. The executive power is in the hands of the Grand Duke and a cabinet presently consisting of 15 ministers (including one Prime Minister), while the legislative power rests with the Parliament, elected by nationals over 18 years of age.

A law becomes effective when it has been given the Grand Duke’s assent and when it is published in the official gazette, the Memorial. The legal system is primarily based on the French and Belgian systems (Napoleonic Code), although significant modifications have been enacted. Due to its size and political stability, Luxembourg has been able to introduce European Union (EU) legislation faster than other Member States.

Luxembourg is a small, industrially developed country, essentially reliant on foreign markets. It has grown into an important financial center. In June 2011, the total labor force was approximately 353,700, excluding the approximately 148,000 French, German, and Belgian employees who travel into Luxembourg daily.

The service sector comprises banking, insurance, radio and television, tourism, transport, and other services, and it employs the largest segment of the workforce. Luxembourg enjoys one of the highest living standards in Europe. The unemployment rate reached 5.6 per cent of the workforce at the end of June 2011.

Legislative Attitude toward the Regulation of Employment

The definition of labor contracts was first regulated by statute in 1919 by the Law of 31 October 1919 (“Civil Code”). It intended to grant employees a minimum of protection in their relationships with the employer. It had a positive impact on the professional dignity of employees, but required amendments on several points.¹

¹ Law of 7 June 1937; Law of 20 April 1962, which added to the provisions on working
The most important reform of the legal provisions governing the relationship between employers and employees was introduced by the Law of 24 May 1989, as amended. A Labor Code was subsequently introduced by the Law of 31 July 2006.

The Law on the Unified Regime (statut unique) of 13 May 2008 ended the existing differences between white-collar and blue-collar workers, notably in relation to severance indemnity, overtime work, thirteenth month-pay, and continuance of the remuneration during sickness. Since 1 January 2009, the labor law defines only one category of workers: i.e., the employees.

Legal Relationship between Employer and Employee

Labor Contract

Article 1710 of the Civil Code defines the labor contract as a contract by which one of the parties agrees to do something for the other on the basis of a price agreed upon by both of them. In terms of jurisprudence, the subordination of the employee constitutes the essential criterion of the labor contract. A decree of the Cour de Cassation on 2 February 1989 defines the labor contract as the agreement by which a person agrees to put his activity at the disposal of another, under whose subordination he places himself, in return for remuneration.

Thus, the constitutive elements of the labor contract are: (a) the service of work; (b) the remuneration or salary as a counterpart for the service of work; and (c) the position of subordination with the power of direction inherent to the employer.2

To determine whether there is a position of subordination, the judge should consider not only the terms of the agreement between the parties, but also all the indications supplied by their special situation in which the position of subordination should be integrated and from which their true intention can be seen.3

This position of subordination normally results from the fact that the employee is submitted to the rules and usages of the establishment by executing orders from the employer concerning the working schedule, the work to be accomplished, and work discipline.4

The terminology (employer and employee) used by the parties to the labor contract does not bind the court.5 The courts have held that a person who holds a

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2 Cour de Cassation, 5 March 1975.
3 Cour de Cassation, 10 February 1976 and 3 May 1978.
4 Cour de Cassation, 11 November 1983.
5 Cour d'Appel, 5 February 1994.
plurality of offices and is a technical director placed in a situation of juridical
subordination may still be subject to labor law.\textsuperscript{6}

Agents and independent contractors are normally not considered as employees
unless the courts determine that their financial subordination is strong enough to
meet the conditions used to define an employee. An in-service traineeship
cannot be considered as a labor contract.\textsuperscript{7}

Prior to the conclusion of the contract, the employee should pass a medical test
establishing his ability to carry out the requested tasks.\textsuperscript{8} Although the labor
contract is valid by the informal consent of capable parties as to its main aspects
(e.g., nature of the job, hours of work, and salary), the law requires that it be
established in writing for each employee at least when he begins work. Each
party should have a copy of the contract. Article L.121-4 of the Labor Code
requires that the written contract should include the following:

- The identity of the signatories;
- The date of the beginning of service;
- The place where the service will be provided;
- A precise description of the functions or tasks assigned to the employee at the
  moment of hiring;
- The employee’s normal daily or weekly working hours;
- The standard work period;
- The salary, wage, or other means of remuneration, and frequency of payment;
- The duration of the paid holidays, the mode of calculation and attribution of
  holiday, and the trial period;
- The terms of notice to be respected by the employer and the employee or, if
  this is not possible at the moment of conclusion of the contract, the mode of
  determination of the notice period;
- The derogatory or complimentary clauses agreed upon by the parties;
- A reference to the relevant collective agreement; and
- The existence and nature of a complementary pension scheme and the
  employee’s rights thereunder.

If these formalities and indications are not respected, the validity of the contract
is not prejudiced, but the terms are \textit{ad probationem}, i.e., if there is no legal
document, the law authorizes the employee to prove the existence and content of
the labor contract by other means. When one of the parties refuses to sign a legal
document in conformity with the requirements of law, the other party may
terminate the labor contract without warning or compensation.

\textsuperscript{6} Cour de Cassation, 25 January 1975.
\textsuperscript{7} Cour de Cassation, 24 March 1983.
\textsuperscript{8} Labor Code, art L.326-1.
Parties to the Contract

In general, any person may contract as long as the law has not declared him unable to do so. Under Article 488 of the Civil Code, a person is capable of all acts of civil life at the age of 18 years.

Under certain conditions, children are allowed to work from the age of 15 years. Anyone, except dependent minors and persons of majority age protected by law, may be bound by a labor contract as an employer or an employee. Corporate bodies also can hire personnel, and they are bound by the signature of their director(s).

Types of Labor Contracts

The labor contract for an indefinite period is often referred to as the “normal” labor contract. However, there are other labor contracts that are governed by partly different legal provisions.

Some contracts merely aim to organize the work in a special way (e.g., contracts for a definite period, for temporary work, for voluntary part-time work and for intermittent work). Most employers want their employees to prove their abilities to work during a trial period, whether the contract is for a definite or an indefinite time. Article L.121-5 of the Labor Code defines the rules to be applied in relation to the trial period.

- A contract for a definite period may only be concluded for exceptional instances and is governed by Articles L.122-1 to L.122-13 of the Labor Code and other specific rules. These rules are a compromise between the necessity for the employer to hire people without being required to keep them when the job is done and the protection of the employee’s right to a stable job. The following tasks allow for the conclusion of a contract for a definite time:
  - Replacement of an employee who is temporarily absent or whose labor contract has been suspended;
  - Seasonal employment (e.g., activity relating to crops or grape harvesting, to hotels and restaurants during the tourist seasons, and to travel guides);
  - Jobs for which contracts with an undetermined period are not usual, such as actors, fashion models, scriptwriters, professional sportsmen, specialists for private banking, and specialists in swaps, shares, risk capital, deposits, mergers, and acquisitions;
  - Occasional tasks that are not part of the usual activity of the company, such as auditing and accounting expertise;
  - Precise and short-term tasks to be carried out in cases of exceptional and temporary increase of the activity of the company;

9  Civil Code, art 1123.
• Urgent work that is necessary to prevent accidents as well as specific task-oriented jobs, such as the reorganization of the installation of the company to avoid detriment to the employer and his employees;
• Jobs for unemployed employees registered at the Job Agency benefiting from an insertion or reinsertion plan or jobs for a specific category of unemployed employees defined by the Grand-Ducal Regulation;
• Jobs to encourage the hiring of a specific category of unemployed employees; and
• Jobs offering additional professional training.

Contracts with a time limit should include, in addition to the definition of the task to be accomplished, the following provisions relating to its duration:
• The date of expiration if the contract is concluded for a previously determined period;
• The minimum duration if the contract expires upon the accomplishment of a determined task;
• The name of the replaced employee if the contract has been concluded for such purpose;
• The duration of the trial period; and
• A renewal clause.

If the contract was not concluded in writing, it is presumed to be concluded for an indefinite period and proof to the contrary may not be offered. The duration of a contract for a definite term cannot exceed 24 months, including renewals and the trial period.

Nevertheless, the Minister of Labor and Employment may grant requests to hire employees for a definite period of more than 24 months for works requiring highly specialized knowledge. The contract may be renewed twice within the twenty-four month period.

If the principle of renewal of the contract or the conditions relating to the period are not contained in the initial contract, the law presumes that the renewed contract is for an indefinite period and proof to the contrary is not allowed.

The tacit renewal of an expired contract for a definite period automatically generates a contract without a time limit. Employees hired for a definite time should be paid the same salary or wage as employees hired without a previously determined limitation of time.

**Termination**

The contract terminates on its expiration date, even if it had been suspended prior to such date. If the employer pre-terminates the contract, he is liable to the
employee for damages in an amount equal to the salary or wages the employee would have earned during the remaining period of the contract.

If the employee pre-terminates the contract, he may be liable for damages to the employer in an amount equivalent to the salary due for the duration of the notice period.

**Remuneration**

*In General*

A wage, remuneration, or stipend includes the remuneration paid in currency by the employer to the employee, and all other advantages such as bonuses, seasonal extra remuneration (thirteenth month), and payments in kind.11

The remuneration of employees should be paid monthly. Remuneration in cash should be paid at the latest on the last day of the month, while other types of remuneration should be paid within two months or at the end of the financial year.

The employee has a right of action against the employer for the payment of all sums due. This action prescribes after three years.12 Anticipatory payments of the monthly remuneration may be made to an employee who has an urgent, specific, and legitimate need, but such should not exceed the proportional amount corresponding to the work the employee has already accomplished during the month. The employer is required to provide the employee a monthly form containing accurate and detailed information relating to all elements on which the total monthly remuneration is based.

**Minimum Wage**

The minimum wage is the minimum remuneration that an employer is allowed to pay an employee, with no distinction as to the employee’s gender or origin and as to the economic sector in which the employer operates.13

The minimum wage is set every two years by the legislature and is based on the economic development of the Grand Duchy. On 1 October 2011, the minimum wage was € 1,801.49. Qualified employees may benefit from a 20 per cent increase in minimum wage, while adolescent and disabled employees may earn a percentage of the minimum wage.

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11 Labor Code, art L.221-1.
12 Civil Code, art 2277.
13 Labor Code, art L.222-1. It is different from the guaranteed minimum income system created by the Law of 26 July 1986, as amended, which consists of the payment by the National Solidarity Fund of the difference between the guaranteed minimum income and the income of a domestic community.
Seizure and Transfer of Remuneration

The Law of 11 November 1970, amended by the Law of 23 December 1978, aims to protect employees by restricting the seizure and transfer of the first €1,750 of their remuneration or unemployment benefits. The procedure for seizure of employee remuneration is regulated by the Law of 11 November 1970 and the Grand-Ducal Regulation of 9 January 1979, which consider that:

- For remuneration of €0 to €550 per month, nothing is distrainable;
- For remuneration of €550 to €850 per month, 10 per cent is distrainable;
- For remuneration of €850 to €1,050 per month, 20 per cent is distrainable; and
- For remuneration of €1,050 to €1,750 per month, 25 per cent is distrainable.

Hours of Work

In General

The legal working time is generally limited to 40 hours a week. However, employers may organize working hours, within certain limits, according to the needs of the activity. The employer may unilaterally extend the daily working time to 10 hours a day and 48 hours a week, provided that the working time on period of reference of four weeks does not exceed 160 hours.

A conventional period of reference may be agreed upon by means of a collective agreement concerning specific activity sectors. The period of reference may be shorter or longer than the normal four-week period under certain conditions but may not exceed 12 months. A schedule also is compulsory in this case. If there is no collective agreement, the Minister of Labor may grant a special derogation.

Work hours lost because of accidents, bad weather, the breakdown of machinery, or other events over which the employer has no influence may be recovered. The employer should inform the Inspection du Travail et des Mines (ITM) of the reasons for the interruption of work and the number of lost hours. These hours should be recovered within two months after the interruption. The weekly working time, including hours of recuperation, should not exceed 48 hours and a maximum of 10 hours a day.

Overtime

Work that is executed beyond the daily and weekly limits of normal working time, as determined by law, the parties, the schedule, or a period of reference, is considered as overtime. However, if a derogation to the normal working hours

14 Labor Code, art L.211-5. A week consists of five working days of eight hours each.
15 Labor Code, art L.211-12.
has been granted, the work accomplished within the limits of the schedule is not considered as overtime.

Article L.211-23 of the Labor Code provides that overtime is allowed to: (a) prevent the loss of perishable goods; (b) meet unusual increases of workload due to special circumstances; (c) fulfill certain tasks that should be accomplished within a determined period; and (d) deal with events presenting a risk for the national security or public order.

Overtime also may be done without previous authorization in the case of an accident that has already happened or is about to happen, as well as in every other case of emergency. In such cases, the employer should merely inform the ITM about the extra hours. If the work is spread over more than three days per month, prior notification authorization is required. Unless the work is done under the conditions defined in Article L.211-22 and Article L.211-23, the extra hours may not exceed two hours a day, while the daily working time may not exceed ten hours.

As a general rule, minors under 18 years of age are not allowed to do overtime, except for special reasons that should be communicated immediately to the Director of the ITM. Such overtime should be compensated by a reduction in working time without loss of salary. For each extra hour, the minor is entitled either to a 100 per cent increase in salary or to an apprenticeship allowance.

**Rest Time**

Article L.231-1 of the Labor Code prohibits employees in the public and private sectors from working on Sundays. Each employee has the right to a weekly rest of 44 hours without interruption. This rest time should include Sunday, as far as possible. If the work of the employee does not allow for a weekly rest of 44 days, the employee should benefit by an extra vacation of six days a year.

The prohibition against work on Sundays does not apply to commercial travelers and trade representatives who carry out their work outside the establishment, company directors, or senior managers whose presence is necessary to ensure the function and control of the company.

Article L.231-2 of the Labor Code also excludes the following activities from the prohibition against work on Sundays: (a) supervision of workplaces; (b) cleanup work and maintenance necessary for the normal continuation of work, as well as any work which is not part of the production but on which production depends; and (c) urgent work that should be done immediately to avoid damage to raw materials or products.

In such cases, Sunday work is allowed only if the tasks cannot be carried out on another day of the week. The ITM should be given prior notice of work to be performed on Sundays. Some activities are authorized by Article L.231-6 of the
Labor Code to be carried out on Sundays without special authorization. If the working time exceeds four hours, the rest time is a full day. Otherwise, it is half a day. Each hour worked on Sunday implies an increase in salary of 70 per cent.

Public Holidays


If any of these days coincides with a day upon which the employee would normally have worked, he is entitled to compensatory rest. An employee who works on public holidays receives a triple payment of his normal rate for that day.

Vacations

Article L.233-4 of the Labor Code confers on all employees the right to an annual vacation of at least 25 working days. War-disabled persons, handicapped employees and employees who do not have an uninterrupted weekly rest of 44 hours are entitled to an additional vacation of six days. Mine employees are entitled to three additional days of vacation.

The right to a paid vacation arises after three months of uninterrupted work with the same employer. This right may be withheld by the employer if the employee’s unjustified absences exceed ten per cent of the time during which he ought to have worked.

However, the absence is not considered unjustified if it is due to sickness, accident, an event over which the employee has no influence (except absence due to imprisonment), or if it was previously authorized by the employer. Public and paid holidays and legal strike days are regarded as working days.

Although the law provides that annual vacation is to be taken all at one time, this is generally not the case in practice. The vacation cannot be taken after 31 March of the following year. No paid work may be carried out by the employee during holidays.

17 These include those related to: (a) restaurants, hotels, bars, and canteens; (b) pharmacies and drugstores; (c) agriculture and viticulture; (d) transport companies; (e) public entertainment businesses; (f) domestic employees; (g) hospitals and old age homes; (h) factories operating 24 hours a day; (i) retail stores for four hours and between seven o’clock in the morning to one o’clock in the afternoon; (j) traveling showmen; and (k) gas, electricity, and water undertakings.


If the employee falls ill during his holidays, those days for which a medical certificate is produced will not be considered part of the vacation. The medical certificate should be sent to the employer within three days if the employee dwells in Luxembourg, or as soon as possible if he is abroad.

If the labor contract is terminated before the end of the calendar year, the employee is entitled to a vacation of one-twelfth of his annual vacation for each full month. If, at the moment of departure, the employee has not taken all the vacation days to which he is entitled, compensation should be paid for the days remaining. This payment is calculated by taking into consideration the average salary of the last three months.

The employee is entitled to extra holidays when the following events occur, namely:

- One day for the death of a parent or relative up to the second degree;
- Two days for the delivery of a child by the employee’s wife or for the birth of a legitimate or naturally recognized child, the marriage of his child, for a declaration of legally recognized partnership, for the receipt through adoption of a child of less than 16 years, or for moving into a new home;
- Three days for the death of the employee’s spouse or of a parent or a relative for the first degree; and
- Six days for the employee’s marriage or declaration of legally recognized partnership.

Each parent of a child under five years of age is allowed to take six months’ leave if he chooses to keep a part-time job. The law enables two periods of parental leave to be requested (one for each parent), provided that the first period of leave is taken immediately after the maternity leave, otherwise the second period of leave is lost.

The employer cannot refuse parental leave, but he may postpone the date of the second period. While an employee is on parental leave, his labor contract is suspended. At the end of the period, the employee is entitled to be reinstated in his previous work position.

**Discrimination**

**In General**

Articles 454 and 455 of the Penal Code prohibit discrimination based on origin, color, gender, sexual orientation, family situation, health, handicap, political and

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21 Labor Code, art L.233-12.
philosophical belief, union membership, and real or assumed membership of people, ethnic group, nationality, race, or religion.

A fine of €251 to €25,000 and/or a prison sentence of eight days to two years may be imposed on an employer for refusal of employment, sanction, or termination based on these grounds.

**Discrimination on the Basis of Gender**

*During the Hiring Process*

Articles L.241-1 and L.241-2 of the Labor Code prohibit discrimination based on the gender of employees. Job offers, selection criteria applied to candidates for a post offered, and the terms and conditions of the labor contract cannot be based on the gender of the employees.

Direct or indirect reference to the gender of candidates in job offers is prohibited. After an injunction from the labor administration, both the author and publisher of a prohibited job offer or announcement can be subjected to a fine. An employer may be allowed to refer to the gender of the employee in a limited numbers of cases, e.g., when the gender of the employee is a determining condition for the execution of the job.

*During the Labor Relationship*

According to Article 119 of the Treaty of Rome (approved by the Law of 30 November 1957), International Labor Convention Number 100 (approved by the Law of 17 May 1967), and the Grand-Ducal Regulation of 10 July 1974, men and women are to be paid an equal remuneration for the same job performance. This requires an employer to apply the same criteria for calculating any element of the remuneration\(^\text{23}\) to male and female employees and to determine their professional promotion or classification. Stipulations in a labor contract that are contrary to this rule are automatically replaced by the higher lawful remuneration. Any clause in the labor contract that would terminate the labor relationship due to the marriage of the employee is void. Dismissal due to marriage also is unlawful.

*Pregnant Employees*

Article L.332-3 of the Labor Code prohibits the notification of termination of the labor relationship to pregnant women, those who have given birth (during the eight weeks after delivery), and breastfeeding mothers (in the case of a breastfeeding mother, the holiday is extended to 12 weeks).

Sexual Harassment

Articles L.245-1 to L.245-8 of the Labor Code govern the issue of sexual harassment. The employer is required to prove that the sanction against an employee was not based on the ground of sexual harassment. No penal sanction may be imposed, but the measures taken by the employer against the employee will be null and void.

Under the Grand-Ducal Regulation of 15 December 2009, the collective agreement of 25 June 2009 relating to harassment and violence at work is generally binding for all employers and employees.

Discrimination on the Basis of Age

Employers are allowed to state an explicit age condition in their offers, but the law protects the employee against unlawful dismissal by the employer once such employee is hired.

Discrimination on the Basis of Nationality

The law applies the term “foreign employee” without distinction to employees, apprentices, and trainees. As a general rule, no foreign employee is allowed to work in Luxembourg unless he has a valid working permit. This rule does not apply to EU nationals24 or nationals from European Economic Area (EEA) Member States (except for Bulgarian and Romanian citizens) and some other specific, mostly international, activities.25

The granting or renewal of the working permit may be refused for internal labor market reasons. The permit may be taken away from a foreign employee who has tried to obtain such permit through unlawful means or who has performed a job outside the field of activity in which he was allowed to work.

Any employer who intends to engage a person is required to file a “declaration of employment” with the Employment Administration Office (ADEM). This allows the relevant authorities to verify if the vacant position could be taken by a registered job seeker. Otherwise, the employer may employ a person from a non-EU country provided that such person has obtained a work permit.

Work permits are obtained from the Minister in charge of immigration issues, currently the Minister of Foreign Affairs. The request has to be filed by the person who intends to work in Luxembourg for a period exceeding three months.

If the person resides in a non-EEA country, the request has to be made in such country and submitted to the relevant authorities in Luxembourg. He is allowed to come to Luxembourg after receipt of the authorization, and may then apply

for a work and residence permit. A person who is already residing in another EU country only has to apply for a work permit.

**Discrimination on the Basis of Union Membership**

Article 26 of the Constitution and the Law of 11 May 1936 guarantees the freedom of association to any person. Employees have the right to associate and to strike in order to improve working conditions. Union membership is not a just cause for immediate termination of the labor contract.26

**Collective Bargaining**

Collective agreements are concluded between one or more nationally representative unions and one or more employers’ unions or one or several companies operating in the same or a similar field.27 The most representative trade unions are those that have the largest number of members and characterize themselves by their activities and independence.

The employer is required to enter into negotiations if the trade unions require the conclusion of a collective agreement. If the employer refuses, the negotiations fail, or the parties do not agree on all-important points, the dispute is referred to the National Conciliation Board.

Each company may only have one collective agreement for its employees.28 The agreement should be in writing and signed by the representatives of the contracting unions of the employees and employers or by the employers themselves.

The agreement should be registered at the ITM by one of the contracting parties and is applicable the day after deposit. It should be posted at the main entrances of the enterprise’s office buildings or factories. If the parties to the negotiation were not authorized to act, the Minister of Labor will refuse registration of the agreement. The negotiators may appeal against this decision before the Administrative Court within a month after notification of the refusal.

The collective agreement is required to contain certain clauses. It should regulate extra payments for night work and difficult, dangerous, and unhealthy work, and should guarantee that remuneration will vary with the cost of living. It also should ensure equal remuneration for male and female employees and provide for sanctions in cases of sexual harassment.

Other questions concerning working conditions, such as the hiring and dismissal of employees, working hours, overtime, Sunday work and work on public holidays, weekly rest, annual vacation, and public holidays are generally dealt with by the collective agreement.

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Unless the agreement contains a particular clause concerning its effective date, it is applicable from the day following its registration, for a minimum duration of six months and for a maximum duration of three years. If none of the parties has given notice at the end of the initial term, the agreement is renewed for an indefinite term.

A party that does not want to continue the agreement after its term should give notice prior to its expiration. The parties also should enter into negotiations six weeks before the expiration of the previous agreement in order to agree on a new collective bargaining agreement or to modify the previous one.

The contracting parties are bound by the agreement and are required to refrain from doing anything that could compromise its execution in good faith. Employees should not strike and employers should not conduct lockouts during the term of the agreement.29

The collective agreement determines its own scope of application. In general, it applies to companies whose representatives negotiated and signed it, as well as to companies that have signed it without having taken part in the negotiations. A Grand-Ducal Regulation may declare a collective agreement generally binding for all employers and employees of the profession for which it was concluded.

**Employee Participation in Management**

Only companies with one of the following criteria30 are required to have employees’ representatives among the members of their boards of directors:

- Companies having at least 1,000 employees for the last three years;
- Companies in which the State holds at least 25 per cent of the stock capital; or
- Companies profiting from a State concession concerning their main activity.

The employees’ representative directors are elected by staff delegates, and any wage earner who has had a labor contract for at least two years may be a candidate in the election.31 In the iron and steel sectors, the most representative unions have the privilege of directly designating three directors representing the staff of the company.32

In the first category of companies, employees’ representatives make up one-third of the board of directors, or at least three members in the second and third categories, above. The companies under the second and third criterion should

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The Grand-Ducal Decree of 11 August 1974, as amended by the Grand-Ducal Decree of 19 February 2008, has identified the companies falling under these criteria. These are the electrical company (ENOVOS International), the Luxembourg radio and television station (RTL), the Luxembourg airline company (Luxair), the European satellite company (SES), and the Airport of Luxembourg Company (Lux-Airport).

31 Labor Code, art L.426-6.

32 Labor Code, art L.426-5.
complete their board of directors with one director for every 100 employees, but the directors representing the employees should not exceed one-third of the directors making up the board.\textsuperscript{33}

The mandate of the directors representing the staff has the same duration as that of the other directors and is renewable under the same conditions. The mandate may end prematurely if the labor contract is terminated.

No wage earner may be a staff representative on more than two boards of directors at the same time. The staff representative may not serve as a director in a company or have a labor contract with a company with activities similar to those of his employer.

\textbf{Health and Safety in the Workplace}

Depending on the activity of the employer, a number of safety rules of statutory, administrative, or conventional origin should be respected by the employer and the employees.

The ITM, placed under the authority of the Ministry of Employment, is authorized to ensure the application of safety rules in the workplace. It also provides advice to employers and employees on improving safety in the workplace, and determines the conditions under which dangerous industrial activities may be carried out.

ITM supervisors are authorized to enter, without any prior notice to or authorization from the employer, any establishment subject to control. Supervisors may ask for police assistance to ensure access to the workplace.

The ITM may require an employer to eliminate a source of danger for the employees, or may order work stoppage and the evacuation of the workplace. Special rules govern child labor, adolescent labor, and labor by pregnant women. These prohibit the performance of certain types of work or require that such work be performed under certain conditions.

\textbf{Employees’ Compensation and Survivors’ Benefits}

\textbf{In General}

Disabled employees include: (a) soldiers disabled by war; (b) persons with a physical, mental, sensorial, psychic, or socio-psychic handicap whose working capacity has been decreased by natural causes or by an accident; and (c) persons disabled by a working accident whose working capacity has decreased by at least 30 per cent.\textsuperscript{34} Article L.562-3 of the Labor Code requires employers in the private sector to reserve jobs for disabled employees.

\textsuperscript{33} Labor Code, art L.426-3.
\textsuperscript{34} Labor Code, art L.561-1.
The placement office may acknowledge the status of a disabled employee and propose specific rehabilitation and re-educational measures for him. The office also may decide to contribute to the salary expenses of his employer or to the expenses of a specially designed work post for him. Two per cent of the posts in the public sector are reserved for disabled employees. Handicapped employees also benefit from government programs aimed at guaranteeing a minimum income.

**Employers’ Duties and Liabilities**

A private sector employer regularly employing more than 25 employees is required, if sufficient handicapped persons are registered with the Employment Administration Office (ADEM), to reserve at least one post for a disabled employee, two per cent of the posts if his regular staff exceeds 50 employees, and four per cent of the posts if his regular staff exceeds 300 employees.35

If the employer refuses to hire the required minimum number of disabled employees, he is liable to pay a monthly fine corresponding to 50 per cent of the minimum legal income per disabled employee who was not hired and for as long as the refusal continues.

The employer must pay the disabled employee according to his work capacities. The rules of minimum salary apply. The disabled employee will be paid the total remuneration for the post if he fully performs the work.

**Survivors’ Benefits**

The labor contract automatically ends with the death of the employee. Nevertheless, upon the request of the spouse, the minor children, the children of full age for whom the employee was caring at the moment of death (including living cost and education) or the parents with whom the employee lived at his own cost, the employer must pay the salary for the full month in which the death occurred as well as an indemnity of three times the monthly salary. Such an obligation may be included in the labor contract but, even if it is not, the obligation exists as long as the request is made as above.

If part of the employee’s remuneration consisted of free lodging, the spouse, children, and/or parents also benefit from a three-month period during which the employer cannot require them to leave. Orphans’ and/or spousal pensions are provided through pension insurance to all members of the Social Security Service.

35  Labor Code, art L.562-3, s 2.
Dispute Resolution

In General
The competent jurisdiction for dispute resolution is the Labor Tribunal composed of a magistrate, who acts as the chair, and two assessors, of which one is chosen from among the employers and one from among the employees.

The Ministry of Justice nominates for each of the existing Labor Tribunals (Luxembourg, Esch/Alzette, and Diekirch) two active and six substitute employer-assessors, as well as one active and three substitute employee-assessors for each category of employees. These assessors are recommended by the Ministry of Employment after having been proposed by the concerned professional bodies. All nominations are made for a renewable period of five years.

Jurisdiction
The Labor Tribunal is competent for all disputes relating to a labor contract or an apprenticeship contract, complementary pension schemes, and insolvency insurance. The principal place of work determines which of the three Labor Tribunals is competent to hear the case.

If the principal place of work is outside Luxembourg, the competent tribunal is determined by reference to the rules of Council Regulation 44/2001/EC of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

Procedure
The employer or the employee may initiate the case by means of a request to the Labor Tribunal with a petition submitted to the office of the court clerk. The request should state the surname, first name (or company name), address, and profession of the parties, and the function in which they act. The request should state its subject and provide a summary of the facts. The petitioner or a proxy should sign the document.

The parties are then advised by the clerk of the tribunal by registered mail of the date, time, and place of the hearing. After the preliminary investigation of the dispute, the chair of the tribunal and the two assessors deliberate. The judgment is sent to the parties by registered mail.

A party that neither appeared nor was represented during the hearing can oppose a default judgment within 15 days after notification of the judgment to the parties, except if the summons is delivered in person. In this case, the judgment is considered by the law to be a contradictory decision and the party may only lodge an appeal.
The parties can appeal against decisions involving values in excess of €1,250 within 40 days after notification (adversarial appeals) or within 40 days after the day when opposition is no longer possible (appeals against default judgments).

The Court of Appeal has jurisdiction to hear appeals. During the procedure before the Court of Appeal, the judgment of the Labor Tribunal may be executed if its provisional enforcement has been decided.

The last possible recourse before the Supreme Court (Cour de Cassation) is only possible in limited cases. This recourse can be introduced within two months following the appeal judgment. The Supreme Court does not judge the file anew but checks the correct application of law and procedure by the Labor Tribunal and the Court of Appeal.

**Summary Procedure**

Besides the ordinary procedure before ordinary Labor Tribunals, the legislature also has introduced a summary procedure (référé).36 The chair of the Labor Tribunal is the magistrate of the summary procedure, and the procedure rules governing ordinary summary procedure also apply. The magistrate of the summary procedure has the power to:

- Invoke all measures necessary to prevent the disappearance of proof;
- Order all measures required to prevent imminent harm or to stop an obviously illicit situation (including the reinstatement of an employee);
- Decide on all claims in relation to the difficulties of execution of decrees and of the judgments issued by the Labor Tribunal;
- Grant all appropriate measures in emergency cases if no serious argument can be made against them;
- Grant the creditor the benefit of a provisional execution of an injunction if the obligation of the debtor cannot be seriously questioned; and
- Grant provisional unemployment benefits to unemployed employees waiting for the final Labor Tribunal decision on the issue of their dismissal.

Such actions do not have the authority of a final judgment of the Labor Tribunal but are only provisionally enforced until the judgment of the Labor Tribunal. They may be appealed to the Court of Appeal within 15 days from the notification of the court clerk.

If the defendant is not present or represented before the chair of the Labor Tribunal sitting as magistrate of summary procedure, the decision of summary procedure can be appealed within eight days of its notification. This eight-day period runs simultaneously with the period during which a normal appeal is possible.

36 New Civil Procedure Code, arts 941 et seq.
Termination of Employment

Restrictions on Termination

Industrial Disability or Sickness

An employee who is incapable of working because he fell ill or was injured in an accident is required to inform the employer or his representative on the day of absence. Notice may be given either orally or in writing, and should be followed by the delivery of a medical certificate before the end of the third day of absence. The certificate also should include information regarding the approximate duration of the employee’s absence.

The employer who has been given notice of the employee’s inability to work may not dismiss such employee or summon him to a preliminary interview, even if the dismissal would be justified by a serious fault of the employee committed before the absence. This special protection is warranted only for 26 weeks from the first day of absence.

The employer may terminate the labor contract as long as the employee has not provided a medical certificate stating his incapacity or has not informed the employer of his absence. The employee is not protected against dismissal if his disability is due to a crime or offense in which he was voluntarily involved.

Pregnancy

An employer is not allowed to terminate the labor contract of a pregnant woman if he has been informed of the pregnancy by the receipt of a medical certificate.

A woman who has been dismissed may void the dismissal by sending a medical certificate to the employer within eight days after she has received the notice of dismissal.

Staff Representatives

Once an employee has announced his candidacy to serve as a staff representative, he may not be dismissed for a period of three months.

The special protection for employees elected as staff representatives covers their term and a period of six months after such term has ended. If the employer has dismissed a staff representative, the Labor Tribunal would be required to order his immediate reinstatement and can impose a daily fine on the employer. The legal protection of staff representatives does not prevent dismissal in the case of a serious fault.

37 Labor Code, art L.121-6.
Employees’ Representatives

Employees’ representatives serving as directors may not be laid off without the authorization of the Labor Tribunal, except in the case of serious fault. The protection is extended to candidates for election and to former employees’ directors for a period of six months after the end of their mandate.

Employees on Parental Leave

An employer is not allowed to terminate the contract of an employee on parental leave, except on serious grounds that justify dismissal without prior notice. Apart from this case, dismissal during parental leave is null and void and the employee may request his immediate reinstatement.

Notice Periods

A contract for a definite period expires on the date fixed in the contract or upon the occurrence of a specified event. Unless its termination is the consequence of a serious fault of the employee or the employer, the party that wants to end it should respect a notification period with duration depending on the seniority of the employee and the identity of the party that wishes to terminate.

The period of notification the employer will have to respect varies from two months if the employee has been working for the same employer for less than five years, four months if he has five to ten years of service, and six months if he has at least ten years of service.38

These periods of notification are divided by two in cases of a breach of contract initiated by the employee. Thus, an employee who decides to resign should respect a notification period of one to three months.

An employer who has less than 20 employees may avoid paying severance if he extends the notification period up to 18 months.39 For both dismissal and resignation, the notification period runs from the fifteenth of the calendar month during which the termination has been notified, if the notification has been made before this date, and from the first of the following month, if the notification has been made after this date.

Procedures for Termination

Resignation of the Employee

An employee who decides to terminate his labor contract should inform his employer. He may do so by sending a registered letter to the employer or having the employer countersign the resignation letter.

38 Labor Code, art L.124-3.
39 Labor Code, art L.124-7, s 2.
Dismissal with Prior Notice

An employer may not dismiss an employee without respecting certain rules of form designed to protect the wage earner from an arbitrary decision. The legal procedure consists of three steps, the first of which concerns only employers who employ at least 150 employees:

- Any employer who employs at least 150 persons should call the employees subject to dismissal to a preliminary interview. The letter of notice should indicate the date, time, place, and purpose of the interview, but it need not state the reasons for the dismissal. The letter also should inform the employees of their right to be represented or assisted by any staff member or representative of a nationally representative union organization represented in the staff delegation of the plant. The reasons for the dismissal should be given during the preliminary interview, and the employees should be given an opportunity to be heard.

- The letter of termination may be sent on the day following the preliminary interview up to eight days after the interview. The employer is not required to give the reasons for the dismissal in the termination letter, but the employees may request them.

- Employees may request the reasons for the dismissal within the month after notification of the dismissal. The employer is required to answer such request within one month. The reasons should be real and serious and in connection with the behavior or professional aptitude of the employees or justified by the organization of the work in the production line or enterprise.

Dismissal without Prior Notice

Both the employer and the employee may immediately terminate their relationship in the case of a serious fault by the other party. A serious fault should be appreciated in context. The courts should consider the degree of education of the employee, his social situation, professional experience, the consequences of the dismissal, and all other elements that could have an influence on the employee’s responsibilities.

The burden of proof rests on the employer, who is required to include in the letter of notification of dismissal the exact reasons for the dismissal and the circumstances that make them serious. If such reasons are not indicated or if they are not given with the required precision, the dismissal is presumed irregular and unwarranted.

The facts or faults that may justify a termination without previous notice may not be cited more than one month after the day on which the party that wants to take advantage of them has come to know of them. This time limit does not

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40 This is defined by art L.124-10 of the Labor Code as any fact or fault that immediately and definitely compromises the continuation of the labor relationship.
apply if the fact involved a criminal activity or if the fact or fault is linked with a new fact or fault.

**Severance or Redundancy Payments**

The rights and duties of the parties are not modified during the notification period. Thus, the employee who continues to work should be paid in the same way as before. The employer may bar the employee from working during the notification period, but remains liable to maintain the employee’s remuneration unless the latter takes a new job that provides at least the same remuneration. If the employee asks to be barred, he may not claim wages.

The dismissed employee has the right to a severance indemnity (*indemnité de départ*) in an amount equivalent to one to twelve months of remuneration depending on the length of continuous service with the same employer. However, an employee is not entitled to such severance indemnity if he is dismissed for serious misconduct or if he is entitled to a pension allowance.

The employer is required to pay the compensation at the moment the employee leaves the job. If the dismissal is declared wrongful by the Labor Tribunal, the employee may claim damages from the employer.

**Employment Fund and Unemployment Allowances**

**Employment Fund**

If the employer is a corporate entity and is declared insolvent, the State guarantees the payment of employee wages for the past six months through the Employment Fund (*Fonds pour l'emploi*) administered by the Ministry of Employment.

The sums guaranteed by the Employment Fund include all remuneration and indemnities due to the employee on the day the judge opens the insolvency procedure and for a maximum period of six months preceding the breach of the labor relationship, up to a limit of six times the legal minimum monthly salary. The sum excludes compulsory social security or tax payments made by the employer on behalf of the employee.

If the administrator of the insolvency procedure decides to continue the activity of the employer, the same sums are guaranteed to the employee up to six months from the date he was dismissed. The right to benefit from the guarantee exists if all or part of the sums due to the employee cannot be paid within ten days after the judgment pronouncing the opening of the insolvency procedure. The benefit extends to apprentices. The Employment Fund will pay the amount due when asked by the administrator of the insolvency procedure with the prior approval of the judge of the insolvency procedure and after the approval of the labor administration.
Unemployment Allowances

In order to benefit from “total unemployment allowances”, the applicant should:

- Be involuntarily unemployed;
- Reside in Luxembourg;
- Be aged 16 years to 64 years;
- Not benefit from a retirement, old age, or invalidity pension;
- Be able and willing to work and accept any appropriate job;
- Be listed in one of the public placement offices;
- Have been employed in Luxembourg for at least 26 weeks during the year preceding inscription with a public placement office; and
- Not have unjustifiably left his last post or have been dismissed for a serious reason.

The total unemployment allowances can be paid only to persons who are usually full-time employees and to part-time employees who have lost a job where they have worked at least 16 hours per week. The total unemployment allowance equals 80 per cent of the previous gross remuneration.

Self-employed persons who are jobless are classified as usual full-time employees and receive an allowance generally corresponding to 80 per cent of the remuneration earned if employed full-time as a qualified employee. If the spouse or partner of the unemployed person earns at least the equivalent of 2.5 times the legal minimum wage, the benefit is reduced to 60 per cent of the previous remuneration.

Young persons who cannot find a job upon completion of their education are classified as usual employees under the condition that they reside in Luxembourg and are listed in one of the public placement offices within the year following completion of schooling. Depending on the level of their education, maximum wages are set by law. They will receive a percentage of the legal minimum wage paid to an unqualified employee, i.e., 40 per cent for sixteen-year-old to seventeen-year-old jobseekers without a State-recognized diploma, and 70 per cent of the same wage for older and qualified adolescents.

Other Protective Provisions

Article L.125-9 of the Labor Code requires an employer who has recovered from economic difficulties to hire with priority employees dismissed for economic reasons if such employees express their wish in writing to return to the employer.
Social Security

In General

Every employee should be enrolled with the Social Security Services. The employer is required to declare all national or foreign employees to the Social Security Services and to contribute to financing the social security system.

In return for the contributions paid by the employer and paid by the employee, the employee is entitled to national social security benefits, such as illness or pregnancy insurance, old age, accident, dependency (nursing care insurance) and occupational illness, family allowances, and other specific benefits.

Illness-Pregnancy Insurance

The Social Security Services offer members two types of assistance: payment of lost remuneration during the illness period, and total or partial payment of medical expenses.

The payment of “replacement salaries” does not exceed 20 per cent of the total expenses of the illness insurance branch, while “services in kind” (medical expenses) payments use up the greater part of the budget.

Old Age Pension

The Social Security Services’ old age pension system is divided into the following groups: (a) employees; (b) self-employed; and (c) persons working in agriculture, viticulture, and horticulture. Entitlement to old age pension normally begins at 65 years for a beneficiary who has a record of at least ten years’ continuous compulsory contribution or retrospective purchase of rights. A special insurance exists for civil servants, State employees, and employees of the national railway company.

The Law of 23 May 1984 has radically modernized the contribution system of old age pensions. Most of the rules concerning old age pension are currently set out in the Social Security Code. The Law of 24 April 1991 has brought major improvements to the situation of the beneficiaries of old age pensions, such as enabling members to postpone the benefits of the pension until the age of 68 years.

Accident Insurance

Accident insurance covers work accidents, accidents occurring while going to or coming from work, and occupational illnesses. It also allows injured members or their families to receive benefits for invalidity or for the surviving spouse and/or orphan of a deceased member.
Family Allowances

Family allowances are intended to contribute to meeting expenses incurred in the birth of children and those incurred in their education up to 18 years. A child who is a student and resident of Luxembourg since at least five years of age is entitled to financial assistance of about € 12,000 per academic year.\(^{41}\)

Dependency Insurance

Dependency insurance aims to cover the costs of assistance and care of dependent persons living at home or in a special home.\(^{42}\)

Other Benefits

Other assistance services for the support of families whose earnings are below a certain level determined by the law are provided by the Guaranteed Minimum Wage Law of 29 April 1999.

The sum paid by the Social Security Services represents the difference between the earnings of the family and the legal minimum income.

Summary of Social Costs

The contributions of employers and employees to the compulsory social insurances are as follows:

- For illness-pregnancy insurance, the employer and the employee each contribute between 2.8 and 3.05 per cent (the applicable rate depends on the nature of the remuneration);
- For old age pension, the employer and the employee each contribute eight per cent;
- For dependency insurance, the employee contributes 1.4 per cent;
- For health at work insurance, the employer contributes 0.11 per cent.
- For accident at work insurance, employer’s part 1.5 per cent;
- For employer’s mutual insurance, 0.62 - 2.38 per cent\(^{43}\); and
- For crisis contribution, 0.8 per cent employees on professional and personal income (to be abolished in 2012).

Such contributions should be paid to the Central Social Security Center. The maximum annual contribution of the employee or the employee is five times the social minimum reference wage (€ 8,787.81 at index 719.84).

\(^{41}\) Law of 26 July 2010.
\(^{42}\) Social Security Code, arts 347 –395.
\(^{43}\) By manual workers employer’s contribution of 2.10 per cent.
Malaysia

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Introduction

The cornerstone of Malaysia’s employment law and industrial relations lies in the Employment Act of 1955 (the “Employment Act”) and the Industrial Relations Act of 1967 (the “Industrial Relations Act”). The Employment Act governs employer-employee relations, while the Industrial Relations Act regulates employer-union relationships and industrial disputes.

The Employment Act provides for the appointment of the Director General of Labor, who is authorized to inquire into complaints by employers and employees that are generally related to wages and other payments. The forum for such inquiries is the Labor Court, which has powers and functions similar to a civil court. The Employment Act also regulates the minimum terms and conditions of employment, but is applicable only to a limited category of employees.

The Industrial Relations Act establishes the Industrial Court, which has relatively broad powers including the power to order the reinstatement of an employee who is found to have been dismissed without just cause. The Industrial Relations Act was amended in 2008 to somewhat limit the powers of the Industrial Court.

There is extensive legislation protecting workers’ welfare and benefit. The Occupational Safety and Health Act of 1994 and the Factories and Machinery Act of 1967 are applicable in the area of workers’ health and safety in the workplace, while the Employee’s Social Security Act of 1969 is relevant as regards compensation and survivors’ benefits.

The Employment Provident Fund Act of 1991 also creates a compulsory saving scheme for employees and insures them against contingencies of old age and death by compelling monthly contributions from employers and employees.

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1 The Employment Act only applies to West Malaysia. The East Malaysian states of Sabah and Sarawak have their respective legislation, namely Sabah Labor Ordinance (Cap. 67) and the Sarawak Labor Ordinance (Cap. 76).
Government Attitude towards Regulation of Employment

Malaysia\(^2\) was previously under British rule and was basically an agricultural nation, although its current economy is no longer dependent on agriculture. During the colonial era, most estates and plantations in Malaysia were owned by the British. Employers were free to determine the terms and conditions of their employees’ employment. This led to dissatisfaction among workers, although they did not have organized representation.

In the late 1920s, the Communist Party of Malaya (CPM) was formed. The CPM was largely responsible for influencing, if not organizing, “retaliation” by workers including strikes. As a result, the British government took steps to regulate employment matters, although this took a setback during the Japanese occupation from 1941 to 1945.

The CPM gained recognition as a political party after the Second World War, and continued to influence workers to set up trade unions and organize strikes. Many of these strikes led to violence, thus the government proceeded to further regulate employment and union issues, which led to a restriction on the influence of the CPM and deregistration of several trade unions.

The Malayan Trade Union Council (MTUC) was formed prior to independence, and remains to this date. Technically, it is not a trade union but it has representatives from various industries and has substantial influence over trade unions. It has international affiliation and recognition and forms policies for the benefit of trade union members.

After gaining independence from the British in 1957, the new government continued to regulate employment issues, created the Department of Labor and Industrial Relations, and enacted a Trade Unions Ordinance.

The government asserted very little control over trade disputes prior to independence. While allowing arbitration of industrial disputes, the Industrial Court Ordinance of 1948 required the parties’ mutual consent for such arbitration.

However, the lack of government involvement led to further disharmony. This necessitated further government involvement, which led to the creation of the Industrial Arbitration Tribunal. The Minister of Labor was authorized to conciliate trade disputes and compulsorily refer unsettled disputes to binding arbitration.

The success of such government intervention led to a consolidation of laws in the Industrial Relations Act. Compulsory arbitration under the Industrial Relations Act is adjudicated by the Industrial Court. The Trade Unions (Amendment) Act of 1965 also was enacted to prevent multiplicity of trade

\(^2\) West Malaysia was known as Malaya until 1963. Thereafter, Malaya, Sabah, and Sarawak formed Malaysia.
unions representing the same trade or industry and to prevent persons from holding office in more than one trade union.

Although there were more controls in place, industrial harmony could not always be maintained. On 13 May 1969, riots erupted in Kuala Lumpur following general elections that saw the opposition securing some relatively major victories in certain constituencies. The Trade Unions (Amendment) Act of 1971 was then enacted with the intention of ensuring that trade unions were free from political control, among others.

The improved industrial harmony enabled the government, the MTUC, and the Malaysian Employers’ Federation to agree on a Code of Conduct for Industrial Harmony (“Code of Conduct”) in 1975. Despite not having the binding force of law, the Code of Conduct was and still is substantially successful, although there were still incidents of industrial disharmony.

Today, the Employment Act and Industrial Relations Act together with the involvement of the government, the civil courts, the MTUC, various employees’ and employers’ trade unions, and legal practitioners play a vital role in maintaining industrial harmony in the country. The laws and regulations continue to evolve and develop.

Important changes have been seen since 1995, particularly in the attitude of the courts in safeguarding the concept of security of tenure of an individual’s employment. Further changes, including codifying practices and precedents set by the courts, continue to take place. The Superior Courts have consistently held that since the Industrial Relations Act and Employment Act are pieces of social legislation by which labor disputes are to be speedily resolved, a very liberal approach should be taken when interpreting such laws.

**Legal Relationship of Employer and Employee**

**In General**

The distinction between an employment contract and a contract with an independent contractor would determine whether the principles of labor law and industrial law would apply and the extent to which they apply, if at all.

Although the traditional test of “control” is important, it is no longer conclusive. Factors such as whether what was done under the contract was an integral part of the business organization, whether the employee was employed as part of the business organization, the method of payment, the existence of any

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obligation to work only for that employer, how the contract may be terminated, and the nature of the work are relevant considerations.\(^5\)

The way in which the parties treat the contract and the way in which they describe and operate it are not conclusive. All facts, circumstances, and features of the relationship should be considered in determining whether an employment relationship exists.

**Definition of Employee and Employer**

The Employment Act defines an “employer” as any person who has entered into a contract of service to employ another person as an employee, while an “employee” is defined as any person or class of persons (a) included in any category in the First Schedule of the Employment Act or (b) in respect of whom the Minister of Human Resources (“Minister”) makes an order under Section 2(3) or Section 2A of the Employment Act.

Under the First Schedule, the following are deemed as employees: (a) any person who has entered into a contract of service with an employer under which such person’s wages do not exceed MYR 1,500 a month; or (b) any person who, irrespective of the amount of his monthly wages, has entered into a contract of service with an employer in which he:

- Is engaged in manual labor, but if he is employed by one employer partly in manual labor and partly in some other capacity, he will not be deemed to be performing manual labor unless the time during which he is required to perform manual labor in a particular wage period is more than half of the total time during which he is required to work in such wage period;
- Is engaged in the operation or maintenance of any mechanically propelled vehicle operated for the transport of passengers or goods, for reward, or for commercial purposes;
- Oversees other employees engaged in manual labor employed by the same employer in and throughout the performance of their work;
- Is engaged in any capacity in any vessel registered in Malaysia and who: (a) is not an officer certificated under the Merchant Shipping Acts of the United Kingdom; (b) is not the holder of a local certificate as defined in the Merchant Shipping Ordinance of 1952; or (c) has not entered into an agreement under the Merchant Shipping Ordinance; or
- Is engaged as a domestic servant.

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\(^5\) Cassidy vs. Ministry of Health, 1 All ER 574 CA (1951); Lian Ann Lorry Transport and Forwarding Sdn. Bhd. vs. Govindasamy, 2 MLJ 232 (Federal Court, 1982); Stevenson Jordan and Harrison Ltd. vs. McDonald and Evans, 1 TLR 101 (1952); Hoh Kiang Ngan vs. Industrial Court, 3 MLJ 369 (1995); Equator Engineering Sdn. Bhd. vs. Gopalan a/l Vasumenon and Another and Other Appeal, 4 AMR 4924 (2001).
The Minister may declare (or exclude) a person or class of persons to be employees for purposes of the Employment Act. Section 2 of the Employment Act defines a “part-time employee” as an employee whose agreed average hours of work do not exceed seventy per cent of the normal hours of work of a full-time employee employed in a similar capacity in the same enterprise.

On the other hand, the Industrial Relations Act defines an “employer” as any person or body of persons who employs a workman under a contract of employment. A “workman” refers to any person, including an apprentice, employed by an employer under a contract of employment to work for hire or reward. For the purposes of any proceedings in relation to a trade dispute, the term includes any person who has been dismissed, discharged, or retrenched in connection with or as a consequence of such dispute or whose dismissal, discharge, or retrenchment has led to such dispute. From these definitions, it is clear that the Employment Act protects only a limited section of employees while the Industrial Relations Act covers almost the entire spectrum of employees.

**Employment Contract**

The relationship between an employer and workman is essentially contractual. Although the Industrial Relations Act refers to the employment contract as a “contract of employment” while the Employment Act refers to it as a “contract of service”, they are effectively the same.

Being contractual in nature, it is for the parties to agree on the relationship’s terms and conditions. However, the Employment Act specifies the minimum terms and conditions to be adhered to in the employment contract. Workmen who fall within the definition of “employee” in the Employment Act would be amply protected.

Any term or condition in the contract of service or an agreement that is less favorable to the employee than a term or condition prescribed in the law will be void, and the more favorable provisions of the law will be effective in such instance. However, the employment contract may stipulate more favorable terms and conditions or other than those contained in the Employment Act.

Section 10(1) of the Employment Act requires a contract of service for a specified period exceeding one month, or for a specified piece of work where the time reasonably required for its completion exceeds or may exceed one month, to be in writing. Such written employment contracts also should specify the mode by which they may be terminated by either party.

Section 8 of the Employment Act prohibits any restriction to the right of employees to join or participate in the activities of a registered trade union or to

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6 Employment Act, s 7.
7 Employment Act, s 7(B).
associate with any other persons for the purpose of organizing a trade union in accordance with the Trade Unions Act of 1959.

**Capacity of the Parties**

**Minors**

The age of majority in Malaysia is eighteen years. A person who is of the age of majority according to the law to which he is subject, who is of sound mind, and is not disqualified from contracting by any law to which he is subject, may enter into a contract. Nevertheless, a minor (i.e., child or young person) may enter into an employment contract as an employee.

A “child” is defined as a person under the age of 14 years, while a “young person” is one who is fourteen to 16 years of age. Under the Children and Young Persons (Employment) Act of 1996 (the “Children and Young Persons Act”), a child may be employed in the following types of employment:

- Employment involving light work suitable to his capacity in any undertaking carried on by his family;
- Employment in any public entertainment in accordance with the terms and conditions of a license granted under the Children and Young Persons Act;
- Employment requiring him to perform work approved or sponsored by the federal government or any state government and carried on in any school, training institution, or training vessel; and
- Employment as an apprentice under a written apprenticeship contract approved by the Director General.

In West Malaysia, a young person may generally be engaged in the following types of employment:

- All categories of employment mentioned under the employment of a child;
- Domestic servants;
- Employment in any office, shop, hotel, bar, restaurant and stall, warehouse, factory, workshop, store, boarding house, theatre, cinema, club, or association;
- Employment in an industrial undertaking suitable to the young person’s capacity; and
- Employment on any vessel under the charge of his parent or guardian.

A young female is not allowed to work in hotels, bars, restaurants, boarding houses, or clubs unless the establishment is controlled by her parent or guardian.

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8  Contracts Act of 1950, s 11.
9  Children and Young Persons Act, s 2(2).
10 Children and Young Persons Act, s 2(3).
guardians, but she may work in a club not controlled by her parent or guardian if the Minister approves.\textsuperscript{11}

\textit{Women}

Female employees may not be allowed to work at any industrial or agricultural undertaking from ten o’clock in the evening to five o’clock in the morning, or from being employed in any underground working.\textsuperscript{12} They also are entitled to a rest period of eleven consecutive hours.\textsuperscript{13}

\textit{West and East Malaysia}

Save for West Malaysians intending to work in East Malaysia, there are no general restrictions for citizens to work in any state or territory. West Malaysians intending to work in East Malaysia are required to obtain the necessary work pass before commencing employment.\textsuperscript{14}

\textit{Foreign Employees}

A foreign employee is defined by Section 2 of the Employment Act as an employee who is not a citizen, but permanent residents of Malaysia are not “foreign employees” for the purposes of Part XIIB of the Employment Act (on the regulation of foreign employees).

Foreigners may only be employed in Malaysia after first obtaining a work pass from the Immigration Department.\textsuperscript{15} In some cases, the approval of the relevant ministry of the particular industry in which the foreigner intends to work would have to be first obtained before the immigration department would process any application for a work pass.

Approvals, if granted, may be conditional and are generally for a fixed period of time, although they may be extended upon application. There are severe criminal sanctions for foreign employees working illegally in Malaysia and their employers.

An employer who employs a foreign employee should furnish the nearest office of the Director General of Labor with such employee’s particulars in the manner determined by the Director General of Labor within fourteen days of the employment.

\textsuperscript{11} Children and Young Persons Act, s 2(2).
\textsuperscript{12} Employment Act, Section 35. s 2 of the Employment Act defines “underground working” as any undertaking in which operations are conducted for the purpose of extracting any substance from below the surface of the earth, the ingress to and egress from which is by means of shafts, adits, or natural caves.
\textsuperscript{13} Employment Act, s 34.
\textsuperscript{14} Immigration Act of 1959/1963 (“Immigration Act”), s 66.
\textsuperscript{15} Immigration Act, s 10; Employment (Restriction) Act of 1968, s 6.
The Director General of Labor may inquire into any complaint of discrimination as regards terms and conditions of employment from a local or foreign employee, and he may issue to the employer such directives as may be necessary or expedient to resolve the matter.

Employers may not terminate the employment contract of a local employee for the purpose of employing a foreign employee. Where an employer is required to reduce his workforce by reason of redundancy, he should not terminate the services of a local employee unless he has first terminated the services of all foreign employees employed by him in a capacity similar to that of the local employee.

**Transfer of Business**

The transfer of business, by sale or other disposition or by operation of law, would necessitate the termination of the employment of those affected by such transfer. There is no automatic transfer of workmen to the transferee or new owner as the workman has the right to choose his employer.16

Even if the new owner offers to continue employing the employees and no notice of termination is given by the previous owner or employer, the latter should still pay salary in lieu of notice of termination.17 The termination of employment of employees under the Employment Act requires a written notice of termination. The length of notice18 may not be less than:

- Four weeks, if the employee has been so employed for less than two years on the date on which the notice is given;
- Six weeks, if he has been so employed for two years to less than five years on such date; or
- Eight weeks, if he has been so employed for five years or more on such date.

However, the employer may terminate the contracts of employees before the expiration of the relevant notice period by paying an indemnity equal to the amount of wages that would have accrued to those employees during the unexpired term of such notice.19

For workmen who do not fall within the Employment Act, the notice period as stipulated in the employment contract would be applicable. They also will be entitled to indemnity in lieu of notice in the event that inadequate notice of termination is given.

Employees under the Employment Act are entitled to termination benefits unless the new owner offers to continue their employment on terms and conditions not

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17 Raditha Raju vs. Dunlop Estates, 1 MLJ 561 (1996).
18 Employment Act, s 12(2).
19 Employment Act, s 13.
less favorable than before within seven days of the change of ownership, and the employee unreasonably refuses such offer.\textsuperscript{20}

Where the refusal is not unreasonable, employees with a continuous contract of service with the employer for at least twelve months will be entitled to termination benefits.\textsuperscript{21} The minimum amount of termination benefits is:

- Ten days’ wages for every year of employment under a continuous contract of service with the employer if he has been employed by that employer for less than two years;
- Fifteen days’ wages for every year of employment under a continuous contract of service with the employer if he has been employed by that employer for two years to less than five years; or
- Twenty days’ wages for every year of employment under a continuous contract of service with the employer if he has been employed by that employer for five or more years and \textit{pro rata} in respect of an incomplete year, calculated to the nearest month.\textsuperscript{22}

If payment of a bonus has been contractually agreed to, then it should be paid. Benefits to be paid to workmen who are not within the ambit of the Employment Act are regulated by their respective employment contracts. All termination benefits paid should be accompanied by a written statement of the amount of benefit and the method of calculating the benefit.

**Terms and Conditions of Employment**

**Hours of Work**

Subject to certain exceptions, an employee may not be required to work: (a) more than five consecutive hours without a period of leisure of at least thirty minutes; (b) more than eight hours in a day; (c) in excess of a spread-over period of ten hours in one day; or (d) more than forty-eight hours in one week.\textsuperscript{23}

Work carried out in excess of the normal hours of work entitles the employee to be paid at a rate of not less than 1.5 times his hourly rate of pay.\textsuperscript{24} The rates increase for work and for overtime work on a rest day or public holiday.

Subject to not being required to work more than five consecutive hours without a period of leisure of not less than thirty minutes, an employee who is engaged in shift work may be required to work more than eight hours in one day or more

\textsuperscript{20} Employment (Termination and Lay-Off Benefits) Regulations of 1980 ("Employment Regulations"), reg 8(1).
\textsuperscript{21} Employment Regulations, reg 3.
\textsuperscript{22} Employment Regulations, reg 6.
\textsuperscript{23} Employment Act, s 60(A).
\textsuperscript{24} Employment Act, s 60(A)(3).
than forty-eight hours in one week, but the average number of hours worked over any period of three weeks may not exceed forty-eight hours per week.\textsuperscript{25}

Unless the work to be performed in any industrial undertaking is essential to the economy or is an essential service as defined in the Industrial Relations Act, no employer may require any employee who is engaged in shift work to work for more than twelve hours a day.\textsuperscript{26}

**Rest Day**

Every employee should be allowed a rest day of one whole day each week as may be determined by the employer.\textsuperscript{27} Where an employee is allowed more than one rest day in a week, the last of such rest days will be the legally required rest day. An employee cannot be compelled to work on his rest day unless he is engaged in work which requires that it be carried on continuously by two or more shifts, or in the following cases:

- An actual or threatened accident occurs at his place of work;
- The work is essential to the life of the community;
- The work is essential for the defense or security of Malaysia;
- Urgent work should be done to machinery or a plant;
- There is an interruption of work which was impossible to foresee; or
- Work is to be performed in any industrial undertaking essential to the economy or in any essential service as defined in the Industrial Relations Act.\textsuperscript{28}

**Public Holidays**

Every employee is entitled to a paid holiday at his ordinary rate of pay on:

- Ten gazetted public holidays in a calendar year, four of which should be the National Day, the birthday of the Yang di-Pertuan Agong (the Supreme Head of Malaysia), the birthday of the Ruler of the Yang di-Pertua Negeri (the Supreme Head of the relevant state) of the state in which the employee works (or the Federal Territory Day if the employee works in a Federal Territory), and the Workers’ Day; and
- Any day declared as a public holiday under Section 8 of the Holidays Act of 1951.\textsuperscript{29}

Before the commencement of each calendar year, the employer should exhibit conspicuously at the place of employment a notice specifying the remaining six

\textsuperscript{25} Employment Act, s 60(C)(1).
\textsuperscript{26} Employment Act, s 60(C)(2).
\textsuperscript{27} Employment Act, s 59.
\textsuperscript{28} Employment Act, s 60(A)(2).
\textsuperscript{29} Employment Act, s 60(D).
gazetted public holidays in respect of which the employees are entitled to paid holidays.

However, the employer and the employee may agree to substitute any other day or days for one or more of the six remaining public holidays, and the employer may grant the employee any other day as paid public holiday in substitution of the specified holidays.  

**Annual Leave**

An employee is entitled to paid annual leave at his ordinary rate of pay:

- Of eight days for every twelve months of continuous service with the same employer, if he has been employed by that employer for less than two years;
- Of twelve days for every twelve months of continuous service with the same employer, if he has been employed by that employer for two years to less than five years; or
- Of sixteen days for every twelve months of continuous service with the same employer, if he has been employed by that employer for five years or more.  

If he has not completed twelve months of continuous service with the same employer during the year in which his employment contract terminates, his entitlement to paid annual leave will be in direct proportion to the number of completed months of service.

**Sick Leave**

An employee should be entitled to paid sick leave at his ordinary rate of pay in the following periods:

- Where no hospitalization is necessary, a paid sick leave of: (a) fourteen days in the aggregate in each calendar year, if the employee has been employed for less than two years; (b) eighteen days in the aggregate in each calendar year, if he has been employed for two years to less than five years; or (c) twenty-two days in the aggregate in each calendar year, if he has been employed for five years or more; and
- Where hospitalization is necessary, of sixty days in the aggregate in a calendar year.  

This presupposes an examination at the expense of the employer by a registered medical practitioner appointed by the employer or, if no such medical practitioner has been appointed or if the services of the appointed medical

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30  Employment Act, s 60(D)(IA).
31  Employment Act, s 60(E).
32  Employment Act, s 60(F).
practitioner are not obtainable within a reasonable time or distance, by any other medical practitioner or by a medical officer.

Maternity Leave and Protection
Every female employee is entitled to maternity leave for a period of not less than sixty consecutive days in respect of each confinement, and to receive maternity allowance from the employer. An employer is prohibited from:

- Dismissing a female employee at any time during her maternity leave; or
- Terminating a female employee’s services if she remains absent from work within ninety days after her eligible period as a result of illness arising out of her pregnancy or confinement and rendering her unfit for work as certified by a registered medical practitioner.

Wages
There is currently no minimum wage legislation in Malaysia, but Part III of the Employment Act regulates the payment of wages. The employment contract should specify a wage period not exceeding one month and, if no wage period is specified, it is deemed to be one month. Wages should be paid not later than the seventh day after the last day of any wage period, less lawful deductions. There also are certain limitations on advances and places at which payment of wages may be made.

Discrimination
Except for Article 8 of the Federal Constitution and the provisions of the Employment Act, there is no specific legislation protecting workers against discrimination on the basis of gender, age, or race.

The main provisions of Article 8 of the Federal Constitution are as follows:

- All persons are equal before the law and are entitled to equal protection of the law;
- Except as expressly authorized by the Constitution, there should be no discrimination against citizens on the ground only of religion, race, descent, place of birth, or gender;

33 Employment Act, ss 37 and 38.
34 Employment Act, s 40(3).
35 Employment Act, s 42(1).
36 Employment Act, s 18.
37 Employment Act, s 19.
38 Employment Act, s 22.
39 Employment Act, ss 25(A) and 26.
There should be no discrimination in favor of any person on the ground that he is a subject of the ruler of any state; and

No public authority should discriminate against any person on the ground that he is a resident or carrying on business in any part of the Federation outside the jurisdiction of such public authority.

However, Article 8 of the Federal Constitution does not invalidate or prohibit:

- Any provision regulating personal law;
- Any provision or practice restricting office or employment connected with the affairs of any religion, or of an institution managed by a group professing any religion, to persons professing that religion;
- Any provision for the protection, well-being, or advancement of aboriginal peoples of the Malay Peninsula (including reservation of land) or the reservation to aborigines of a reasonable proportion of suitable positions in the public service;
- Any provision prescribing residence in a state or part of a state as a qualification for election or appointment to any authority having jurisdiction only in that state or part of it, or for voting in such an election;
- Any provision of a Constitution of a state, being or corresponding to a provision in force immediately before Merdeka Day; or
- Any provision restricting enlistment in the Malay Regiment to Malays.

Pursuant to lobbying by activists, the government launched the Code of Practice on the Prevention and Eradication of Sexual Harassment in the Workplace that took effect in 1999. The Code does not distinguish between men and women, although in reality, women are more often the victims of sexual harassment.

A group of non-governmental organizations has prepared a draft bill that proposes to eliminate discrimination involving sexual harassment in the workplace, among others, and to promote recognition and acceptance of the principle of the equality of women and men.

**Collective Bargaining and Collective Agreements**

**In General**

There are many active unions in Malaysia, most of which are national unions that represent workers in several industries.

The largest unions in terms of membership are the National Union of Plantations Workers and the All Malayan Estate Staff Union. Other larger unions include the National Union of Hotel, Bar, and Restaurant Workers and the National

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40 There are 13 states in Malaysia, namely Johore, Kedah, Kelantan, Malacca, Negeri Sembilan, Pahang, Penang, Perak, Perlis, Sabah, Sarawak, Selangor, and Terengganu.
Union of Bank Employees. It also is quite common to have “in house” unions, i.e., unions set up by the employees only within a particular company or establishment.

**Collective Bargaining**

Collective bargaining is the means of improving the terms and conditions of employment of employees in an establishment by achieving a collective agreement which sets out in writing the terms and conditions of employment for a specified period. A trade union should first be accorded recognition by the employer before it can invite the employer to commence collective bargaining.

The Industrial Relations Act provides the basic framework of a collective agreement. It stipulates that a collective agreement should be for a period of not less than three years, and that a union may not include various proposals as regards termination or transfers of an employee, which are all deemed “managerial prerogative”.

The Industrial Court has little to do with the initial collective bargaining. If the employer and the employee do not commence collective bargaining or the terms of a collective agreement cannot be accomplished, a trade dispute exists. The Director General of Industrial Relations may take such steps to bring the parties to commence collective bargaining. If such dispute is not resolved, the Minister may then refer the dispute to the Industrial Court.

A collective agreement should not contain any terms that are less favorable than or in contravention of the provisions of any law. Once the terms and conditions of the collective agreement have been concluded, a signed copy should be jointly deposited by the parties with the Registrar of the Industrial Court within one month of signing, and the Registrar will bring it to the notice of the Industrial Court for its cognizance.

**Effect of a Collective Agreement**

Section 17 of the Industrial Relations Act provides that a collective agreement which has been taken cognizance of by the Industrial Court will be deemed to be an award of the Industrial Court and will be binding on the parties and their successors, assignees, or transferees. The terms and conditions of the collective agreement will be observed unless varied by a subsequent agreement.

Once the initial or first collective agreement for three years has been agreed, the renewal of subsequent collective agreements is normally a matter of course. Each collective agreement usually provides that parties should give notice of the commencement of collective bargaining for the new collective agreement three months before the expiration of the old one.

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41 Industrial Relations Act, s 9.
42 Industrial Relations Act, s 13(3).
As the general substratum of a collective agreement is already in place, it is merely an issue of the union proposing to review the terms “upwards”, and it is rare for an employer to succeed in reviewing the terms “downwards”. An employer normally proposes for the maintenance of the status quo.

All collective agreements generally provide that pending the finalization of a new collective agreement, the old collective agreement will remain in force notwithstanding the expiration of three years.

When negotiating a subsequent collective agreement, a union usually proposes that every employee be given an immediate increment of eight per cent to thirteen per cent of the basic salary. The courts will normally award such an increment to account for inflation but are normally guided by the consumer price index in Malaysia.

While collective agreements are entered into between the national union and a particular company, cross references may be made to collective agreements entered into between another company in the same industry and the national union. This is because the Industrial Relations Act provides that the Industrial Court should have regard to public interest and on the industry concerned in handing down the terms of the collective agreement.

If a dispute arises as to the interpretation of a particular clause in a collective agreement, Section 33 of the Industrial Relations Act provides a mechanism where a party may apply to the Industrial Court for an interpretation and a decision on the question. The Industrial Court will make such interpretations after a hearing and also may vary any of the terms for purposes of removing any ambiguity or uncertainty.

Similarly, if a party does not comply with the collective agreement, a complaint in writing may be made to the Industrial Court. A hearing will be conducted and the Industrial Court may dismiss the complaint or order compliance with the collective agreement.

Worker Participation in Management

Although there is no statutory duty to do so, it is common for collective agreements to provide that any proposed changes in working conditions should be discussed with the union.

It also is common for collective agreements to provide that retrenchment exercises may only be done after consultation with the union. Collective agreements also provide for exhaustive grievance procedures to be followed.
Health and Safety at the Workplace

Occupational Safety and Health Act

The Occupational Safety and Health Act of 1994 (“Occupational Safety and Health Act”) regulates almost all industries set out in the First Schedule to the Occupational Safety and Health Act,\(^{43}\) except for most work onboard ships and the armed forces.\(^{44}\)

The Occupational Safety and Health Act provides for the establishment of the National Council for Occupational Safety and Health (“Council”), which has the power to do all things expedient or reasonably necessary for or incidental to the carrying out of the objects of the Occupational Safety and Health Act.

Employers and self-employed persons have the general duty to ensure, so far as is practicable, the safety and health of employees and others at the workplace. A breach of such duty is punishable by a fine not exceeding MYR 50,000 or imprisonment for not more than two years or both.

Part V of the Occupational Safety and Health Act provides for the general duties of persons who design, manufacture, import, or supply any plant for use at workplaces. A breach of these duties is punishable by a fine not exceeding MYR 20,000 or imprisonment for not more than two years or both.

Part VI of the Occupational Safety and Health Act provides for the general duties of employees, including taking care of themselves and others and to cooperate with their employers. A breach of these duties is punishable by a fine not exceeding MYR 1,000 or imprisonment for more than three months or both.

The employer should notify the nearest occupational safety and health office if any accident, dangerous occurrence, occupational poisoning, or occupational disease occurs or is likely to occur at the workplace.\(^{45}\) The Director General also may inquire into the nature and cause of any accident, dangerous occurrence, occupational poisoning, or occupational disease.

Upon recommendation of the Council or the Director General, the Minister may approve industry codes of practice for the proper guidance of persons in complying with the requirements of the Occupational Safety and Health Act.

Where a body corporate contravenes any provision of the Occupational Safety and Health Act or its regulations, every person who was a director, manager, secretary, or other like officer of the body corporate at the time of the commission of the offense may be charged in the same proceedings with the body corporate, and will be deemed to be guilty of the offense.\(^{46}\)

\(^{43}\) Occupational Safety and Health Act, s 1(2).
\(^{44}\) Occupational Safety and Health Act, s 1(3).
\(^{45}\) Occupational Safety and Health Act, s 32.
\(^{46}\) Occupational Safety and Health Act, s 52(1).
may be proceeded against and convicted whether or not the corporation has been proceeded against or convicted.

**Factories and Machinery Act**

The Factories and Machinery Act of 1967 ("Factories and Machinery Act") governs safety, health, and welfare in respect of factories. It requires accidents to be reported, investigations to be carried out, inquiries to be held, and criminal proceedings to be instituted. It also requires occupiers and users of factories to notify the relevant officer of Factories and Machinery appointed under the law regarding the occupation of factories and to seek his approval in respect of machinery to be installed at the factory. Persons who contravene the Factories and Machinery Act are liable upon conviction to a fine. The maximum fine is MYR 5,000 for more severe offenses, while the maximum fine is MYR 2,000 for lesser offenses. If the offense is a continuing offense, the person convicted will be (in addition to the punishment inflicted) further liable to a fine not exceeding MYR 100 for each day during which the offense continues.

**Workers’ Compensation and Survivors’ Benefits**

The Employees’ Social Security Act of 1969 ("Employees’ Social Security Act") was enacted to provide social security in certain contingencies. All employees in the industries should be insured, and both the employer and the employee should contribute thereunder. Any employee in the private sector whose wages are MYR 2,000 or less are employees for purposes of the Employees’ Social Security Act. If such employee’s salary exceeds MYR 2,000 at any time, he will remain as earning MYR 2,000 for purposes of the Employees’ Social Security Act. Under Section 15 of Employees’ Social Security Act, the insured persons or their dependents will be entitled to the following basic benefits:

- Periodic payments to the insured person in case of invalidity certified by a duly appointed medical board;
- Periodic payments to an insured person suffering from disability as a result of an employment injury sustained as an employee;
- Periodic payments to such dependents of an insured person who dies as a result of an employment injury sustained as an employee;

47 Factories and Machinery Act, s 31.
48 Factories and Machinery Act, s 33.
49 Factories and Machinery Act, Part V.
50 Factories and Machinery Act, Section 51.
• Payments for funeral benefits or expenses to the relevant person/s stipulated in Section 29 of the Employees’ Social Security Act upon the death of: (a) an insured person as a result of an employment injury sustained as an employee or while he was receiving disability benefits; (b) an insured person suffering from invalidity while receiving invalidity pension; or (c) an insured person who has not attained 55 years of age but has completed a full or reduced qualifying period for survivors’ pension;

• Periodic payments to an insured person who is receiving invalidity pension or disability benefits if and so long as he is so severely incapacitated or disabled as to constantly require the personal attendance of another person as verified by a duly appointed medical board or other specified authority;

• Medical treatment for and attendance on insured persons suffering from disability as a result of an employment injury sustained as an employee (medical benefit); and

• Periodic payments to dependents of an insured person who dies while receiving invalidity pension, or of an insured person who has not attained fifty-five years of age but has completed a full or reduced qualifying period for survivors’ pension.

Dispute Resolution

Certain employment contracts and most collective agreements lay out extensive procedures labeled as grievance procedures. The general purpose of the Industrial Relations Act clearly shows that it was the intention of the legislature that all disputes should be resolved at an administrative or executive level. Disputes by an employees’ union should be reported to the Director General of Industrial Relations, who is bound to consider the dispute and take all steps necessary or expedient for promoting its expeditious settlement.

It is thus common for employers and unionists to be summoned to the office of the Director General of Industrial Relations to resolve disputes. Only when such disputes cannot be amicably resolved by the parties is the matter referred to the Minister, who may then refer the dispute to the Industrial Court for adjudication.

A workman who considers himself to have been dismissed without just cause may lodge a written representation to the Director General of Industrial Relations, who should take all necessary steps to conciliate the dispute and settle the matter expeditiously. Only if there is no settlement is the matter referred to the Minister who may then refer it to the Industrial Court for adjudication and award.

The adjudication process at the Industrial Court is very similar to a normal civil trial, although the Industrial Court acts according to equity, good conscience,

51 Employees’ Social Security Act, ss 29(3) and (4).
52 Employees’ Social Security Act, ss 17(A)(2) and (3).
and the substantial merits of the case, without regard to technicalities and legal form. It also should have regard to the public interest, the financial implications and effect of the award on the economy and on the industry concerned, and the probable effect in related or similar industries.

Employees under the Employment Act who have complaints against an employer in respect of their wages or any other payment in cash may complain to the Director General of Labor, who then proceeds to issue a summons against the employer and conducts an inquiry in the Labor Court which is akin to a normal civil trial. While it is common for Labor Officers to try to reconcile the parties before a hearing, the Employment Act does not require a reconciliation process.

In practice, the mandatory dispute resolution procedures in the Industrial Relations Act are quite effective as a fair number of disputes do get resolved at the stage when the dispute is before the Director General of Industrial Relations. While picketing, strikes, and lockouts are recognized, there are very strict limitations set by the Industrial Relations Act.

### Termination of Employment

#### Security of Tenure

The courts recognize that the simple invoking of a termination clause in a contract of employment to terminate the services of an employee is unlawful, thus upholding the concept of security of tenure of employment. Every dismissal, if challenged by an employee, should be proven by the employer to have been carried out with just cause.

On a finding of unlawful termination, the Industrial Court may order the reinstatement of the employee with back wages and without any loss of benefit or seniority. If reinstatement is no longer viable, the Industrial Court may order compensation in lieu of reinstatement over and above the back wages awarded. Compensation in lieu of reinstatement is generally calculated based on the formula of one month’s salary for every year of service. In making monetary awards, the Industrial Court is limited as follows:

- Back wages should not exceed twenty-four months’ back wages from the date of dismissal based on the last drawn salary;
- Back wages for probationers should not exceed twelve months’ back wages from the date of dismissal based on the last drawn salary;

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53 Industrial Relations Act, s 30(5).
54 Industrial Relations Act, s 30(4).
55 Industrial Relations Act, Part IX.
56 Goon Kwee Phoy vs. JP. Coats (M) Sdn. Bhd., 2 MLJ 129 (1981); Dr. Dutt vs. Assunta Hospital, 1 MLJ 304 (1981).
57 Industrial Relations Act, s 20.
Where there is post-dismissal earnings, a percentage of such earnings, as decided by the Industrial Court, will be deducted from the back wages given; any relief given should not include any compensation for loss of future earnings; and any relief given should take into account contributory misconduct of the workman.

The function of the Industrial Court is to ascertain whether the reasons given for the dismissal or termination (if any) are proven. It cannot find reasons not relied upon by the employer to justify the termination or dismissal.58

**Just Cause or Excuse**

*In General*

A fundamental breach by the employee of the employment contract would be grounds for termination, although the common grounds for terminating an employee’s services are (a) poor performance, (b) misconduct, or (c) retrenchment. The employer has the burden of proving that he had just cause or excuse in terminating the employee’s services. The standard of proof required is on the balance of probabilities.

*Poor Performance*

If the employee is dismissed on the grounds of poor performance, the employer would have to prove the following to justify a dismissal (the “three-prong test”):

- The employee was warned about his poor performance;
- The employee was accorded sufficient opportunity to improve; and
- Notwithstanding the above, the employee failed to sufficiently improve his performance.

The test does not cover a senior staff member or professional who is aware of the standards required of him but fails to achieve them. The test is applicable across the board, including employees on probation, although it is sometimes held that the test for probationers may be a little less stringent.

*Misconduct*

The Industrial Court will uphold a dismissal based on misconduct if the employer proves that the employee committed such misconduct and the dismissal was warranted for such misconduct. The following examples of misconduct have been held by the courts to justify dismissal: (a) theft; (b) sexual misconduct; (c) habitual tardiness; (d) chronic absence from work; (e)

insubordination; (f) insolence and rudeness; (g) gross negligence; (h) assaulting or threatening a superior; and (i) disobedience of a lawful order.

If more than one employee is guilty of the same offense, a similar punishment should be meted out. The courts do not look favorably on disparity in punishment and view it as an unfair labor practice. Similarly, the courts apply the principle of condonation and will use it to strike down a dismissal as being unfair. The employer’s failure to hold a domestic inquiry or the holding of a defective domestic inquiry does not in itself nullify a dismissal.

Retrenchment

It is for management to decide on the strength of the staff which is considered necessary for efficacy in the undertaking. Retrenchment will be upheld if it is a bona fide exercise of managerial prerogative. There should be no abuse of discretion, discrimination, or capricious or arbitrary action.\(^\text{59}\)

The retrenchment of an employee can be justified if it is carried out for the profitability, economy, or convenience of the employer’s business. The service of an employee may become surplus if there was a reduction, diminution, or cessation of the type of work the employee was performing.\(^\text{60}\) In the absence of any express agreement, an employer is not required to find suitable employment for redundant workers. In effecting retrenchment, the employer should comply with the “last-in, first out” principle unless there are sound and valid reasons for departure.

Other Forms of Dismissal

Indirect Dismissal

Indirect dismissal is a form of dismissal labeled as “resignation”, such as where the employer invites the employee to resign in circumstances where it is clear that the employee will in any case be dismissed. Coercion to resign would be held as an unfair dismissal, and preparing a letter of resignation for an employee to sign and attempting to have the employee sign it can amount to an indirect dismissal.\(^\text{61}\)

Constructive Dismissal

An employee may terminate his contract of service and consider himself as discharged from further obligations if the employer is guilty of breach which affects the foundation of the contract or if the employer has evinced or shown an intention not to be bound by it any longer.\(^\text{62}\) Unlike dismissal on the grounds of

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\(^\text{59}\) Lim Sim Tiong vs. Palm Beach Hotel, Industrial Court Award Number 48 of 1974.


misconduct, poor performance, or retrenchment, the burden of proving constructive dismissal rests with the employee in that he should prove that:

- There was an actual or anticipatory breach of contract by the employer;
- The breach was sufficiently important to justify his resignation, or that it was the last in a series of incidents which justify his leaving;
- He left in response to the breach and not for some other unconnected reason; and
- He did not delay too long in terminating the contract in response to the employer’s breach (failing which he will be deemed to have agreed to vary the contract).

Unreasonable conduct of the employer will not suffice to entitle the employee to plead constructive dismissal. The breach by the employer also may be a breach of an implied term of the contract. A workman also may consider himself dismissed due to a series of actions on the part of the employer, which cumulatively amount to a breach of contract although each individual incident may not do so. In such a case, the last action of the employer which led to the resignation need not be a breach of contract.

Required Notice Periods

The simple invoking of a termination clause in a contract of employment to terminate the services of an employee (without just cause or excuse) is unlawful termination, despite the fact that the employment contract and the Employment Act expressly stipulate that the employer may terminate an employment contract by giving the requisite notice.

Termination of employment by the employer must be justified, i.e., there should be just cause or excuse. However, an employee may give the requisite notice to his employer to terminate his employment contract at any time. He also may terminate his employment immediately by making the necessary payment in lieu of notice.

A willful breach by either party will entitle the other to terminate the employment contract without notice. Where notice is necessary, the necessary notice period would have to be given to the employee. For employees within the ambit of the Employment Act, the length of notice will be the same for the employer and the employee and will be determined by a written provision for such notice in the contract of service. In the absence of such provision in writing, the notice period should not be less than:

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65 Employment Act, s 12(1).
66 Employment Act, s 13(2).
• Four weeks if the employee has been so employed for less than two years on the date on which the notice is given;
• Six weeks if he has been so employed for two to less than five years on such date; and
• Eight weeks if he has been so employed for five years or more on such date.

Either party may waive his right to a notice. An employee will be entitled to notice within the proper periods, regardless of anything to the contrary in the contract of service, when the termination of his services is wholly or mainly attributable to the following facts:

• The employer has ceased or intends to cease to carry on the business for the purposes of which the employee was employed;
• The employer has ceased or intends to cease to carry on the business in the place at which the employee was contracted to work;
• The requirements of that business for the employee to carry out work of a particular kind have ceased or diminished or are expected to cease or diminish;
• The requirements of that business for the employee to carry out work of a particular kind in the place at which he was contracted to work have ceased or diminished or are expected to cease or diminish;
• The employee has refused to accept his transfer to any other place of employment, unless his contract of service requires him to accept such transfer; or
• A change has occurred in the ownership of the business (or a part of such business) for the purpose of which an employee is employed, regardless of whether the change occurs by virtue of a sale or other disposition or by operation of law.

The notice period as stipulated in the employment contract is applicable for workmen who do not fall within the Employment Act. If a notice period is not stipulated in the employment contract, a “reasonable period”, depending on the nature of the employment, would be deemed to be the notice period required. Either party is entitled to an indemnity in lieu of notice where inadequate notice of termination is given.

**Procedures for Termination**

Under Section 14 of the Employment Act, an employee may only be dismissed after due inquiry. Due inquiry necessitates the holding of a domestic inquiry, but the non-holding of such or the holding of a defective domestic inquiry does not in itself nullify a dismissal as the Industrial Court is competent to hear the matter afresh.
Workmen who do not fall within the ambit of the Employment Act should be offered a similar opportunity to be heard in accordance with the principles of natural justice, but a failure to do so does not necessarily nullify a dismissal. However, there are arguments that the requirement to hold a domestic inquiry and the right to natural justice are contractual and fundamental or constitutional rights which should be adhered to, failing which the dismissal would be unlawful.

**Retirement, Social Security, Health Care, Pensions, and Social Costs**

**Retirement**

The compulsory age of retirement for government employees is generally fifty-eight years, although such employees may opt for early retirement (forty to fifty years of age) in certain circumstances. Such employees are paid pensions based on their last drawn salaries.

Retirement benefits, similar to retirement age, are purely contractual and are thus not mandatory. Most employers do not have retirement benefits, although an *ex gratia* payment is not uncommon. However, all private sector employees have the benefit of the Employees Provident Fund. During the tenure of an employee’s working life, both the employer and the employee are required to make contributions to the Employees Provident Fund.

For Malaysian citizens, the current rate of contribution is twelve per cent by the employer and eleven per cent by the employee based on the latter’s salary. Both the employer and the employee may opt to contribute more.

The Employees Provident Fund benefits are payable in full when the employee attains the age of fifty-five years, although partial withdrawal is allowed upon attaining the age of fifty years. Employees also are allowed to make withdrawals of up to thirty per cent of their account for the purchase of real property and ten per cent of their account for medical reasons.

**Social Security and Costs**

The employer is required to pay 1.75 per cent for the Employment Injury Insurance Scheme and the Invalidity Pension Scheme, while the employee pays 0.5 per cent of his wages for coverage under the Invalidity Pension Scheme. The rate of contribution is based on the monthly wage of the employee.

**Medical Assistance**

To a certain extent, medical assistance for the aged is related to the employee’s former employment status in that, generally, former employees from the public sector receive medical assistance at a nominal or no cost, although they should bear the costs of replacements or special orders.
Mexico

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Introduction

Government Policy

Mexico has experienced numerous significant changes as a consequence of the opening of its borders to foreign investment. Simultaneously, it also has aggressively pursued free trade agreements with numerous countries, which has led many international companies to invest, and has created greater and more diverse work opportunities for Mexican nationals.

The beginning of a new political era on 1 December 2000, when an opposition candidate assumed the presidency for the first time in Mexico’s modern history, has led to significant modernization and change in the political system and legal institutions.

Mexican labor law is historically characterized as overprotective of the workforce, both from an individual and a collective standpoint. Some suggest that companies continue to deny Mexico’s viability as a market for investment because of its antiquated labor laws.

Nevertheless, investors are increasingly being offered important opportunities, such as strong investment protection and an affordable workforce. Foreign investors are thus slowly discovering that Mexico is an attractive and viable alternative for efficient, productive, and long-term operations serving domestic and foreign markets.

The influx of foreign investment should provoke changes over time in Mexican labor law. Although these might not be as comprehensive as some foreign investors and nationals hope, they should encompass those that are essential for competing in an increasingly globalized economy.

Development of Labor Relations

Mexico first began to regulate labor relations in the nineteenth century, after winning its war of independence against Spain in 1821. Nevertheless, the Constitution of 1857 failed to consider labor relations.
It was only in 1917 that a comprehensive labor law regime was enacted, which regime was written into the Constitution of 1917. Article 123 of the Constitution of 1917 regulated the general working conditions for employees rendering “personal subordinated services”, and provided certain guarantees for employees with respect to working hours and dispute settlement. Mexico enacted its first stand-alone Federal Labor Law in 1931, which contains provisions on labor unions, collective agreements, and the right to strike.

A new Federal Labor Law (Ley Federal del Trabajo)\(^1\) was enacted in 1970, which remains to be the principal instrument governing labor relations in Mexico. Several federal regulations, the “Official Mexican Standards”, various provisions of the Social Security Law (Ley del Seguro Social),\(^2\) and various provisions of the Law of the Institute for the National Fund of Employees’ Housing (Ley del Instituto del Fondo Nacional para la Vivienda de los Trabajadores or INFONAVIT) complement the Federal Labor Law.

**Legal Relationship between Employer and Employee**

**Employment Relationship**

The Federal Labor Law governs all employment relationships in Mexico, save for those between the government and its employees. Even where there is no contract, the Federal Labor Law guarantees the employee certain basic rights and creates a minimum set of responsibilities for the employer.

In 2009, Section 15-A of the Social Security Law was amended to state that outsourcing agreements must be recorded with the Mexican Social Security Institute. The new Article also provides that the recipient of the services is responsible in a subsidiary manner for the performance of the employer’s obligations for the payment of contributions to the Institute.

Further, any individual who renders a “personal subordinated service” to another is considered an employee, regardless of how he came to render such service. Subordination is a fundamental characteristic of employment. It exists when one person is entitled to issue orders and directions to another, who is required to obey and is entitled to receive compensation.

Directors, managers, officers, and other persons who carry out direction or management activities for a company represent the employer. Where such representative enters into a written contract or other arrangement to receive personal subordinated services, such agreement binds the company in an employment relationship with the individual providing such services.

Employment relationships may be one of three categories. An employment relationship may be for a specific job or service, characterized by the nature of

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the relevant job or service for which the company contracts the employee. The employment relationship is terminated upon conclusion of the job or service.

An employment relationship also may be for a definite term, characterized by the duration for which the job or service is to be performed. Definite-term employment relationships frequently arise where there is employment substitution, such as when an employee is temporarily unable to provide his services (e.g., because of illness or pregnancy). In these cases, the employer often hires a substitute employee for a fixed term.

Finally, an employment relationship may be for an indefinite term, characterized by the lack of an express limitation on its duration. If no written provision states otherwise, labor relationships in Mexico are generally characterized as being of an indefinite term.

**Employers and Employees**

Any person willing to provide a personal subordinated service as an employee may do so, except for the following:

- He is 13 years of age or younger; or
- He is 14 to 16 years of age, but has not completed his studies as required by law (at least primary and secondary school).

The workforce is divided by law into “confidential employees” and “general employees”. Confidential employees perform activities pertaining to the company’s general management, direction, inspection, or supervision, and tend to work directly on matters of “confidence” that go to the heart of the company’s business. General employees perform more basic tasks and usually form the backbone of unions. Any individual or entity may enter into a labor relationship as an employer, subject only to specifications regarding legal capacity under civil law.

“Intermediaries” are persons who hire third parties to render personally subordinated services to an employer. Companies or individuals with sufficient resources to carry out labor obligations are not considered intermediaries, but as employers. Thus, the employer and the company or individual that benefits from the service rendered are jointly liable for any labor obligation that may exist vis-à-vis the relevant employees.

**Employment Agreement**

The terms of the employment relationship should be evidenced in writing. The employment relationship between an employee and an employer is typically created by the execution of an employment agreement or contract, while the employment relationship between an employer and a labor union is formalized by a collective agreement pertaining to all employees. The law provides default rules governing an employment relationship where the parties fail to document it.
Employment contracts should contain the following terms:

- General information regarding the employer and the employee;
- Whether the employment relationship is for a specified job or service, a specific amount of time, or an indefinite amount of time;
- Personal subordinated service to be rendered;
- Place where the service is to be rendered;
- Duration of the work shift;
- Day and place for payment of salary, as well as amount to be paid and form of payment;
- Terms of the training program(s), if any; and
- Other working conditions.  

Foreign Employees

Although Mexican employers may hire foreigners, the Federal Labor Law requires at least a nine-to-one ratio (90 per cent) of Mexican to foreign employees, except for top positions and only if no Mexican national possesses the expertise required for the service in question.

Mergers and Employer Substitutions

Employer substitutions, or actions where employees are transferred between or among employers (e.g., corporate merger), do not affect the validity of existing employment relationships.\(^4\)

The law does not require an employee to consent to the substitution of his employer, but the employer should inform the employees and/or their union, if any, in writing of the substitution.

The new employer should provide the same working conditions as the former employer, including wages, benefits, work location, and seniority. Should the new employer unilaterally change any of those conditions without employee or union consent, employees may either claim the benefit they were receiving or terminate with cause the employment relationship and demand the severance and benefits owed to them under the law.

In the six months following notice of the substitution to the employees, the former and future employers are jointly responsible for fulfilling all labor and social security obligations existing prior to the effectivity of the substitution.

Upon expiration of this period, the new employer assumes sole responsibility for labor and social security obligations to the employees.

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3 Federal Labor Law, s 24.
4 Federal Labor Law, s 41.
Terms and Conditions of Employment

Salary

The Federal Labor Law defines “salary” as the remuneration that the employer should pay to the employee for his services in the course of employment. Salary payments may be arranged by time, upon completion of specific work commitments, by commission, for a fixed sum, or in any other lawful manner.

Salary payments also must be integrated for severance purposes, so that the total amount recorded as salary includes the aggregated daily wage, bonuses, commissions or fees, housing allowance, fringe benefits, or any other non-wage benefit assigned to the employees in exchange for their services.

The minimum wage, which is the minimum amount of cash or currency that an employee should receive for services rendered over the course of a working day, also is set by law. It is set annually at a level sufficient to satisfy a family’s “normal” needs by a national commission composed of government representatives, employers, and employees.5

The minimum wage varies according to geographic zones, reflecting the cost of living of each zone. For example, more expensive industrial cities are classified in a higher minimum wage zone than less industrialized rural areas. Still, the Federal Labor Law provides that for equal positions and equal conditions with equal efficiency within the company, the employee is entitled to equal salary.

Working Hours and Compensation

Work shifts should not exceed eight hours for the day shift, seven hours for the night shift, and 7.5 hours for the “mixed” shift (a combination of day and night shifts). The night hours in a mixed shift should not exceed 3.5 hours; otherwise the shift will be considered a night shift.

Further, every working shift should have a leisure period of at least 30 minutes. If employees are not allowed to leave the employer’s facilities during such period or if it is of only 30 minutes, its duration shall be considered as time actually worked. Regardless, it is common for employees to be granted more than 60 minutes a day as leisure period. It is important to consider that recent court precedents have established that if employees are not granted with more than 60 minutes per day as leisure period (with the ability to leave the employer’s facilities, if so desired), such time should also be considered as part of the continuous work shift, which may imply the payment of overtime. The employer also should grant the employee at least one day of paid rest, calculated at the daily wage, for every six working days. The employer and employee may

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5 However, it is difficult to calculate the “normal” needs of a family, and even more so with the economic crisis. Although the minimum wage is increased annually, it is generally insufficient to provide for the “normal” family’s needs. Nonetheless, it is very unlikely that the commission will increase the minimum wage to meet these needs, because the increase would have to be considerable.
decide to adjust the employee’s working hours to allow for additional rest, but working shifts should not exceed the limits set by law. The parties may agree to allocate maximum weekly work shifts in fewer days to allow additional rest time for employees. The employer should calculate as overtime those hours worked in excess of the limits set for working shifts, for which the employee is entitled to a 100 per cent increase in his hourly wage.

The Federal Labor Law permits only three hours of overtime per working shift and three of such working shifts per week. Still, an employee may exceed nine hours of overtime per week (“extraordinary” hours), and is entitled to triple his hourly wage.

Employees who regularly work Sundays as part of their labor agreement also are entitled to a premium of twenty-five per cent above their normal salary. An employee who works on his day off should receive a 200 per cent premium above his normal salary.

**Vacations and Legal Holidays**

After their first full year of employment, employees may request up to six working days of paid vacation. In the first four years, paid vacation time increases by two days per year. After the fourth year of employment, vacation periods increase by two days for every five years of employment.

Paid vacation is calculated as the employee’s salary plus a twenty-five per cent vacation premium. However, most union contracts negotiate even higher vacation bonuses. Substituting payment for vacation time is expressly prohibited by law. Thus, an employee may not forgo vacation time in exchange for remuneration. Companies also usually allot a greater number of vacation days and higher premiums to employees in higher positions.

The law sets a minimum number of mandatory holidays and a minimum vacation premium. However, employers may give their employees additional days off in excess of the federally mandated holidays and those provided in the collective agreements with labor unions.

**Discrimination**

**In General**

Section VII of the Constitution provides that equal work should receive equal pay, while the Federal Labor Law prohibits the creation of distinctions between

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6 The obligatory holidays are: (a) 1 January; (b) every first Monday of February, in commemoration of the Constitution; (c) every third Monday of March, in commemoration of Benito Juarez; (d) 1 May; (e) 16 September; (f) every third Monday of November, in commemoration of the Mexican Revolution; (g) every presidential inauguration, occurring on 1 December every six years; (h) 25 December; and (i) special dates as designated by the electoral laws.

7 Federal Labor Law, s 56.
or among employees on account of race, sex, age, religion, political affiliation, or social status.

**Discrimination Based on Gender**

Men and women are entitled to the same rights in the employment context, but the equality provided for by law is not necessarily reflected in practice. The National Institute on Statistics, Geography, and Information has found that women hold only 35.3 per cent of positions in the manufacturing industry and that 63 per cent of employers pay higher salaries to male employees.

Nevertheless, special treatment is afforded by law to pregnant employees. Pregnant women may not work under hazardous conditions or perform industrial tasks during the evening or during extraordinary hours. They also are entitled to 12 weeks' maternity leave, with six weeks prior to the child's birth and six weeks after. This period may be extended if there is a justifiable cause.

The Constitution and the Federal Labor Law provide that the employer should pay the employee's full salary while on maternity leave, but the Mexican Institute of Social Security (Instituto Mexicano del Seguro Social) assumes such obligation if the employee is registered as required by law.

The Federal Law to Prevent and Eradicate Discrimination was enacted as an effort to suppress discrimination in Mexico. This law applies to private and public (governmental) relationships and is important primarily for its legal and moral principles, rather than as a source of regulatory provisions. Such Law defines a discriminatory measure as "any distinction, exclusion or restriction based on national or ethnic origin, gender, age, disability, social or economic condition, health condition, pregnancy, language, religion, opinion, sexual preferences, civil status or any other, which restraints or invalidates the recognition or exercising of rights as well as actual equal opportunity among individuals. The Law established the National Commission for the Prevention and Eradication of Discrimination, whose purpose is investigating complaints regarding potential cases of discrimination. If a private employer allegedly causes the discrimination, the employer’s participation on the conciliation process is voluntary. However, if the discrimination act was allegedly committed by the federal government or one of its agencies, the conciliation process is mandatory. The criminal penalty for discrimination on the workplace based on the Criminal Code for Mexico City is either from one to three years of prison or a fine from between 25 and 100 days of the minimum wage.

The Federal Labor Law does not directly regulate sexual harassment. The only reference to sexual harassment in the law is found in the Criminal Code (Código Penal para el Distrito Federal), which provides that any person who sexually harasses another by taking advantage of a higher position of authority in an

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8 Constitution, art 4.  
employment relationship increases the penalty of sexual harassment (one to three years of imprisonment) by one-third. However, sexual harassment is punishable only where it results in actual damage, and the offender can only be prosecuted at the instance of the injured party. Nevertheless, an act of sexual harassment may constitute sufficient grounds (i.e., “just cause”) to terminate an employment relationship, insofar as it shows a failure of integrity in the course of service.

**Discrimination Based on Age**

The employment of minors is regulated by the Federal Labor Law, which requires their working shifts to be within certain reduced hours. Minors may work more than six hours a day, but a six-hour shift should be divided into at least two periods of three hours, with an obligatory rest period of one hour.

Minors may not render overtime or extraordinary hours, and may not work on Sundays and legal holidays. The law also prohibits minors from 14 to 16 years of age from work that:

- Affects their morality or good conduct;
- Requires their presence in places that serve intoxicating beverages for immediate consumption;
- Is itinerant, except with the special authorization of the labor authorities;
- Is underground or underwater;
- Is dangerous or unhealthy;
- Exceeds their physical strength or may hinder or retard normal physical development;
- Requires their presence in non-industrial establishments after ten o’clock in the evening; and
- Such other occupations as determined by law.

**Discrimination Based on Physical or Mental Handicap**

No specific regulation exists in dealing with handicapped employees. However, Sections 498 and 499 of the Federal Labor Law require employers to reinstate an injured employee in the position he held prior to any accident suffered in the course of his work.

If the harm suffered is such that the employee can no longer perform his job, the employer should relocate him to a new position that he is fully capable of performing.

**Discrimination Based on Race, Nationality, and Religion**

No individual may be barred from employment on account of race, religion, or political affiliation; the aforementioned provisions regarding discrimination are
also applicable on this section. Constitutional restrictions govern the composition of an entity’s workforce with respect to nationality.

Section 154 of the Federal Labor Law also requires employers to hire a Mexican national instead of a foreigner where both are equally qualified.

**Collective Bargaining**

**In General**

An employee should be affiliated with a labor union to be able to participate in collective bargaining activities. Labor unions are the only entities authorized to enter into collective bargaining agreements on behalf of their employee members. They also are responsible for ensuring compliance with such agreements.

**Labor Unions**

The Federal Labor Law defines a “union” as an association of employees or employers established for studying, improving, and defending their members’ interests. Although Article 123 of the Constitution guarantees the right to defend interests through unionization, employers’ unions are rare in Mexico. Employers usually join other types of employers’ associations to further their interests, but these constitute *de facto* unions in practice. These employers’ associations lead discussions on behalf of their members whenever multiple unions and employers come together to negotiate a collective agreement within an industry (collective agreement or *contrato ley*).

The Constitution and the Federal Labor Law grant employees (except “confidential employees”\(^{10}\)) the right to decide whether to join a union. However, this freedom is commonly breached by exclusion and separation clauses written into almost all collective bargaining agreements.

Exclusion clauses require employees to join the union prior to being hired, while separation clauses require the employer to fire any employee expelled by the union and free the employer from liability in such event.

Groups that wish to be constituted as unions should register as such with the Ministry of Labor or the corresponding local Conciliation and Arbitration Board (“Board”). Registration depends on the activity or line of business developed by the union, thus the right to form a union may be denied if the group:

- Does not pursue a legal or feasible purpose;
- Does not possess the minimum membership required by law (i.e., 20); or
- Does not include the required documentation in its application.

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\(^{10}\) These are employees who are prohibited from unionizing because of the confidential nature of their services, e.g., top management.

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The following documents and information should be included in the application for union status:

- The name and domicile of the entities where the group’s members are employed;
- A copy of the group’s bylaws;
- A copy of the minutes of the group’s organizational meeting; and
- A copy of the minutes of the meeting in which the group selected its board of directors and officers.

The union’s main goal is to protect the collective and individual interests of its members. Thus, it is responsible for policing compliance with collective bargaining agreements. Unions may not deal with religious matters or perform commercial activities for profit. A union’s only lawful income is derived from the contributions of its members and, in some cases, contributions from the company where its members are employed.

Unions have historically played an important role in Mexican politics, but this role has diminished in recent years as Mexico has made the transition to a fully functioning democracy.

Unions may enter into relationships with other unions to form federations or confederations, which should likewise be registered. The registration requirements for federations and confederations are the same as those for individual unions.

A union may be dissolved by a vote of two-thirds of its members, or upon the expiration of its term as stipulated in its bylaws. Its registration may be canceled upon its dissolution or failure to comply with any legal requirement.

**Collective Bargaining Agreements**

Collective bargaining agreements are entered into by one or several employees’ unions or their associations, and one or several employers or their associations, for the purpose of establishing working conditions in one or more enterprises or establishments.\(^1\)

An enterprise may operate without a collective bargaining agreement. However, if its employees unionize, they may demand the protection of a collective bargaining agreement and the employer is required by law to execute one with the union. The terms of the collective bargaining agreement extend to all persons working at the enterprise or establishment, even if they are not union members, provided that no exclusion or separation clauses exist. The collective

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11 “Enterprise” refers to production or distribution of goods or services, while “establishment” refers to a branch, agency, or similar unit that forms part of the institution undertaking the enterprise.
The collective bargaining agreement should be in writing and filed with the proper Board. It may not provide working conditions less favorable to employees than those provided in the Federal Labor Law.

Employees’ wages are subject to annual review, while collective bargaining agreements are subject to global review every other year. Formally, the union should request such reviews. It should give 30 days’ notice for wage reviews and 60 days’ notice for global reviews.

A majority of Mexican industries have entered into collective bargaining agreements. “White unions”, or unions that tend to avoid creating major difficulties for the employer, sometimes execute such agreements. By contracting with a white union, the employer avoids the risk that a more active union intervenes to obtain control over the administration of another collective bargaining agreement.

Nevertheless, it is not uncommon that employees governed by a collective bargaining agreement with a friendly union initiate a lawsuit (“union certification procedure”) before the Labor Board to change unions to an active union, which must prove to be actually representing the majority of the unionized employees. In most cases, the active union displaces the white union.

**Law Collective Agreement**

A law collective agreement (contrato ley) refers to an employment contract entered into by (a) one employees’ union and several employers or employers’ unions, (b) one employer and several employees’ unions, or (c) several employees’ unions and several employers or employers’ unions.

The purpose of law collective agreements is the establishment of minimal working conditions for a branch of industry that are then declared obligatory in one or several states and/or in one or several economic zones. Law collective agreements may even cover the entire geographic territory of Mexico.

Unions representing at least two-thirds of unionized employees in a particular branch of industry are allowed to request permission from the proper labor authority to execute a law collective agreement. If the labor authority assents, it gives notice to both the labor union and the affected employers, who then choose representatives to attend a hearing chaired by the labor authority.

As with other collective bargaining agreements, the law collective agreement may establish exclusion or separation clauses. The union representing the largest number of employees is responsible for ensuring industry compliance with the law collective agreement.

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12 Federal Labor Law, s 148.
In the event of a discrepancy between prior collective bargaining agreements and the law collective agreement, the latter will apply. Law collective agreements are subject to a global review every two years, and wages are subject to revision every year.

Only a few law collective agreements exist on some industries. This is because they have become obsolete, as they tend to establish the same conditions for all industries covered by the agreement. Such conditions are often too burdensome for small companies.

**Unionization**

A company may only execute one collective agreement with a single union, but employees may decide to change their affiliation to another union. To do so, the employees should file a special lawsuit (“union certification procedure”) before the Labor Board, which determines by special vote which union is favored by a majority of the employees.

Employee non-affiliation with a union has several advantages. First, the company can avoid reviewing wages annually and contracts every two years, as well as the call to strike that usually accompanies the review process associated with union contracts.

Second, employees are less likely to make collective demands for increased benefits because they are less organized.

Finally, the company may hire personnel freely where employees are not affiliated with a union. Unions frequently include a clause in collective bargaining agreements stipulating that the union will assume responsibility for supplying all of the employer’s employees.

However, employee non-affiliation with a union also has several disadvantages. First, the advantages of non-affiliation may be ephemeral. Two employees agreeing to affiliate with a union are sufficient for such union to demand that the employer negotiate a collective bargaining agreement.

Such demands are generally accompanied by a call to strike, which can occur although a majority of employees does not support the union movement. Where the union movement does have employee support, the collective bargaining agreement will likely reflect terms and conditions acceptable to the union. Non-affiliation also leaves a company open to the influence of individuals who advise employees to form company unions solely for them to obtain personal advantage.

Second, any union may petition the Labor Board to force a company to execute a collective agreement with the union, even if the union does not have the employees’ support. If no settlement is reached, the union may issue a call to strike.

Third, it is often advisable that companies seek out an industry union in light of the risks of non-affiliation, as industry unions are amenable to accepting a
contract prepared by the companies. The risk that employees form or join a union without the employer’s knowledge or control, which always carries the risk of a call to strike to force the execution of a contract, also is reduced.

Finally, unionized employees are usually easier for an employer to communicate with, although an employer’s authority to direct and administer his employees is not undermined nor enhanced in the eyes of the law because such employees are affiliated to a union with which a contract has been executed.

**Internal Work Regulations**

Internal work regulations refer to obligatory provisions governing employees and employers with regard to the enterprise or establishment. They may relate to matters such as entry or exit times, days and location for receiving payment, permits and licenses, safety measures and instructions, medical examinations, and disciplinary process for employees, among others. Employers are required to have internal work regulations.

A mixed commission of employee and employer representatives helps develop internal work regulations, regardless of whether the employees are unionized. Employees should be able to freely choose their representatives on the commission.

Internal work regulations should be filed with and approved by the Board to be valid and effective. Copies also should be distributed to the employees and posted in visible places throughout the workplace.

Internal work regulations tend to protect the employer, but not all companies have internal work regulations. Most companies have internal policies, which are not the same as internal work regulations. Thus, if the Labor Authorities inspect the enterprise and find that there are no internal work regulations, the employer may be fined.

**Health and Safety in Workplace**

The Constitution, the Federal Labor Law and its regulations, and the Official Mexican Standards require the employer to observe certain rules of hygiene and safety in business establishments and to adopt adequate measures to prevent and address workplace accidents.

Employers and employees are required to jointly organize a mixed commission for health and hygiene, composed of an equal number of persons representing the management and employees. The commission is responsible for investigating the causes of accidents and illnesses in the workplace and for proposing mechanisms to prevent accidents and to ensure compliance with safety requirements. If the Labor Authorities inspect the employer and find that there are no commissions, the employer may be fined.
Employers are liable for work-related accidents and illnesses. In principle, the employer should provide appropriate indemnification for each accident or illness resulting in an employee’s temporary or permanent handicap or death.

Employees, including those that have outside medical insurance or other healthcare, should be affiliated with the Mexican Institute of Social Security (IMSS). IMSS is a cradle-to-grave institution that functions as a social safety net, providing everything from emergency care to child day care for affiliated individuals.

**Employees’ Compensation and Survivors’ Benefits**

The IMSS assumes the care of employees in case of occupational injury or illness, other illness, maternity, handicap, old age, retirement, and death. It finances its programs and services through fees that are jointly borne by employers, employees, and the government.

In exchange for affiliating their employees and paying the appropriate fees for their care, employers are released from their duty under the Federal Labor Law to provide indemnity for accidents and illnesses (“work risks”) suffered by their employees while performing their job or while in the workplace.

Each employee who suffers injury or illness has the statutory right to receive the necessary medical care, surgery, rehabilitation, hospitalization, medication, prosthetic and orthopedic assistance, and indemnification for any handicap suffered. His heirs also receive indemnification in case of his death.

The Federal Labor Law requires the employer to reinstate any employee who has suffered a work-related injury, where the employee is capable of performing his prior duties and provided that he returns within a year of the injury.

However, if the employee suffers a total and permanent handicap for which he received full indemnification, the employer should offer him another job commensurate to the duties he is capable of performing. The Social Security Law provides that an employee affiliated with the IMSS who suffers an injury is entitled to the following cash compensation:

- Where the employee is unable to work because of a work-related injury, he is entitled to 100 per cent of his salary that is on record with the IMSS at the time of the injury;
- Where the employee suffers a total and permanent handicap, he is entitled to a monthly pension as determined by the IMSS; and

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13 Constitution, art 123, s XIV, sub-para A.
14 “Accidents” refer to all physical injury or illness, immediate or delayed, or death that occurs in connection with employment. “Illnesses” refer to all pathological conditions that arise in connection with something to which the employee has to be continuously exposed in the workplace.
Where the employee suffers a partial and permanent handicap, he is entitled to a pension in accordance with an evaluation schedule and calculated on the same basis as that used for total and permanent handicaps.

In the case of a work-related death of an employee who is not affiliated with the IMSS, the Federal Labor Law requires his widow, widower, children under the age of 16, or other persons financially dependent on him to be paid an indemnification equivalent to two months’ salary to cover funeral expenses and an additional 730 days of salary.

The Board is responsible for determining which persons are entitled to receive such indemnity. However, if the deceased employee is affiliated, the IMSS will assume the responsibility of paying the beneficiaries’ pension.

Section 64 of the Social Security Law also provides that those persons entitled to indemnity should receive an amount equivalent to 60 days of minimum wage, payable on the date of death, to cover funeral expenses.

The surviving spouse also is entitled to a pension equal to 40 per cent of that which would have been paid in the event of permanent and total handicap, while the surviving children are each entitled to a pension equal to 20 per cent of that which would have been paid in the event of permanent and total handicap.

To receive this pension, surviving children should be younger than 16 years old, or younger than 25 years old and continue to study in public schools. The employer will absorb the cost of indemnification if he is not registered with the IMSS or if he did not affiliate the employee.

**Dispute Resolution**

**In General**

All individual or collective disputes arising from labor relationships between the employer and the employee or between the employer and the labor union should be resolved before the Boards or Courts that exist at the federal and local levels.

The Ministry of Labor controls the federal Boards, while state governments control the local Boards within their jurisdictions. Each Board’s authority over a particular employer corresponds to the enterprise’s activities.

Article 123 of the Constitution and Section 527 of the Federal Labor Law list those industrial branches and services that are subject to the federal Boards’ jurisdiction. All other industries are subject to the jurisdiction of local Boards.

Local Boards have their own procedural rules and regulations for individual and collective disputes distinct from those set forth in the Federal Labor Law for the federal Board.

However, as the Federal Labor Law applies throughout Mexico, local Boards should still ground their resolutions therein.
Individual Disputes

Individual disputes generally arise when an employee files a claim against an employer with the proper Board. Filing a claim initiates an “ordinary” procedure, which is frequently referred to an internal branch of the federal or local Board with specialized expertise pertaining to the employer’s industry, or the employer or defendant’s particular work activity (the “Special Board”).

The Special Boards are formed by the following representatives: (a) a government representative who generally serves as the president; (b) an industry representative appointed by companies engaged in the industrial activity corresponding to the Special Board; and (c) a union representative elected by a labor union in the same industrial branch.

After the Special Board receives the claim containing the employee’s allegations, it sets a day and time for a hearing for specific phases (i.e., conciliation, claims and answering such claims, objections, and offering and accepting of evidence).

During the hearing, the Special Board seeks to facilitate a settlement between the employer and the employee. The settlement usually consists of the employer paying compensation in exchange for the employee’s withdrawal of his claim. There are no specific rules and no set amounts for settlement.

If the parties fail to settle, the lawsuit proceeds into its second phase, where each party states its claims and answers the claim or objections. The employee may ratify, clarify, or make further claims and the employer may challenge these. The parties then proceed to offer evidence to support their claims and objections.

After introducing evidence, the parties are given time to file their arguments. The record is then submitted to an officer of the Special Board for preliminary judgment.

If at least two of the Special Board’s three members concur, the preliminary judgment is approved and becomes the final decision on the case. The members of the Special Board should then sign the judgment and notify each of the parties.

The parties have a 15-day window within which to file a constitutional suit (amparo) before the Circuit Collegiate Tribunal challenging the decision. The Circuit Collegiate Tribunal that receives the appeal will decide if the resolution of the Board is valid or not.

At present, the Circuit Collegiate Tribunals only receive the written record and written arguments for each side.

15 This challenge is the Mexican equivalent of an appeal, but is distinct insofar as the appeal should argue that something about the Special Board’s treatment of the case was unfounded in or contrary to the Constitution and/or the Federal Labor Law.
Collective Conflicts

Lockouts
A lockout is a temporary suspension of operations by the employer such that the employees cannot work. The Federal Labor Law permits lockouts that are not attributable to the employer and caused by:

• Acts of God or force majeure;
• The scarcity of raw materials that is not brought about by the employer;
• A production surplus brought about by economic and market conditions;
• A temporary and obvious lack of profitability in the company’s operations; or
• Failure to obtain earnings from the business’ normal operation.

The proper Board should be notified of the intended lockout and its causes. It will then deliberate whether to allow the company to proceed with the lockout. If the Board approves the lockout, it should fix the compensation payable to the employees.

An unjustified suspension of the employees’ work is tantamount to an unjustified termination of the labor agreement, which will entitle the employees to severance packages and other benefits.

Strikes
A strike is any collective temporary suspension of work by employees. Strikes are justifiable by law where the goal is to:

• Harmonize the rights of the employees and the employer;
• Obtain acceptance or revision of the collective bargaining agreement;
• Secure the execution or revision of the law collective agreement;
• Demand execution or compliance with the collective bargaining agreement or the law collective agreement;
• Demand performance of the legal provisions governing profit sharing;
• Support another strike that shares any of the goals listed herein (i.e., a solidarity strike); or
• Demand revision of contract wages.

Only the labor union that negotiated the employees’ collective bargaining agreement may call a strike. It should give notice of the strike to the employer, including a list of its demands, the goal of the strike, and the exact date and time when work activities will be suspended.

Once a strike notice has been given to the employer, any and all action against the employer’s assets should be suspended. Attachment, repossession, eviction, or any other action brought against the company’s assets is forbidden.
The labor union also should file a copy of the strike notice with the proper Board at least six days prior in the case of private companies, and at least 10 days prior in the case of public services. Within the 48 hours following receipt of notice, the employer should file a written answer with the Board. The Board will then conduct a conciliation hearing.

The employees should appear at the conciliation hearing to proceed with the strike. The employer also should appear, otherwise the strike notice remains in full force and effect. This pre-strike period may be extended at the request of the labor union, but the strike will take place if no settlement is reached during this stage.

During a strike, the employees should bring any ships, aircraft, trains, buses, or other means of transportation *en route* to their last scheduled destinations. For strikes affecting hospitals, clinics, and similar establishments, patients should continue to receive care until transferred to another location.

A minimum number of employees as determined by the Board also should continue working in activities that would cause severe problems or compromise the safety or well-being of the workplace, machinery, equipment, or raw materials, or the resumption of suspended business activities. The employer may hire substitutes should the striking employees refuse to perform these activities.

The Board may refuse to approve a strike if it fails to meet the requirements in the Federal Labor Law. The employees should then return to work within 24 hours, otherwise their employment relationships are terminated and the employer is free to hire new employees.

It is illegal for employees to strike in a number of cases, such as when a majority of the striking employees engage in violent acts against the employer or his property, or where the employees work in government establishments or shops during wartime. If the Board declares a strike illegal, the strikers’ employment relationships are automatically terminated.

**Termination of Employment**

**Individual Employment Relationships**

The Federal Labor Law allows both the employee and the employer to rescind the employment relationship at any time, and without incurring liability if there is a justified cause. Under Section 47 of the Federal Labor Law, the following are the justified causes for which employers may rescind agreements with their employees:

- When the employee deceives the employer, such as where an employee was chosen by the union on the basis of false certificates or references attributing capacities, aptitudes, or abilities to the employee that he did not possess. This cause of termination may no longer be exercised after the first 30 days of employment.

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• Where the employee, in the course of his employment, engages in conduct that reveals a lack of integrity or honesty. This includes committing acts of violence and directing threats of injury or ill treatment against the employer, his family, or the supervisory and administrative personnel of the enterprise or establishment, except in case of provocation or self-defense.

• The employee commits any of the acts specified in the second item, above, against fellow employees, causing disruption in the workplace.

• The employee, while not in the course of his employment, commits any of the acts referred to in the second item, above, against the employer, his family, or any supervisory or administrative personnel, rendering impossible any continued employment relationship.

• The employee intentionally causes physical damage to the buildings, work product, machinery, instruments, raw materials, or any other thing related to his employment or in the course of his employment.

• Where the employee unintentionally causes the physical damage referred to in the fifth item, above, provided that such damage is serious and caused by his negligence.

• The employee, because of imprudence or inexcusable carelessness, endangers the safety of the establishment or the persons therein.

• The employee engages in immoral acts in the establishment or workplace.

• The employee reveals manufacturing secrets or discloses exclusive matters to the detriment of the enterprise.

• The employee is absent for more than three times within 30 days, without the employer’s permission or just cause.

• The employee disobeys the employer or his representatives in the course of employment and without just cause.

• The employee refuses to adopt preventive safety measures or to follow procedures for avoiding accidents and illness.

• The employee arrives to work inebriated or intoxicated as a result of alcohol, a narcotic substance, or other debilitating drug, except for medical prescriptions. However, the employee should inform the employer of the issue and present the doctor’s prescription as evidence before beginning work.

• The employee is ordered to serve jail time without the possibility of appeal, making him unable to fulfill his work commitment.

• For any analogous cause (i.e., of equal seriousness, having similar consequences, and for reasons pertaining to the course of employment).

The employer should give the employee a written notice of termination indicating the date of termination and the cause. If the employee refuses to accept such notice, the employer should notify the proper Board of such refusal within five days, and provide it with the employee’s last registered address so that the Board may deliver the notice of termination.
The employer’s failure to deliver notice to the employee or to the Board renders the termination unjustified. The employer’s right to terminate an employee for cause should be exercised within 30 days from the date on which the cause for termination becomes known to him. The employer has the burden of proof in the case of termination of the delivery of the aforementioned notice and of the justified cause of termination. Any employer may terminate an employee without just cause by paying full severance. Under Section 51 of the Federal Labor Law, the following are the causes that allow the employee to terminate his employment without liability:

- The employer or association to which the employer belongs made a deceptive offer as to working conditions, on the basis of which the employee accepted employment. This cause of termination should be exercised within the first 30 days of employment.
- The employer, his family, or supervisory and administrative personnel fail to treat the employee with integrity or honesty in the course of employment, or if they act violently, threaten, insult, or engage in ill-treatment or other similar conduct that harms the employee or his family (e.g., spouse, parents, children, or siblings).
- The employer, his family, or other employees engage in behavior prohibited in the second item, above, outside of the workplace, where such behavior is so serious as to render impossible the continuation of the employment relationship.
- The employer inappropriately reduces the employee’s wages.
- The employer fails to pay the employee on the agreed upon or customary date or place.
- The employer maliciously damages the employee’s work tools or implements.
- A grave risk to the safety or health of the employee or his family exists, such as the lack of hygienic conditions in the establishment or noncompliance with preventive safety measures required by law.
- The employer, through imprudence or inexcusable carelessness, endangers the security of the establishment or of the persons within.
- For any analogous cause (i.e., of equal seriousness, having similar consequences, and for reasons pertaining to the course of employment).

If the Board determines that the employer terminated the employment relationship without cause, the employee is entitled to full restoration of his prior position. Alternatively, the employee may choose to receive three months’ salary as severance payment and his salary for the period between the date of termination and the date of the Board’s decision that the termination was unfounded.

If an employee requests reinstatement and the employer refuses, the employee is entitled to his severance package plus the equivalent of 20 days’ salary for every year of employment with the employer. He also will receive a seniority
premium, constituting 12 days’ salary per year worked at a rate twice the minimum wage, effective as of the date of termination. Irrespective of whether the termination is with or without cause, the employee is entitled to receive any unpaid salaries for work completed prior to the termination date, as well as unpaid vacations, vacation premiums, Christmas bonuses, and other fringe benefits.

**Collective Employment Relationships**

When working relationships are terminated as a consequence of a company’s closure or downsizing, the Federal Labor Law provides that the following constitute justified causes for collective termination:

- Acts of God or *force majeure*, including the employer’s physical or mental incapacity or death;
- A notable and clear lack of profitability from the company’s operations; and
- Depletion of the enterprise’s primary material in the case of an extractive industry, or lawful bankruptcy or reorganization at the authorities’ direction.

The Board’s prior approval is necessary for the employer to assert a collective termination cause. Where the employer collectively terminates employment relationships, employees are entitled to three months’ salary as severance payment and to their seniority premium.

When employees are terminated because of downsizing as a result of the introduction of new machinery or procedures, dismissed employees are entitled to four months’ severance pay, 20 days’ salary for each year worked, and the seniority premium. There is no public unemployment insurance in Mexico.

**Retirement Benefits and Pensions**

The IMSS provides elderly and retired workers and their families pension, medical assistance, family payments, and additional benefits. Family payments include family expenses incurred by the dependents of the retiree, while additional benefits include payments where the retiree’s physical condition requires permanent or temporary assistance from a third party.

To qualify for old age benefits, an individual should be at least 65 years old and have made social security contributions for at least 1,250 weeks. To collect retirement insurance, the insured should be at least 60 years old, should have made social security contributions for at least 1,250 weeks, and should be unemployed. Retirement insurance provides the same benefits as old age insurance, and a recipient ordinarily may not draw from both.

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16 This number is calculated as the cumulative sum of weekly contributions made by all those employers for which an individual has worked during his lifetime.
The old age or the retiree’s pension, including family and additional assistance, may not be less than 100 per cent of the minimum wage for the Federal District. The pension also may not exceed the funds accumulated by the individual in his retirement account.

The pension should be reviewed each year, and the amount should be increased commensurate to the consumer price index. If an individual receiving an old age or retirement pension performs work covered by the social security regime, this suspends his pensions except in certain cases.

For instance, the individual may continue receiving a pension if he works for a different employer upon claiming his benefits and if more than six months have elapsed between the granting of the pension and his current employment.

If the retiree moves abroad, the pension is suspended during his absence from the country unless otherwise provided for in an international treaty. However, if he shows that his foreign residence will be permanent, the IMSS may deliver his payments in two installments over the course of a year. All future benefits expire with these payments.

**Summary of Social Costs**

The Social Security Law basically covers workmen’s compensation, illness, maternity, disability and life insurance, retirement and old age pensions, children’s day care centers, and other social benefits.

Obligatory contributions from employees, employers, and the government finance the IMSS’ operation. The employer is required by law to withhold his contribution and that of the employee and to pay these to the IMSS on a monthly basis, subject only to the limitations set forth in Article 27 of the Social Security Law.

Calculations for all contributions to the IMSS are based on the employee’s integrated salary (i.e., the sum total of wages, benefits, and bonuses), capped at 25 times the minimum daily wage in effect for the Federal District. The single exception is for disability, old age, and death insurance, which is currently capped at 10 times the minimum daily wage for the Federal District.

**Workmen’s Compensation for Occupational Hazards**

**In General**

In principle, employers are directly liable for any occupational hazard suffered by employees. However, the acts of affiliating employees with the IMSS and paying monthly contributions as required release employers from such liability.

Should the employer fail to register his employees, or if the IMSS’ coverage does not extend to the geographic location of the employees’ workplace, the
employer should assume the costs of providing his employees all social security benefits as required by law. There are two basic types of occupational hazards:

- Professional accidents, which are organic injuries or functional disturbance, whether occurring immediately or subsequent to the course of employment. They also include death, occurring suddenly in the course of employment or as a consequence thereof, irrespective of the place and time it occurs. They likewise include accidents occurring when the employee is en route to and from work.
- Professional illnesses, which include any pathological condition having its origin in continual exposure to something as a result of the employee’s work or presence in the workplace.

Employees suffering accidents or illnesses due to an occupational hazard are entitled to receive the following services from the IMSS:

- Medical, surgical, and pharmaceutical attention;
- Orthopedic equipment and prosthesis; and
- Rehabilitation.

The employer pays workmen’s compensation contributions for this section in their entirety. The amount contributed depends on the level of risk involved in carrying out the company’s activities, as measured in part by the number and seriousness of associated accidents and illnesses, and on the total amount of integrated salary received by the employee. The higher the risk, the higher the amount the employer is required to contribute.

### Illnesses and Maternity

The IMSS generally provides the employee with medical, surgical, pharmaceutical, and hospital attention for illnesses. For pregnancies, the IMSS provides the mother with obstetric attention, in-kind assistance during the first six months of lactation, and a bassinet for the newborn child. These benefits are available to employees and their relatives who have been registered with the IMSS. Contributions for this coverage are subject to the following provisions:

- For each insured employee, the employer pays a daily contribution equivalent to 3.5 per cent of the minimum daily wage for the Federal District.
- If the base salary of any insured employee exceeds three times the minimum daily wage for the Federal District, the employer should pay an additional contribution equivalent to six per cent of the minimum daily wage for the Federal District, while the employee should pay an additional amount equivalent to two per cent of the difference between the base salary and three times such minimum daily wage.
- The federal government initially pays a monthly contribution for the insured party equivalent to 13.9 per cent of the minimum daily wage for the Federal...
District. This amount is revised and increased on a quarterly basis in accordance with variations in the National Price Index.

- Additional benefits for illness and maternity insurance are calculated based on a contribution of one per cent of the base salary and are allocated as follows: (a) employers pay 70 per cent; (b) employees pay 25 per cent; and (c) the federal government pays the remaining five per cent.

Disability and Life Insurance
Contributions for disability and life insurance made by the employer amount to 1.75 per cent of the base salary, while those made by the employee amount to 0.625 per cent of the base salary.

The federal government contributes an additional contribution equal to 7.143 per cent of the employer’s aggregate contribution.

Retirement, Early Retirement, and Old Age Pensions
The contributions for retirement and old age pensions are computed as follows:

- Employers pay the entirety of retirement contributions, equivalent to two per cent of the base salary.
- Employers and employees both pay old age pension contributions, equivalent to 3.15 per cent and 1.125 per cent of the base salary, respectively.
- The federal government pays 7.124 per cent of the aggregate employer’s contribution for old age pensions.
- Additionally, the federal government initially contributes an amount equivalent to 5.5 per cent of the minimum daily wage for the Federal District for each computed base salary on a monthly basis. This contribution is revised and increased on a quarterly basis in accordance with the National Price Index.

Retirement fund management companies, such as the Administradoras de Fondos para el Retiro (AFOREs) and the Sociedades de Inversión Especializada en Fondos para el Retiro (SIEFOREs), manage the money collected from these contributions. Both companies are regulated by the Retirement Systems Coordination Law and supervised by the National Retirement Funds Systems Commission (CONSAR).

Day Care for Female Employees’ Children
Mothers are entitled to receive day care services for their children during the workday, with the entire amount of contributions supporting such services being paid by the employer. Such contributions amount to one per cent of the employee’s integrated salary.

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Low-Cost Housing Fund

INFONAVIT is geared towards facilitating low-interest credit or loans to Mexican employees for acquiring, constructing, and/or remodeling their homes. Like the IMSS, the employer largely finances INFONAVIT’s activities, as he should contribute five per cent of every employee’s base salary to INFONAVIT.

This obligation is triggered by approval of a loan to an employee by INFONAVIT, at which point his employer is required to deduct these contributions from his salary to account for the loan.

Protection of Employees’ Personal Data

Even though the Federal Labor Law does not establish a specific provision on the matter, our Federal Constitution establishes the right of personal data protection. The Federal Law for the Protection of Personal Data in the Possession of Private Parties (Ley Federal de Protección de Datos Personales en Posesión de los Particulares) effective on 6 July 2010, sets forth that all personal data processing or treatment (gathering, disclosure, storage, and use) is subject to the consent of the individual to which such data belongs, unless such processing is contemplated within one of the exceptions provided by the Law.

The term “personal data” shall include any information pertaining to a natural person that is identified or identifiable, whereas “sensitive personal” data shall be considered such personal data regarding or affecting the most intimate aspects of a natural person’s identity, or information that may have discriminatory effects or created serious risks for a natural person if put to unlawful use.

In general terms, there are two main obligations under the aforementioned Federal Law that must be observed by the employer as data controller: i) the need to deliver a privacy notice to the data subject (employees), which must comply with specific requirements, and ii) the creation of a personal data department, which will promote the protection of personal data within the private entity and represent the private entity if an application for access, rectification, cancellation, or objection of personal data is filed by the data subject with the employer or before the data protection authority (Federal Institute for Access to Public Information and Data Protection). The employer should also take the necessary measures to secure the protection of its employees’ personal data.

The corresponding authority may inspect and sanction employers for not complying with these privacy protection obligations.

According to the law, the noncompliance with privacy obligations will trigger fines that vary from 100 to 320,000 minimum wages in Mexico City (MXN$6,233 pesos to MXN$19,945,600 pesos) or even doubled in case of sensitive personal data.
Such law even includes certain conduct that could be considered as criminal offenses, such as, causing a security breach affecting the databases under a person’s custody for profit or if, with the aim of achieving an unlawful profit, a person processes personal data deceitfully, taking advantage of an error of the data owner or the person authorized to transmit such data.

**Conclusion**

The Federal Labor Law is the principal law governing labor relations in Mexico. It has been amended various times, with the most important amendments occurring in 1980. It is possible that it will only be partially amended in the near future, as several aspects of Mexico’s labor laws have become more developed than those of other countries.

Mexican labor laws will be the subject of intense discussions and analysis in the near future, which will determine the new direction of labor relations in light of globalization. The federal government has even proposed labor law reforms, which points to the emergence of a new labor culture in Mexico.
The Netherlands

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Introduction

Dutch employment law is heavily regulated and very specific. It differs in many ways from other employment laws in the world. Its provisions are more protective towards employees than towards employers, which is based on the principle that employees by definition have a weaker economical position than employers. The Dutch legislator continues to aim at balancing this inequality between employees and employers, by granting employees a strong legal position.

Dutch employment law is set out in many separate statutes. Chapter 10 of Book 7 of the Civil Code can be regarded as the base code setting out Dutch employment law, but other Acts are equally important and relevant, such as the Act on Collective Bargaining Agreements, the Works Councils Act, the General Act on Equal Treatment, the Unemployment Act, the Notification of Collective Dismissals Act, and the Decree on Labor Relations. In addition, Dutch employment law contains many provisions implemented pursuant to European Union (EU) law. Specialized courts deal with employment law disputes and published case law constitutes an important additional pillar in the framework covering Dutch employment law.

Legal Relationship between Employer and Employee

Definition of Employment Agreement

Dutch law states that an employment agreement is an agreement under which one party (the employee) undertakes to perform work in the employment (i.e., at the instructions) of another party (the employer) during a certain period of time and in exchange for wages. Substance over form applies; for example, an independent contractor can be qualified by a court as an employee if the facts would warrant such a qualification.

Given this statutory definition, an employment agreement can be concluded verbally or in writing, so that any such agreement can be implied as well as express. A written (express) agreement may take the form of a formally drafted agreement or a letter signed by both parties. In either case and pursuant to
European Directive 91/533, the employer is obliged under Dutch law to inform the employee in writing of (at least) the following:

- The parties’ identities and place of residence;
- The work location(s);
- The start date;
- A description of the role of the employee or the nature of said role (job title);
- Confirmation of the normal working hours per day or week, the initial base salary and other wage components, eligibility for or method of calculating the number of holidays, and the applicable notice period;
- Whether the employee will participate in a pension scheme;
- Whether a collective bargaining agreement applies; and
- If the employment agreement has been entered into for a fixed period: the duration thereof.

Dutch law contains a legal presumption which provides that a relation between parties qualifies as an employment agreement in the event that a person, during a consecutive period of three months, performs work for another person or a legal entity against payment of a financial contribution and such work is carried out on a weekly basis or during at least 20 hours in a period of one month. The interested party may state facts in an effort to invalidate this presumption.

In addition to this rebuttable presumption, Dutch law contains a presumption, stating that where an employment agreement has lasted at least three months, the contracted work is assumed to amount to at least the average working hours per month in the three preceding months.

**Definition of Employer and Employee**

The employee is always a person, while the employer is usually a legal entity (but can be a person as well).

**Other Contractual Relationships and Workers Other Than Employees**

Distinct from employees within the meaning of Chapter 10 of Book 7 of the Civil Code are categories such as civil servants, apprentices and temp workers. Specific rules apply to such categories of workers and their contractual relationships.

The same applies to foreign workers and to managing directors. Under current Dutch law, managing directors have a dual legal relation with their employer: an employment relation as set out above as well as a corporate relation with the legal entity to which specific corporate law applies.

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1 European Directive of 14 October 1991 on an employer’s obligation to inform employees of the conditions applicable to the contract or employment relationship.

(Release 1 – 2012)
Impact of Transfer of Undertaking on Employment Agreements

In General

European Directive 2001/23/EC on the approximation of the laws of the Member States relating to the safeguarding of employees’ rights in the event of transfers of undertakings, businesses, or parts of undertakings or businesses has been implemented into Dutch law in Articles 662–666 of Book 7 of the Civil Code.

The key test to establish whether there is a transfer of undertaking, which will result in a transfer by operation of law of employees together with their unchanged terms and conditions of employment, is whether there is a transfer of an economic entity that retains its identity after such transfer. This is determined both by the continuation (by the acquiring party) of the same activities and by continuity of the manner in which the work of the entity is organized, its operating methods, or the operational resources available to it. In order to establish whether or not there is a transfer of undertaking, the following circumstances are assessed:

- The type of economic activity conducted by the undertaking or business;
- Whether or not tangible and intangible assets are transferred;
- The degree of similarity between the activities carried on before and after the transfer;
- The type of activity carried on by the undertaking; and
- Whether customers transfer.

The type of economic activity carried out by the undertaking is an essential element as this determines the relative weight to be given to the other factors mentioned above. All aspects are relevant in order to assess whether or not a transfer of undertaking takes place, but, depending on the type of activity, some aspects are given more weight by the European Court of Justice than others. If activities are primarily based on workforce (labor-intensive activities) and the acquiring company takes over a major part of the workforce in terms of skills and numbers, this shall normally result in the maintenance of the identity of the entity. If the activities are based mainly on assets (asset intensive activities) and the acquiring party takes over such assets that are indispensable for the provision of the activities, this shall normally result in the maintenance of the identity of the entity, even if a major and essential part of the staff has not been taking over.

“Taking over” assets by the acquiring company may take place by an actual transfer of assets, but also can take place by simply being able to use such assets. Although the legal concept of a transfer of undertaking is, as said, based on European Directive 2001/23/EC and to a large extent given substance by case law of the European Court of Justice, there are various issues which are somewhat typical for the Dutch situation, of which we will give a few examples below.
**Information Obligations**

The information obligations of the employer towards its transferring employees in principle take place through the works council, as a transfer will usually be a legal ground for an advisory right of the works council. If there is no works council, there is a statutory obligation for the employer to inform the transferring employees timely regarding the intended decision to transfer, the date of transfer, the reasons for the transfer, the legal, economical and social consequences of the transfer, and any measures considered in this regard.

Furthermore, even if there is a works council, the Supreme Court has held that the employer needs to inform his employees fully regarding the legal consequences of a transfer of undertaking.

**Objecting Employees**

Under Dutch law, a transferring employee does not have a formal right to object to a transfer. An express objection will result in an automatic termination of his employment agreement at the transfer date. Alternatively, the transferring employee could try to request a court to dissolve the employment agreement with his new employer due to the fact that the transfer had a negative affect on the conditions of employment (e.g., increased travel time).

**Seconded Employees**

It is quite common in The Netherlands that employees are employed by one group company (the “formal employer”), but are, in practice, seconded to another group company (the “physical employer”). For years, it has been the subject of debate whether seconded employees transfer if a transfer of undertaking takes place at the physical employer.

The European Court of Justice finally decided that employees who are permanently seconded within a group also transfer out of the physical employer, if a transfer of undertaking takes place at the physical employer. This ruling has provided some clarity, but points of debate still remain, for instance, when a secondment should be considered to be permanent and which types of employment are captured by this.

**Typical Employment Conditions**

Terms and conditions of employment that are deemed to be typical for the old employer (*bedrijfsgebonden arbeidsvoorwaarden*, e.g., a mortgage discount granted by a bank to its employees), in principle, transfer to the new employer as well. It has been held in case law that only under the circumstances of a specific case could this be deemed to be unacceptable given the principles of reasonableness and fairness, but this is a strict legal test that is not easily met. In practice, new employers often provide for alternative conditions of employment or other forms of (financial) compensation.
Collective Bargaining Agreements

Rights and obligations of transferring employees under a collective bargaining agreement transfer to the acquirer. These rights and obligations end in case after the transfer the acquirer is bound by a new collective bargaining agreement or a collective bargaining agreement that is declared generally binding to his industry, or if the collective bargaining agreement expires.

Under Dutch collective bargaining law, this can result in various complications, ranging from the possibility of cherry picking by a transferring employee who also is bound by the collective bargaining agreement of the acquirer (due to membership of the contracting trade union), to the “after-effect” of collective bargaining agreements which can cause a situation in which a transferring employee who does not become bound by the collective bargaining agreement of the acquirer (due to non-membership of the contracting trade union) can continue to claim the rights and obligations of the transferor’s collective bargaining agreement.

In practice, acquirers often attempt to harmonize the rights and conditions of transferring employees by means of a collective bargaining agreement.

Pension

Under certain circumstances, the acquirer of the undertaking does not need to continue the transferring employees’ pension scheme, these being:

- The acquirer may offer the same pension scheme to the transferring employees which it has offered to its own employees prior to the transfer (even if it is financially less attractive);
- If the acquirer is obliged by law to participate in an industry-wide pension fund, the transferring employees will participate in that fund as well; and
- A different arrangement is agreed upon in a collective bargaining agreement.

Works Council

The Dutch legislator has not implemented Article 6 of European Directive 2001/23/EC on the preservation of the status of employee representation in case of a transfer of undertaking, as the legislator considered it to be clear that a works council either transfers (in case of a transfer of undertaking) or not.

This, however, ignores issues such as what happens in case of a transfer of part of an undertaking or what happens if the acquirer already has a works council. This is generally considered to be an omission of the legislator, especially after recent case law from the European Court of Justice on the subject.

In practice, to solve this issue the acquirer, transferor, and the works councils involved often agree an interim arrangement until elections for a new, combined works council at the acquirer have taken place.
Terms and Conditions of Employment

In General

The freedom of parties to determine the content of their employment agreement is restricted to a large extent under Dutch law, given the extensive number of mandatory provisions (from which deviations are not permitted) and semi-mandatory provisions (from which deviation is only permitted based on a collective bargaining agreement or regulation by or on behalf of an administrative body authorized for that purpose) in Chapter 10 of Book 7 of the Civil Code.

Various other Acts in The Netherlands also directly or indirectly influence the contents of an individual (or collective) employment agreement, such as the Minimum Wage and Minimum Holiday Allowance Act (Wet Minimumloon en minimumvakantiebijslag), the Continued Payment of Wages during Illness Act (Wet loondoorbetaling bij ziekte), and the Work and Care Act (Wet Arbeid en Zorg).

Minimum Wage and Minimum Holiday Allowance

On the basis of the Minimum Wage and Minimum Holiday Allowance Act, all employees aged 23 and older are entitled to a gross minimum wage per month and a minimum holiday allowance of eight per cent of their regular base salary. Employees younger than 23 are entitled to a certain percentage of this minimum wage. An employer and employee can validly agree that the holiday allowance is included in the employee’s salary, if the employee earns more than three times the minimum wage.

Continued Payment of Wages during Illness

Under Dutch law, the employer is obliged to continue to pay employees who are absent due to illness at least 70 per cent of their regular daily wage with a maximum of 70 per cent of the maximum daily wage (as of January 2012, €191.82 gross) and for a period of two years (104 consecutive weeks). In practice, it is not unusual for employers to have agreed on paying ill employees 100 per cent of the full monthly wage during the first 52 weeks of illness and 70 per cent during the following 52 weeks. Collective bargaining agreements commonly contain such additional obligations for employers.

If the illness has been caused deliberately by the employee, or for the period during which his recovery is impeded by his own actions, or if he refuses to perform other suitable work, the employee is, in principle, not entitled to continued payment of wages during illness. The employee and the employer are obliged to ensure that the employee can return in his role within the company. If the employee fails to fulfill these (statutory) obligations, this may result in payments being halted or in dismissal. If the employer fails to fulfill his reintegration obligations, an extension of the obligation to continue to pay the
wage in the event of illness may result. After 104 weeks of illness, the employee may be entitled to a disability benefit.

**Work and Care**

On the basis of the Work and Care Act, female employees are entitled to pregnancy leave and maternity leave amounting to a total of 16 weeks. Adoption entitles the employee to leave for four consecutive weeks in an 18-week period. During pregnancy leave and maternity leave or adoption leave, the employee is entitled to social security.

In addition, the Work and Care Act grants employees (both male and female) the right to unpaid parental leave for caring for his child below the age of eight. In that case, the employment agreement must have been in force for at least one year. If an employee commences a family-law relationship with more than one child at the same time, the employee will be entitled to leave with respect to each of those children.

Collective bargaining agreements sometimes provide for paid parental leave. In addition, the Works and Care Act provides for several other types of leave of absence, such as calamity leave and short- and long-term care leave in order to allow the employee to take care of family members.

**Trial Period**

Parties to an employment agreement may agree on an initial trial (probationary) period in writing only. The length of the trial period must be the same for both the employee and the employer. The statutory maximum trial period for an indefinite-term employment agreement is two months. For a fixed-term employment agreement, it is one month if the agreement covers a period of less than two years, and two months if the agreement covers a period of two years or more.

Deviations to the detriment of the employee are only possible pursuant to an applicable collective bargaining agreement. If the maximum trial period is exceeded, the trial period is invalid (void) altogether. During the trial period, either party may terminate the employment agreement at any time without observing a notice period and without any liability for severance pay, unless the termination is, for instance, based on discriminatory reasons, in which case the employee can initiate legal proceedings against the employer. At the employee’s request, the employer must provide the reasons for termination of the employment agreement during the trial period.

**Restrictive Covenants**

Employment agreements often contain restrictive covenants imposing obligations on employees relating to confidentiality, non-solicitation, and non-competition (during the employment and after the termination thereof). Such
covenants are often combined with penalty clauses and these covenants and penalty clauses are generally enforceable in The Netherlands. The only rule under Dutch law to validly restrict an employee from accepting competing employment after the termination of the employment agreement is that the non-competition clause must be agreed upon in writing and signed by both parties and the employee must be at least 18 years of age at the time of signing.

When a non-compete covenant clearly sets out the scope of the prohibited activities, a reasonable geographical scope, and a reasonable and specified applicability period (ranging from a number of months to sometimes several years), such covenants will usually be upheld by Dutch courts save for specific individual circumstances.

A request for enforcement of a non-competition clause by the employer may be restricted or denied by the court. The court may deny the request of the employer to enforce the non-competition clause if an employee will become too restricted in finding a new job by the non-competition clause. A non-competition clause may become invalid if the responsibilities ensuing from the employee’s position are substantially amended in the course of employment and such amendment creates an obstacle for the employee to find a new suitable position elsewhere.

Holidays
Under Dutch law, the statutory minimum holiday entitlement per year amounts to four times the number of working hours per week (e.g., a minimum of 20 holidays in case of a full-time job). Collective bargaining agreements and individual employment agreements often contain more substantial entitlements (25 days being the generally accepted minimum for full-time jobs). The employer is obliged to allow his employees to actually use up the minimum number of holidays each year.

The period in which holidays are taken must be determined in accordance with the employee’s request, unless the employer can demonstrate that substantive reasons prevent taking up vacation days in that specific period. In consultation with the employee, the employer is entitled to amend a holiday period already determined, but only in case of substantive interests and whilst being obliged to compensate the employee financially for any damages incurred.

As a result of a 2009 ruling by the European Court of Justice (in joined cases C-350/06 and C-520/06), pertaining to holiday entitlements in case of illness, Dutch legislation relating to holiday entitlements has been amended with effect from 1 January 2012 to reflect that holiday entitlements continue to be accrued during periods of absence due to illness.

In addition, one of the recent changes is that the entitlement to the minimum number of holidays lapses after six months following the year of accrual, unless the employee has not reasonably been able to use up said holidays, in which case these days lapse after five years. Entitlements to vacation days above the said
statutory minimum lapse after five years following the year of accrual. All holidays (minimum and above) accrued prior to 1 January 2012 lapse five years following the year of accrual.

**Adjustment of Working Hours**

The Adjustment of Working Hours Act (*Wet aanpassing arbeidsduur*) grants employees who have been employed by a company for at least one year, the right to request adjustment (i.e., an increase or a reduction) of the number of working hours. Such a request can be filed once every two years. The employer must discuss the request with the employee and is obliged to approve it, unless substantial business/company related interests preclude such approval.

The Act sets out various examples of when interests qualify as such. Deviating from these rules is possible by collective bargaining agreement, by written agreement with the works council, or by ministerial decree, but only with regard to an increase of the working hours (i.e., not a reduction).

**Unilateral Modification of Terms and Conditions**

The employer can contractually reserve the right to unilaterally amend the terms and conditions of employment, and invoke such right in the event that there are such circumstances that the interests of the employer outweigh the interests of the employee. A positive advice of a company’s works council is usually an indication for a court that there are such circumstances. In case a “unilateral change” is not included in the employment agreement, it becomes more difficult for an employer to change the terms and conditions of employment.

According to the Supreme Court, unilateral change clauses are primarily aimed at collective changes and the absence of such a clause should result in the necessary negotiations with the individual employees. In these negotiations the employer and employee need to conduct themselves as a “diligent” employer and employee. When assessing whether a “diligent” employer should accept a change, it should be determined whether the employer, as a “diligent” employer, had sound reasons for such a change. If that is the case, it should then be determined whether the acceptance of the employer’s reasonable proposal could in all reasonableness be expected from the employee.

In case of collective changes, in the absence of a unilateral-change clause, an employer will generally need to demonstrate that it would be unacceptable to continue the current terms and conditions under the standards of reasonableness and fairness or that there are unforeseen circumstances, which are both strict tests.

**Foreign Workers**

With the exception of certain categories of foreigners, being mainly foreign nationals of member states of the European Economic Area, a foreigner will
require a working permit in order to be able to work in The Netherlands. Working permits are issued by a semi-governmental agency, the UWV, which also deals with social security and notice permits.

In addition, resident permits may be required for foreign workers, which are issued by the immigration service (IND). Obtaining such permits is subject to various statutory requirements. Various exceptions also apply; for instance, a work permit may not be required for short business meetings, and it is generally easier and quicker to obtain the necessary permits for “knowledge migrants” who earn above a certain salary threshold.

**Employment Agreements Subject to Foreign Law**

Directive 96/71/EC on the posting of workers has been implemented into Dutch law by means of the Act on Cross-border Work (*Wet arbeidsvoorwaarden grensoverschrijdende arbeid*). Essentially, the Act ensures that certain essential statutory obligations of Dutch employment law apply to employees who work in The Netherlands, but whose employment agreement is subject to foreign law.

The obligations, for instance, relate to holidays, equal treatment, health and safety, and minimum wage and minimum holiday allowance. Collective labor agreements that have been declared generally binding also will apply to the extent they are more favorable.

Furthermore, European Council Regulation 593/2008 (Rome I) puts a number of restrictions on applicable foreign law for employees who work in The Netherlands, as a choice for foreign law may not result in the loss of rights which cannot be deviated from under Dutch law, and a choice of law cannot set aside mandatory provisions of Dutch law (such as the general requirement to have a notice permit before notice is given).

**European Rules on Remuneration in the Banking Sector**

According to the European Parliament and European Council, excessive and imprudent risk-taking in the financial sector has led to the failure of individual financial institutions and systemic problems in member states and globally. While the causes of such risk-taking are many and complex, there is agreement between supervisors and regulatory bodies, including the Group of 20 (G-20) and the Committee of European Banking Supervisors (CEBS), that the inappropriate remuneration structures of some financial institutions have been a contributory factor.

European rules on remuneration have been implemented through European Directive 2010/76/EU (CRDIII). These rules affect the financial sector. The rules aim to “transform the bonus culture and end incentives for excessive risk taking”. Similar European rules on remuneration are due to be implemented in 2013 through AIFMD that will affect alternative investment fund managers, and through CRDIV.

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CRDIII is the third amendment to the Capital Requirements Directive which, among other things, sets out requirements on remuneration for the financial sector. These specific rules relating to remuneration have been implemented into Dutch law by the Decree on Controlled Remuneration, which came into force on 1 January 2011.

In short, the Decree on Controlled Remuneration aims at ensuring that a financial undertaking’s (FU) remuneration policy complies with and contributes to a reliable and efficient risk control, whilst the remuneration policy does not encourage taking more risks than acceptable for the FU. In addition, the FU’s remuneration policy must be compliant with the business strategy, objectives, values, and long-term interests of the FU, whilst covering measures to avoid conflicts of interests.

**Corporate Governance Code**

*In General*

In addition to the statutory provisions of the Civil Code mentioned above, various codes aimed at self-regulation have been introduced in The Netherlands, of which the Corporate Governance Code is widely recognized as the most relevant Code. Other codes include the Banking Code and the Insurance Code.

Like the other Codes, the Dutch Corporate Governance Code (the “Code”) contains principles and best practice provisions relating to good corporate governance, for example, on remuneration. Dutch-listed companies are required to comply with the Code, but this obligation is of a “comply or explain” nature. The Code does not qualify as binding law. Deviations are therefore allowed, and in practice frequently occur, provided that a sound explanation is provided for any deviation or non-compliance in the management report contained in the company’s annual report.

The Code, however, assumes that Dutch-listed companies will apply its best practice provisions or explain non-compliance. Dutch-listed companies are required by law to include a statement on corporate governance in their annual reports. As such, the Code has gained a basis in Dutch law, without currently qualifying as binding law.

In practice, the Code is followed closely by Dutch-listed companies, in light of the increasing pressure from society (politics, media) on good corporate governance. At the same time, deviations from the Code’s principles as well as its best practice provisions are not uncommon.

The Code’s principles, however, continue to be regarded as reflecting the general views on good corporate governance, which enjoy wide support. The Code’s principles and best practice provisions are written for the members of the management (or executive) board in a typical two-tier board structure. One must assume that they also apply to the executive board members in a one-tier board structure.
**Clawback of Bonuses**

The Code prescribes that the supervisory board of a company should be able to recover from regular management board members any variable remuneration awarded on the basis of incorrect financial or other data (clawback provision) or to adjust the value downwards or upwards if a variable remuneration component conditionally awarded in a previous financial year would, in the opinion of the supervisory board, produce an unfair result due to extraordinary circumstances during the period in which the predetermined performance criteria have been or should have been achieved (*malus* provision).

A legislative proposal on the adjustment and clawback of bonuses is pending in Dutch parliament. If the legislative proposal is adopted in its current form, the following will apply:

- The legislative proposal stipulates that the corporate body responsible for determining the remuneration has the right to adjust variable pay to an appropriate level, if payment of the variable pay would be unacceptable according to the standard of reasonableness and fairness (*Malus*) and to recover (clawback) variable pay to the extent that it was paid on the basis of incorrect information regarding the achievement of the relevant targets or the occurrence of certain events to which the variable pay was directly connected.

- The concept of variable pay covers any part of the remuneration, whether in the form of cash, shares, or rights pertaining to shares, that is directly connected to certain performance criteria or targets or to the occurrence of certain events.

At this stage, it is unclear if and when the legislative proposal will come into force. The Dutch Government aimed for the legislative proposal to come into force on 1 January 2012, but the legislation process has been substantially delayed.

**Discrimination**

**In General**

Based on several European Directives, non-discrimination obligations are laid down in the General Act on Equal Treatment (*Algemene wet gelijke behandeling*), the Act on Equal Treatment of Men and Women (*Wet gelijke behandeling van mannen en vrouwen*), the Act on Equal Treatment of Age within Employment (*Wet gelijke behandeling op grond van leeftijd bij de arbeid*), the Act on Equal Treatment based on handicap or chronic illness (*Wet gelijke behandeling op grond van handicap en chronische ziekte*), and the Civil Code.

Under these various acts an employer is not allowed to discriminate on the basis of religion, personal belief, political orientation, race, gender, nationality, sexual
orientation, civil status, disability, age, part-time employee status, and fixed term employee status when it concerns, amongst others, an offer of employment, the termination of employment or terms and conditions of employment.

Discrimination can be either direct or indirect. Indirect discrimination can be objectively justified in case it is proportionate and contributes to a legitimate aim. Some other limited exceptions are also possible, for instance, under certain conditions women may be privileged above men to reduce their under-representation in a company.

Employees who believe they have been discriminated can decide to either file a claim in court, or file a complaint with the Equal Treatment Committee (Commissie Gelijke Behandeling). The Equal Treatment Committee rules on whether or not equal treatment legislation has been breached, but cannot award damages and its rulings are not binding to a court (in case of a follow-up court case). Employees who claim they have been discriminated may in any case not be prejudiced by the employer.

Other Legislation

The Governance and Supervision Act (Wet bestuur en toezicht) is expected to enter into effect in 2013. The Act contains a “women quota”, meaning that the board and supervisory board of an N.V. or B.V. company need to consist of at least 30 per cent women and 30 per cent men. Non-compliance with this requirement will result in the obligation to explain this in the company’s annual accounts, but will not result in any legal sanctions.

Equal work in principle should be equally paid, unless it can be objectively justified. This principle follows from the general obligation under Dutch employment law to act as a “diligent employer”. However, the Supreme Court has ruled that even if equal work is not paid equally and there is no objective justification, this does not automatically mean it is not allowed. There is only a right to equal pay if the difference in pay is of such a nature that it is unacceptable under the standards of reasonableness and fairness, which is a strict test.

Collective Bargaining

In General

An employer can be bound on several grounds by a collective bargaining agreement, i.e., an agreement between a company and a trade union or between an employer’s association and a trade union on terms and conditions of employment based on the fact that he is a contracting party to the collective bargaining agreement, because he is a member of the employer’s association who is a contracting party to the collective bargaining agreement, or because a collective bargaining agreement has been declared generally binding to his industry (algemeen verbindend verklaard). In the latter case, if the employer
falls within the scope of application of the collective bargaining agreement, he is obliged by law to apply it.

Dutch employment law makes a distinction between those employees who are a member of the trade union who is a party to the applicable collective bargaining agreement (“bound employees”) and those who are not (“unbound employees”). Individual terms and conditions of employment that are in conflict with terms and conditions in the collective bargaining agreement are legally void when it concerns bound employees.

Furthermore, all provisions of the collective bargaining agreement apply to the employment relationship with bound employees. In respect of unbound employees, however, the employer is obliged to observe his obligations under a collective bargaining agreement as well, but the employee cannot himself enforce terms and conditions in the collective bargaining agreement that are in conflict with his individual terms and conditions of employment; only the contracting trade union can. In addition, the provisions of a collective bargaining agreement do not automatically apply to their employment relationship.

Given that in various industries the number of bound employees is relatively low (and employers do not know which employees are trade unions members as this is sensitive personal data), employers frequently incorporate the collective bargaining agreement within the individual employment agreement, in order to ensure that the collective bargaining agreement applies to their employees.

**Collective Bargaining Agreements**

A collective bargaining agreement can have a minimum or a standard character, i.e., it either lays down a minimum that the employer and employee can deviate from in the employee’s favor or a standard framework that cannot be deviated from at all.

Collective bargaining agreements are commonly agreements setting out all the terms and conditions of employment for a certain period of time, but also can be social plans (in case of restructurings), harmonization plans (to harmonize different sets of employment terms and conditions, for instance, after a transfer of undertaking), or consist of an obligation to pay an amount to an educational fund set up for a specific industry.

When a collective bargaining agreement expires and is not replaced by a new one, it can have a so-called “after-effect” (nawerking) if it concerns a bound employee, meaning that the terms and conditions of the collective bargaining agreement remain intact (do not lapse), but the employer and employee are free to agree on different terms and conditions on an individual basis.

This does not apply to unbound employees, but the collective bargaining agreement will continue to apply to them if it has been incorporated in their individual employment agreement. A collective bargaining agreement that has been declared generally binding to an industry in principle does not have an
“after effect”. When the expired collective bargaining agreement is replaced by a new one, this does not automatically end the “after effect” of the old collective bargaining agreement; unless the new collective agreement says differently (or has a standard character), bound employees can claim provisions of the old collective bargaining agreement which were more favorable than the provisions in the new collective labor agreement.

**SER Merger Code**

In case of a transfer of ownership concerning at least one company in The Netherlands with 50 or more employees, or concerning a company which is part of a group with a Dutch company with 50 or more employees, there is an obligation under the SER Merger Code (*SER-besluit Fusiegedragsregels 2000*) for the employer to notify the trade unions involved and the Social Economic Council before agreement is reached on this transfer of ownership.

This obligation does not apply if the company whose ownership transfers employs 10 or less employees, or if the transfer cannot be considered to be part of the Dutch jurisdiction. The trade unions need to be informed of the motivation for the transfer, any plans in respect of policy and social, economical, and legal consequences, and any measures considered in this regard. The opinion of the trade unions needs to be requested at such a time that their opinion can still influence the transfer and the conditions of the transfer.

Furthermore, the works council should be able to study their opinion before they render their advice. A violation of this obligation can result in a public ruling by a disputes committee.

** Strikes and Industrial Action**

Dutch law contains no statutory right of employees to strike. The right to strike is therefore based on the European Social Charter, which right is acknowledged by the Supreme Court. If a collective action is covered by the European Social Charter, this is, in principle, considered to be a justified action, despite the damage that this may cause to the employer and others.

A court will assume that the trade union and its members have a justified interest to carry out their strike. Unless there are special circumstances, a court will not evaluate whether one party or the other is right in respect of the conflict that causes the strike. In order for a court to rule that a strike is nevertheless not justified, an employer will need to show that severe procedural rules have been breached or that the trade unions and its members in all reasonableness could not have come to this collective action. These procedural rules include that a strike can only be justified if it is used as a means of “last resort” and has been timely announced. This announcement aims to prevent unnecessary damage to the company and the protection of the interests of those who use the services of the employer.
The question whether a strike is used as a “last resort” will be looked at by a court with restraint, as it is a fundamental right of a trade union and it is difficult for a court to assess especially given the limited timeframe which is usually available for a court decision. The question whether or not the trade unions and its members in all reasonableness could not have come to a collective action is a question of proportionality that will depend on the interests of the parties involved in a specific case, and will also not easily be assumed.

For instance, a strike of a ship towing company in the Rotterdam harbor was considered not to be allowed as refineries threatened to shut down and environmental damage could be caused. A strike also may not be possible in case of so-called “peace obligations” in a collective bargaining agreement, which obliges the parties to the collective bargaining agreement to refrain from strikes.

An employee who strikes is not entitled to his wages, but the employer is not allowed to punish him otherwise (unless the strike was forbidden by court or exceeds reasonable boundaries). An employer is not allowed to break a strike by using outside employees to replace striking employees.

**Works Councils and Employee Participation in Management**

Under the Works Councils Act, companies with 50 or more employees must establish a works council. Part-time employees and temp-workers who have worked at the business for at least 24 months also count for this threshold. The purpose of the Works Councils Act is to promote consultation between management and employees with regard to the business and policies of the company. The members of the works council are chosen directly by the employees from among their own ranks.

The number of members usually varies from three to 25, depending on the number of employees of the company. One of the members is appointed as a chairperson. A managing director may not be a member of the works council. The works council has no executive power and, in general, may only advise management in connection with the company’s business. The management of the company and the works council must meet at least twice a year.

During such meetings, discussions about subjects concerning the company that either management or the works council believes merit deliberation are held. The management has an obligation to provide the works council with the necessary data and documentation (such as the financial results and the legal structure of the company) and to inform it about the results and the prospects of the company.

The works council also has a right to information on the scope and content of the terms and conditions of employment with respect to different groups of employees, the income development between the different groups of employees in the company, and the development in relation to the previous year. The

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management has an obligation to provide the works council with this information.

The management must furthermore consult the works council on a number of important intended decisions, such as those related to the transfer of control of the company, the termination of or a major change in the company’s activities, major investments, significant reorganizations, mergers, takeovers, changes in location or major workforce layoffs, and dismissals.

If a works council has the statutory right to render advice on an intended decision, such advice must be requested before a final decision can be executed by the company and at a time when such advice can still have a material impact on the final decision to be taken. If the works council renders a positive advice on the intended decision, the company can execute its decision without delay. However, in the event of a negative advice (or no advice), a waiting period of one month applies in which the company cannot execute its decision.

During this one month, the works council can initiate legal proceedings against the company in an effort to block the decision. In the worst case, the court could order the company to reverse its decision. Regardless of the outcome of such legal proceedings, the timing of such decisions (e.g., on a merger) can be impacted substantially. It must be noted that failure to comply with these consultation obligations in practice often also results in unwanted media exposure, court proceedings, and unrest among employees and (where applicable) trade unions. Given this, the works council consultation process is a very important step and is to be taken seriously.

In principle, the works council must also be consulted on the appointment and dismissal of a managing director if the latter has sole authority, or shares joint authority with others, over the workforce. The works council also has the right to render its prior consent (i.e., not advice) on a limited number of intended decisions that directly affect employment conditions, such as pension schemes or in-house employment regulations. Different rules apply and the works council has no access to the specific legal proceedings relating to their right of advice. In case the works council does not render its consent, the employer can request a court to provide its consent on the matter at hand instead, so that the intended decision can be executed based on a court ruling.

Members of the works council are obliged to observe strict confidentiality with respect to what they learn or discuss during meetings with management. In principle, they may not be dismissed from employment during their membership without the court’s permission.

The Works Councils Act also contains consultation obligations for companies that do not have a works council. For example, companies with at least 10 but less than 50 employees without a works council are required to set up a “staff representation committee” if the majority of the employees so requests. Management must consult with the staff representation committee on a number of subjects, such as intended decisions that may result in job losses or major
changes in the working conditions of at least a quarter of the employees working in the company.

Small companies (with less than 10 employees) also may set up a staff representation committee on a voluntary basis. The committee has the same facilities at its disposal as a staff representation committee in a company with 10 to 50 employees. However, its powers are (even) more limited. If an enterprise with at least 10 but less than 50 employees neither has a staff representation committee nor a works council, it is obliged to give its employees the opportunity to meet with the entrepreneur twice every calendar year during a personnel meeting. The Works Councils Act provides the personnel meeting with the same advisory powers as the staff representation committee although, contrary to a works council, such committee does not have access to legal recourse if the company ignores a negative advice.

An entrepreneur (ondernemer) who maintains two or more businesses employing at least 50 employees can set up a joint works council if this would improve the application of the Works Councils Act. The same applies to a group of entrepreneurs who maintain two or more businesses. An umbrella works council on top of two or more works councils, i.e., a central works council, also can be set up if this would improve the application of the Dutch Works Councils Act. If such a central works council is established for only a part of the group, it is called a group works council. The group works council and the central works council are authorized only in joint matters regarding the businesses in question, regardless of whether the (local) works councils have any authority in those matters.

European Directives 2009/38/EC and 2001/86/EC regarding the European Works Council and the involvement of employees in the European company, respectively, have been implemented into Dutch law by means of the European Works Councils Act (Wet op de Europese ondernemingsraden) and the Act on the Role of Employees at the European Company (Wet rol werknemers bij de Europese vennootschap).

**Employee Participation Rights and Regular Co-Determination Rights**

In addition to the regular co-determination rights based on the Works Councils Act as set out above, statutory Dutch law provides for specific employee participation rights (vennootschapsrechtelijke medezeggenschap) for companies maintaining a large company regime (structuurregime). These employee participation rights are set out in Article 158 of Book 2 of the Civil Code. As such, under Dutch law, co-determination rights are distinct from employee participation rights.

In short, employee participation rights are rights of works councils to make certain binding recommendations in relation to contemplated appointments of supervisory board members. Companies can deviate from these statutory provisions and provide for alternative provisions instead. Prior approval of the

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supervisory board and the approval of the works council is required to validly deviate from the statutory provisions.

Whether employee participation rights exist also is relevant in case of a contemplated crossborder merger within the meaning of the relevant Directives, i.e., Article 16 of European Directive 2005/56, which refers to European Directive 2001/86 and statutory Dutch law (Article 333k, Paragraph 1, of Book 2 of the Civil Code in conjunction with Article 1:1, Paragraph 1, of the Act on the Role of Employees at the European Company).

Health and Safety and Working Hours

In General

The obligations of an employer to provide for a safe working environment are included in the Labor Conditions Act (Arbeidsomstandighedenwet). In this regard, the employer needs to:

- Organize employment in such manner that it will not cause injury to the health and safety of the employees;
- Reduce risks and dangers regarding the health and safety of the employees as much as reasonably possible;
- Modify workplaces, methods, and the contents of the employment to the particular characteristics of the employees;
- Avoid or limit time-bound and monotonous employment;
- Take effective measures with regard to first aid, evacuation of the employees, fire control, and contact with emergency services; and
- Ensure that every employee in case of serious and immediate danger for his own safety or the safety of others can take appropriate measures to prevent such danger.

Specific duties include, amongst others, the obligation to establish a risk inventory and evaluation and a plan of approach regarding measures to be taken in respect of these risks, to discuss health and safety and actively exchange information with the works council, and to establish a policy to prevent psychosocial workload (i.e., sexual intimidation, violence, bullying, aggression, and pressure). An employer also is obliged to use a health and safety service for, amongst others, assisting employees who have become ill and are unable to perform their duties. Work-related accidents resulting in death, permanent injury, or hospitalization of the employee must be reported immediately by the employer to the Inspection Social Affairs and Employment (Inspectie SZW).

The working hours of employees are restricted by means of the Working Hours Act (Arbeidstijdenwet). The Act contains restrictions on items such as maximum working hours, breaks/resting hours, night shifts, on-call duty, and Sunday
labor. Most restrictions do not apply to employees who earn more than three times minimum wage and minimum holiday allowance. Maximum working hours are 12 hours per shift, 60 hours per week, 48 hours per week in a period of 16 consecutive weeks, and 55 hours per week in a period of four consecutive weeks. Resting hours are set at 36 hours in each consecutive period of 7 times 24 hours, or 72 hours in each consecutive period of 14 times 24 hours, which resting time can be split into resting periods of at least 32 hours each.

Breaks are set at a minimum of 30 minutes (which can be split into breaks of at least 15 minutes each) in case of a shift of more than 5.5 hours, or a minimum of 45 minutes (which can be split into breaks of at least 15 minutes each) in case of a shift of more than 10 hours. The Working Hours Act also contains a general obligation for employers to take note of an employee’s obligations of care towards family members when establishing his employment pattern. Violations by employers of their obligations under the Labor Conditions Act and Working Hours Act can result in fines being imposed.

Liability of Employer and Employee for Damages

An employer has a statutory duty of care to provide his employees with a safe working environment, and to take measures and give instructions to his employees to this end. In case an employee suffers damages while carrying out his work, the employer is liable for damages, unless the employee caused the damages intentionally or was consciously reckless.

This liability of the employer also captures workers who are not employees, such as — under certain conditions — independent contractors. In case the employee can show and prove that he suffered damages while carrying out his work, the burden of proof is on the employer to show he fulfilled his duty of care, or whether the employee caused the damages intentionally or was consciously reckless.

An employer’s liability can sometimes also be based on his general statutory obligation to act as a “diligent employer”, for instance, if it concerns damages suffered outside of the working environment, e.g., an employee traveling by car to a customer or a pilot staying abroad during flights. In such cases the employer is often required to have an adequate insurance in place to insure the risk of damages to the employee. If the employee causes damages while carrying out his duties, the employer can only hold him liable if the employee caused the damages intentionally or was consciously reckless.

Unemployment Benefits, Health Care, and State Old-Age Pension

Unemployment Benefits

An employee becomes unemployed within the meaning of the Unemployment Act (Werkloosheidswet) if he loses at least five or at least half of his working hours per calendar week and the right of salary payment for these hours, and is
prepared to accept new work. The number of working hours per week is determined by virtue of the average number of working hours in the preceding 26 calendar weeks.

If, in case of a termination of employment, a notice period is observed which is shorter than the applicable notice period, income related to the employee’s termination (such as a severance payment) is deemed to be equal with the employee’s right of salary payment. This is called the “fictitious notice period” (fictieve opzegtermijn) and basically causes that an employee will not receive unemployment benefits until such date that the employment would have ended if the applicable notice period had been duly observed.

Consenting to a dismissal that does not fully cover the fictitious notice period can be considered to be a prejudicial act (benadelingshandeling), which means that unemployment benefits will be refused for the remaining period of the fictitious notice period. There are exceptions to this rule, for instance, if the employer’s economical situation does not allow for a higher severance payment.

Furthermore, in order to be entitled to unemployment benefits, the employee needs to have worked at least 26 out of 36 weeks prior to becoming unemployed.

The duration of unemployment benefits is in principle three months. This duration can be extended if the employee worked at least 52 days per calendar year during four years out of the last five years prior to becoming unemployed. If this criterion is met, the duration will increase with one month for every full calendar year that the employee worked on top of three calendar years, with a maximum total duration of 38 months.

The amount of the unemployment benefits is 75 per cent of the maximum daily wage (€191.82 as per 1 January 2012) during the first two months and 70 per cent of the maximum daily wage thereafter.

Until the Unemployment Act changed in October 2006, it was customary for employers and employees to conduct so-called “formal rescission proceedings” at a court in case of a termination by mutual consent (see also chapter 11), in order to safeguard unemployment benefits. The proceedings aimed to show that the employee defended himself and tried to prevent becoming unemployed, as culpable unemployment (verwijtbare werkloosheid) does not grant a right to unemployment benefits. Since the legal change, this is, in principle, no longer necessary in case of a termination by mutual consent.

Employees who become unemployed during their first two years of illness can be entitled to social security benefits under the Sickness Act (Ziektewet). Various other social security acts also are in place, for instance, in respect of individuals who are unfit for work (Wet werk en inkomen naar arbeidvermogen) and older employees who become unemployed (Wet inkomensvoorziening oudere werklozen).
Health Care

As of 2006, the Health Care Insurance Act (Zorgverzekeringswet) is in effect, and it radically changed the old health care system. A new obligatory base health care insurance for all Dutch citizens replaced the old system of the health insurances fund, private health care insurance, and public insurances. All insured individuals with an income need to pay a nominal premium and an income-related contribution. This income-related contribution needs to be reimbursed by the employer to the employee.

Under the old health care system, it was customary that employers paid an additional allowance to their employees in respect of health care costs. Since the Health Care Insurance Act entered into effect, numerous litigation has taken place regarding employers who wanted to terminate such additional allowances, particularly in respect of former employees. Most Dutch employers now offer their employees the possibility of a discount on the nominal premium at a certain health care insurer that they have contracted.

State Old-Age Pension

Everyone between age 15 and 65 years of age who lives or works in The Netherlands is automatically insured for state old-age pension (Algemene Ouderdomswet). The amount of this pension depends on an individual’s personal situation. Individuals who live or work abroad for a certain period accrue less state old-age pension, i.e., two per cent less per year.

Voluntary insurances at the Social Insurance Bank (Sociale Verzekeringsbank) are possible though, as are private insurances. Furthermore, employees who are temporarily seconded abroad can continue their accrual of state old-age pension and other social security benefits by means of an A1/E101-form of the Social Insurance Bank.

The start date of state old-age pension is traditionally age 65 and with further increases depend on developments in longevity between 2013 and 2023, the start date will increase. As from 2024, this will result in an increase to age 66 in 2019 and age 67 in 2023.

Recently, the start date of state old-age pension already changed to the date the employee becomes 65, instead of the first day of the month the employee becomes 65. Under the law on equal treatment of age in employment, a termination of employment based on the start of state old-age pension is not considered to be discriminatory.

Based on case law of the Supreme Court and European Court of Justice, termination based on reaching the pensionable age is still generally considered to be permitted, although there is contradictory case law from lower courts whether an employment agreement automatically terminates or not if a “pensionable age dismissal clause” is not included in the employment agreement.
**Non-State Pension Schemes**

**In General.** Most Dutch employers offer their employee some form of pension scheme (so-called second pillar pension, in addition to first pillar state old-age pension). Traditionally, these were defined as benefit pension schemes based on a final pay. Recently, most employers have changed this to either defined benefit schemes based on career average pay or defined contribution schemes.

Furthermore, during recent years the number of company pension funds has significantly reduced — given the increasing complexity of carrying out an own pension scheme — in favor of industry-wide pension funds and pension insurers, and early retirement/pre-pension plans have been mostly abolished due to changes in tax law.

A pension scheme under the Pension Act (*Pensioenwet*) can regard old-age pension, disability pension, and surviving dependants’ pension. Government regulators for these pension schemes are the Dutch Central Bank (*De Nederlandsche Bank*) and the Financial Markets Authority (*Autoriteit Financiële Markten*).

The basis for an employee’s entitlement to a pension scheme is the pension agreement between employer and employee. This pension agreement is usually included in the employment agreement and often refers to the applicable pension regulations. The Pension Act contains various provisions to protect employees regarding the offer of a pension scheme by the employer. For instance, limited waiting periods are possible, employees under 21 years of age and part-time employees cannot be refused access to a pension scheme, and under certain circumstances an employee can claim entry into a pension scheme which other employees are entitled to if no offer is made to him.

There are various statutory information obligations *vis-à-vis* employees regarding pension schemes, both for pension providers and the employer. The employer, for instance, needs to inform the employee within three months after the start of participation in the pension scheme by means of a “starting letter” regarding the contents of the scheme and the indexation policy.

In 2010/2011, the Dutch Government and social partners reached an agreement on pension law reform, which will have a major impact on pension law when implemented during the years to come. One of the prime points of this agreement is that defined benefit schemes which are executed by pension funds will have “softer” pension rights and entitlements, as these become more dependent on investments results. In practice, defined benefit schemes will thus move more closely to defined contribution schemes.

**Execution of the Pension Agreement.** By law, the employer must have the pension agreement executed by means of an execution agreement with a pension provider, usually an insurance company, company pension fund, or industry-wide pension fund. The contents of these execution agreements are regulated by the Pension Act.
An execution agreement with a foreign insurer also is possible and can be subject to foreign law, but the execution agreement will remain subject to the Pension Act. The pension provider will establish pension regulations in respect of the employees in accordance with the pension agreement and the execution agreement. This results in a contractual triangle between employee, employer, and pension provider.

An employer is in principle free to decide whether or not he offers his employees a pension scheme. This main rule does not apply in industries where there are mandatory industry wide pension funds. These industry-wide pension funds mostly operate schemes that are of a collective defined contribution nature.

All employers whose companies fall within the scope of application of such industry-wide pension funds are obligated by law to have their employees participate. Exemptions from this legal obligation are possible but limited in nature.

Employers who — mistakenly or intentionally — do not participate in an industry-wide pension fund despite a legal obligation to do so can face claims from the pension fund and its own employees, including direct liability of the employer’s managing directors. Furthermore, in such a case an employee can claim a pension from the pension fund, even if the employer never paid any premiums to the pension fund.

Most pension funds are set up as non-profit foundations (stichtingen). The manner in which pension funds are managed is regulated in the Pension Act and a corporate governance code (Aanbevelingen STAR inzake goed pensioenfondsbestuur). Boards of company pension funds consist of an equal number of employer and employee representatives; boards of industry-wide pension funds consist of an equal number of representatives of employers associations and trade unions. Pensioners also can be represented in the board.

A bill is currently in parliament to completely overhaul the manner in which pension funds are managed, in order to make the management more professional.

Pension funds are subject to strict funding obligations. Under the Financial Assessment Framework (Besluit financieel toetsingskader pensioenfondsen), a pension fund needs to be at least 105 per cent funded. In addition to this minimum funding requirement, a pension fund must also maintain funding requirements that depend on the risk profile of the pension fund (average in the range of 125 per cent to 130 per cent).

If the funding levels drop below these percentages, the pension fund will need to submit a short-term and long-term recovery plan respectively to the Dutch Central Bank. Such recovery plans can include, for instance, an increase of the pension premiums, additional funding by the employer, and/or the reduction of accrued pension rights and entitlements.
Participants Council. A participants council at a company or industry-wide pension fund consists of representatives of the employees and pensioners. Deferred members (sleepers/former employees) also can be represented. The participants council has a right to advise the pension fund board either when requested or at its own initiative on all matters which concern the pension fund.

This includes items such as modifications to the indexation policy, the conclusion of an execution agreement, and the reduction of accrued pension rights and entitlements. Such advice needs to be requested at such a time that the advice can still materially influence the intended decision of the pension fund board. When the decision of the pension fund board deviates from the participants council’s advice, the participants council can file an appeal with the Enterprise Chamber of the Amsterdam Court of Appeal.

Amending Pension Scheme. The employer can reserve the right to unilaterally amend the pension scheme, when there are such circumstances that the interests of the employer outweigh the interests of the employee. Furthermore, the employer can reserve the right to reduce or end its premium payments in case of a drastic change in circumstances.

Accrued pension entitlement will remain intact after a change of the scheme (i.e., the change will only affect future accrual). Changing the pension scheme also is legally possible if no such reservations have been made by the employer, although the legal test in that case will be more strict. Furthermore, various other obligations may surface when an employer wants to change his pension scheme, for instance, the consent right of a works council or the right of opinion of a pensioners’ association.

A legal debate is still developing in case law and literature whether changes to a pension scheme can legally bind former employees (deferred members and pensioners) as some consider this legal relationship to be “frozen” due to the termination of employment. In short, a lot will depend on the contractual arrangements and the legal method used to change the pension scheme.

Pension Aspects of Termination of Employment

If the participation of an employee in a defined benefit pension scheme ends due to the termination of his employment, the employee preserves his accrued pension entitlements, which must be fully funded. A defined contribution scheme will usually continue to invest the premiums paid until the pension start date.

The commutation (afkoop) of pensions is only possible under limited circumstances, where it concerns pensions of a very limited accrued amount, or pensions that exceed certain tax limits. The Pension Act, in principle, grants an individual former employee the right to transfer the value of his pension to another pension provider. A collective of employees — for instance, in case of a transfer of undertaking or collective dismissal — does not have such right,
although a pension provider may decide to cooperate with a collective value transfer under certain conditions.

The Pension Act also allows for a collective value transfer at the request of the employer, in case of change of pension provider, transfer of undertaking, or change of the pension agreement. Value transfers can result in additional funding obligations for the former employer, the new employer, the old pension fund, or the new pension fund. Such funding obligations can be substantial, although recent legislation aims to limit these for small employers. If the pension regulations allow for this option, a former employee can voluntarily continue his pension scheme after termination for a period of three years, or 10 years if he becomes an entrepreneur.

**Termination of Employment**

**In General**

Dutch termination law is very specific and differs in many ways from other termination laws in the world. Employment agreements can be terminated under Dutch law by employers by:

- Mutual consent;
- Court order (rescission);
- Giving notice of termination after having obtained a permit to give such notice; or
- Summary dismissal in case of an “urgent reason” (such as theft or fraud).²

**Mutual Consent**

An employer and employee are free to reach an amicable settlement at any time, which is then laid down in a settlement agreement between the parties. Such a settlement agreement will confirm that the employment agreement is terminated by mutual consent with effect from a certain date and at the initiative of the employer, in order to safeguard social security entitlements for the employee (if any) as much as possible. A settlement agreement usually contains a number of items in addition to a specific termination date and severance payment, such as bonus entitlements, holiday entitlements, garden leave, and a testimonial/references.

In practice, employers usually offer a settlement agreement before a unilateral dismissal route is chosen (such as rescission by court order). Should the parties

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² In 2012, the Dutch Parliament voted in favour of drastically changing the termination law as from 2014. Whether these changes will actually be implemented is still uncertain given recent elections.
fail to reach agreement, a settlement agreement also can be reached at a later stage (such as at the time of a court hearing).

**Rescission by Court Order**

At any time, the employer (and the employee) may request a court to rescind the employment agreement. In the rescission request, an employer needs to set out his “case” for dismissal, and the employee will be given the opportunity to defend himself, both in writing and during a court session.

A court may refuse to rescind the employment agreement if it is not convinced of the employer’s “case”; for instance, if the employee has not been given a genuine chance to improve his performance. Should the court honor the request (usually within eight weeks after the request is filed), it will determine a termination date and a severance payment (if any). Such payments are generally calculated by using the so-called “cantal court formula”, explained in more detail below. Given European Council Regulation 44/2001, an employer cannot request a Dutch court to rescind the employment agreement if the employee lives abroad.

**Giving Notice of Termination with Dismissal Permit**

*In General*

As an alternative to a rescission request addressed to a court, an employer also may request a dismissal permit from the UWV. Similar to the court route described above, an employer needs to set out his “case” for dismissal, and the employee will be given ample opportunity to submit a defense (in writing, in principle, without a hearing).

Furthermore, similar to the court route, the UWV agency may refuse to grant a dismissal permit if it is not convinced of the employer’s “case”. Only if the UWV agency honors the request for a dismissal permit (usually within eight weeks after the permit request is filed) is the employer able to give notice to the employee. The UWV agency does not set a termination date nor award a severance payment. The termination date depends on the notice period (if not observed by the employer, it needs to be paid out) and, if an employee wishes to claim a severance payment, he is forced to initiate separate legal proceedings (“obviously unreasonable dismissal” proceedings).

In such proceedings, the cantonal court formula (see text, below) does not apply and the court will assess whether the employee has actually suffered damages as a result of the dismissal at the time of the dismissal, taking into account all relevant facts and circumstances. As no fixed formula applies, the outcome of these proceedings can be uncertain. However, damages awarded in “obviously unreasonable dismissal” proceedings in general tend to be lower than the outcome of the cantonal court formula.

Prohibitions to give notice may apply, preventing a successful use of obtained prior dismissal permits. A prohibition on giving notice applies to employees

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who meet certain requirements or for whom certain conditions apply. Employees who are protected are, among others, pregnant employees, ill employees during their first two years of illness, employees in military service, or employees who are members of a works council.

These prohibitions on giving notice do not apply in the event an employee explicitly consents in writing to the termination of the employment agreement. If the (part of the) company for which the employee solely or primarily fulfils its duties is closed down, only the prohibition on giving notice to a pregnant employee continues to apply. In the event that the employer gives notice to a “protected employee”, such employee may invoke the nullity of such notice by writing a letter to that effect to the employer.

It is important to note that, in specific circumstances, a dismissal permit is not required for expatriates (which obviously strengthens the employer’s position). This is the case if the expatriate will not “fall back onto the Dutch labor market” (i.e., he is likely to remain working abroad), although this exception has recently been interpreted more strictly by the Dutch Supreme Court.

**Severance Payments**

If a court honors a request from an employer to rescind an employment agreement, the court will determine a termination date and a severance payment. Such payments are generally calculated by using the cantonal court formula, which also is used by the employer and employee when negotiating a settlement. The formula is:

\[ A \times B \times C, \]

where:

- \( A \) = number of weighted years of service
- \( B \) = employee’s earnings
- \( C \) = adjustment factor

**Factor A** — To determine the number of years of service, the total duration of employment is rounded to the nearest full year. A period of six months and one day is considered a full year. Subsequently, years of service completed before the employee’s age of 35 are multiplied by 0.5, years of service completed between the age of 35 to 45 are multiplied by 1, years of service from the age of 45 to 55 are multiplied by 1.5, and years of service from the age of 55 are multiplied by 2. The reference date for determining the employee’s age and years of service is the date when the employment agreement is terminated.

**Factor B** — The employee’s earnings for the purposes of the cantonal court formula are his monthly gross salary, increased by agreed fixed pay components, such as a regular profit-sharing payment, 8 per cent holiday allowance, and an end-of-year payment (“13th month”). Bonus payments previously paid to the employee on a regular basis and under an established arrangement will also be
Factor C — This adjustment factor is a variable factor that is used to determine a reasonable severance payment. It is 1 if neither party can be blamed for the termination (such as in case of a redundancy), lower than 1 if the employee can be blamed for the termination, or higher than 1 if the employer can be blamed for the termination (with, in practice, 2 usually being the maximum).

Summary Dismissal

In General

Either party to an employment agreement (i.e., the employer or the employee) may be faced with circumstances in which it cannot be reasonably expected to continue the employment relationship (“for urgent reasons”). If the employee causes such circumstances, the employer will be entitled to terminate the employment agreement with immediate effect.

The employee has the same right if the employer causes such circumstances. Dutch law sets forth a number of examples of “urgent reasons”, such as gross negligence in the performance of duties, disclosure of trade or professional secrets, theft, fraud, embezzlement, or (other) crimes involving breach of trust. However, in the end only the competent court can determine whether the facts of any given case actually constitute an urgent reason, justifying an immediate termination.

Collective Dismissal

If an employer aims at terminating at least 20 employment agreements within a period of three months, specific provisions apply under Dutch law which trigger consultation, notification, and information obligations towards the employer’s works council (if any), towards trade unions and towards the UWV.

Non-compliance with these provisions may result in notice given by the employer and concluded settlement agreements being voidable. The aim of these provisions is to allow the employer and the trade unions to negotiate a social plan, although there is no legal obligation to actually reach agreement on such a plan.

Managing Director

Terminating the employment agreement of a managing director (statutair directeur) appointed pursuant to the Articles of association of a legal entity is different from terminating an employment agreement with a regular employee. The reason is the twofold relationship with the company as set out above: a corporate relationship and an employment relationship.
Depending on the company’s Articles of association, the shareholders’ meeting is, in most cases, authorized to dismiss a managing director from his corporate position. The managing director must be given timely notice of the meeting and his intended dismissal and must be given the opportunity to defend himself and cast an advisory vote.

The employment agreement of the managing director also may, in principle, be terminated by the same shareholders’ resolution, as the employer does not require a dismissal permit from the UWV as set out above in order to terminate a managing director’s employment agreement. The employer could replace the notice period by paying (at least) the equivalent of the salary due during such notice period, although this will result in the lapse of any non-competition clause.

Payment of additional compensation may be required, depending on the circumstances. If no compensation is offered, the termination may be deemed obviously unreasonable, in which case the former managing director may sue the company and claim (additional) financial compensation.

As stated above, a distinction must be made between the corporate and employment relationships of the managing director. After the aforementioned requirements are met, the managing director’s corporate position and employment position will be terminated. However, if the managing director has called in sick before he receives the invitation to the shareholders’ meeting, the legal position is different.

In that event, the meeting of shareholders may still dismiss the managing director from his corporate position(s), but cannot dismiss him as an employee, as the managing director is protected by the prohibition against giving notice during an illness as are regular employees. In such cases, the employer has no other recourse but to submit a written request for rescission of the employment agreement to the competent court.

If the company has established a works council and the managing director is the consultation partner of the works council (bestuurder within the meaning of the Works Councils Act), the works council’s prior advice on the intended dismissal of the managing director must be obtained before the decision to dismiss him can be taken and implemented. Under the Governance and Supervision Act, the contractual relationship between a managing director and a listed company can in principle no longer be an employment relationship.
# New Zealand

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Introduction

In General

Until 1991, New Zealand had a highly centralized system of industrial relations. This was based on compulsory arbitration and trade unionism, with an emphasis on governmental intervention. The Employment Contracts Act 1991 (the “Employment Contracts Act”)\(^1\) rejected the old framework and replaced it with a free market-oriented model.

Legislation in 2000 shifted the model back to a more traditional employment law policy. The Employment Relations Act 2000 (the “Employment Relations Act”)\(^2\) and its subsequent amendments focus on the creation and development of the employment relationship, and the promotion of mutual trust and confidence in all aspects of employment.

Industrial Conciliation and Labor Arbitration Act of 1894

The Industrial Conciliation and Labor Arbitration Act 1894 (ICLAA)\(^3\) introduced four central characteristics of the employment regulation framework that were to be progressively developed by subsequent legislation. These were:

- The registration of trade unions, as their development empowered employees by creating new benefits, such as the right to representation free from challenge by competing unions and access to mechanisms for awards under the ICLAA. Initially, membership in trade unions was voluntary.
- The establishment of independent tribunals, which undertook conciliation and arbitration to create binding awards between employers and employees.
- The availability of “blanket” coverage, which extended the significance of independent tribunals from 1900. This meant that the terms of any award granted to one employee were available to all employees in the same geographical area, whether or not they were members of the relevant union.

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1 New Zealand Statutes 1991, Number 22.
2 New Zealand Statutes 2000, Number 24.
3 New Zealand Statutes 1894, Number 14.
Their employers were to be bound by the award although they were not a party to the conciliation or arbitration process.

- The strong encouragement of union membership, even making it virtually compulsory in the 90 years following the introduction of the ICLAA.

The ICLAA required that employment relationships be “cooperative” and that employers submit wage disputes to neutral decision-making bodies. Employees also were required to act cooperatively, and strikes and other forms of industrial action were prohibited.

**Industrial Relations Amendment Act 1984**

The enactment of the Industrial Relations Act 1973 made few changes to the established industrial relations framework. However, the introduction of the Industrial Relations Amendment Act 1984 (IRAA) delivered the first of several major changes to such framework and to general employment law policy.

In particular, the strength of trade unions was significantly weakened by making arbitration voluntary rather than compulsory. The IRAA marked the first time since 1894 that unions did not have the statutory power to compel employers to submit wage claims for decision by neutral parties. This radically altered the balance of bargaining power between unions and employers. The legislation of the 1980s and 1990 represented an attempt to replace compulsory arbitration with decentralized collective bargaining, but it did not go all the way in that process.

**Labor Relations Act 1987**

The Labor Relations Act 1987 (“Labor Relations Act”)\(^4\) further weakened the position of trade unions by increasing the minimum membership requirement for registration and introducing provisions for greater democracy within unions.

The scope of activities in which unions could legitimately participate was extended. The responsibility of enforcing collective agreements was transferred from government inspectors to the unions themselves.

The Labor Relations Act also granted workers the right to strike and employers the right to lock out. However, it defined the circumstances under which such actions would be lawful, i.e., prohibiting industrial action relating to matters already covered by personal grievance and dispute procedures.

Despite the weakening of the arbitration system, the elements of compulsory conciliation, compulsory union membership, blanket coverage of awards, and mandatory dispute and personal grievance procedures were to remain for the time being.

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\(^4\) New Zealand Statutes 1987, Number 77.

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**Labor Relations Amendment Act 1990**

Under the Labor Relations Amendment Act 1990 (LRAA), an employer with more than 50 employees in any one workplace had the right to conduct a ballot among the relevant employees.

If more than 50 per cent of those balloted agreed to enterprise bargaining, then such bargaining could commence, regardless of whether there was already an award covering the employees or whether their union wished to take part in the bargaining. Once negotiated, the enterprise agreement would keep the employees outside the coverage of the award until both parties agreed otherwise.

**Employment Contracts Act 1991**

The Employment Contracts Act made changes more fundamental than any other legislation in this field since 1894. It was premised on freedom of contract and the right to bargain. Provisions in employment contracts requiring an employee to be or become a member of an employment organization were prohibited. Employees were free to choose who would represent them in bargaining. A collective contract applied only to those on whose behalf the contract was negotiated.

The Employment Contracts Act also does not provide for compulsory bargaining, and made major changes to personal grievance procedures. Every employment contract was required to contain provisions that deal with any personal grievance and that circumscribe the terms of such procedure. The framework for specialist dispute resolution tribunals was maintained, and a system of compulsory dispute resolution was mandated.

In line with the nature of the Labour Relations Act, the Employment Contracts Act shifted the responsibility of enforcing employment contracts to the employees themselves, rather than relying on the State. Notwithstanding the essentially contractual nature of the system set in place, the Employment Contracts Act continued to control the conditions of legitimate strikes and lockouts.

Unlike previous legislation, the Employment Contracts Act made it unlawful to take industrial action while a collective contract was in force. It also prohibited the taking of industrial action relating to multi-employer collective contracts.

**Employment Relations Act 2000**

The Employment Relations Act and its subsequent amendments from 2004 to 2010 saw a return to the traditional system of employment law policy,

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5 New Zealand Statutes 1990, Number 110.
6 The most significant provisions abandoned by the Employment Contracts Act included those relating to the registration and affairs of unions and employer organizations, union membership privileges, union coverage, disputed ballots or elections, tripartite wage conferences, and registration of awards and agreements.
recognizing the imbalance of bargaining power between employers and employees.

The present government has made some key changes to the Employment Relations Act in the Employment Relations Amendment Act 2010 (ERAA).7

**Legal Relationship of Employer and Employee**

**Employment Relationships**

An employment relationship is the relationship between:

- An employer and an employee;
- A union and an employer;
- A union and its member;
- A union and another union that are parties bargaining for the same collective agreement;
- A union and a member of another union, when both unions are parties to the same collective agreement; or
- An employer and another employer, where both are bargaining for the same collective agreement.8

The relationship between an employer and an employee is set out in an employment agreement, which is defined by the Employment Relations Act as a contract of service, including a contract for services between an employer and a home worker.

An employment agreement includes the terms and conditions of employment contained in a collective agreement, an individual employment agreement, or a collective agreement together with any additional terms and conditions of employment.

An employee refers to any person of any age employed by an employer to do any work for hire or reward under a contract of service.9 Whether a person is an employee is a question of fact, and the courts will determine the real nature of the relationship. This involves a consideration of all relevant matters, including those that indicate the intention of the parties. Any statement made by the parties to the relationship is not determinative of its nature.

Under the Employment Relations Act, parties to an employment relationship are required to deal with each other in good faith, and may not directly or indirectly

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7 New Zealand Statutes 2010, Number 125.
8 Employment Relations Act, Section 4(2).
9 Employment Relations Act, Section 6(1). The definition includes home workers and persons intending to work, but excludes volunteers who do not expect to be rewarded for work performed as a volunteer, and receive no reward.

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do anything to, or that is likely to, mislead or deceive each other or that is likely to do so.\textsuperscript{10}

This duty was broadened in 2004, such that the parties are now required to be “active and constructive” in establishing and maintaining a productive employment relationship.\textsuperscript{11}

Penalties of up to NZ $10,000 for an individual and NZ $20,000 for a company or other corporation may be imposed by the Employment Relations Act for breaches of good faith, specifically when:

\begin{itemize}
  \item The failure was deliberate, serious, and sustained;
  \item The failure was intended to undermine an individual employment agreement, a collective agreement, or an employment relationship; or
  \item The failure relates to passing on terms and conditions in individual employment agreements agreed in collective bargaining or passing on collective agreement provisions agreed in other collective bargaining or another collective agreement.
\end{itemize}

**Employee and Independent Contractor**

A contract of service is an employment agreement between an employer and an employee, and is governed by the Employment Relations Act and other employment-related legislation. A contract for services relates to an independent contractor.

An independent contractor is seen as autonomous, arranging his own remuneration, holiday, and other conditions. The Employment Relations Act affords no protection to, nor imposes any obligations in relation to, independent contractors.

To determine whether a person is an employee or an independent contractor, the court will consider a number of factors, such as:

\begin{itemize}
  \item Control, i.e., the extent to which the alleged employee is working under the control of the alleged employer;
  \item Integration, i.e., the extent to which the person is integrated into the alleged employer’s business; and
  \item Economic reality, i.e., the extent to which the alleged employee is in business on his own account.
\end{itemize}

\textsuperscript{10} Employment Relations Act, Section 4(1).

\textsuperscript{11} Employment Relations Act, Section 4(1A). Other statutory provisions relating to good faith clarify that the duty of good faith may require the disclosure to employees of information that may affect their employment, that the parties should bargain over all issues between them rather than allowing specific matters to halt further bargaining, and that the duty of good faith applies to individual as well as to collective bargaining.
Employment Agreements

In General

The Employment Relations Act provides for two types of employment agreements, i.e., individual employment agreements and collective agreements. An individual employment agreement is between one employer and one employee, and generally contains such terms and conditions as the employee and employer think fit.

A collective agreement is one that binds one or more unions, one or more employers, and two or more employees. For a valid collective agreement to exist, a union should be a party to the agreement.

Individual Employment Agreements

An individual employment agreement for an employee whose work is not covered by a collective agreement should be in writing, and must include:

- The names of the parties;
- A description of the work to be performed by the employee;
- An indication of when the employee is to perform the work;
- An indication of the arrangements relating to the times the employee is to work;
- The wages or salary payable to the employee;
- For all employees other than specified categories of employees listed in Schedule 1A of the Employment Relations Act, an “employee protection provision” dealing with the rights and obligations of the parties in the event that the business (or a part of it) is contracted out, transferred, or sold; and
- A plain language explanation of the services available for the resolution of employment relationship problems, including a reference to the 90 days within which a personal grievance should be raised.

The ERAA introduced an additional requirement applying to individual employment agreements, i.e., for an employer to retain a signed copy of each individual employment agreement to minimize the uncertainty and consequent costs that can arise in litigation where both parties do not have a copy of the signed agreement.

In addition, the Holidays Act 2003 (“Holidays Act”) requires individual employment agreements to refer to the employee’s right to be paid at least his relevant daily pay (or, as applicable, average daily pay), plus half of that amount again for time worked on a public holiday.12

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12 New Zealand Statutes 2003, Number 129, Sections 52 and 53.
Collective Agreements

An employee will be bound by a collective agreement if his employer is a party to the agreement, if he becomes a member of a union that is a party to the agreement, and if his work comes within the coverage clause in the agreement. The employee’s terms and conditions may be supplemented by extra ones that are mutually agreed to by him and his employer, and are not inconsistent with those in the collective agreement.

An employer should comply with certain obligations upon employing persons who are not union members, and where such employer is party to a collective agreement that covers the work to be done by the employee. When the new employee enters into an individual employment agreement, the employer is required to inform the employee that:

- The collective agreement exists and covers the work to be done by the employee;
- The employee may join the union that is party to the collective agreement (and contact details are required to be provided);
- The employee will be bound by the collective agreement if he becomes a member of the union; and
- During the first 30 days of his employment, the employee’s terms and conditions will be those in the collective agreement and any additional terms and conditions mutually agreed to by him and the employer that are not inconsistent with the collective agreement (the 30-day rule).

The employer also should provide the employee with a copy of the collective agreement. If the employee agrees, the employer also should inform the union as soon as practicable that the employer and employee have entered into an individual employment agreement.

A collective agreement has no effect unless it is in writing and signed by each union and employer that is a party to the agreement. Under the Employment Relations Act, a collective agreement must contain:

- A coverage clause;
- For all employees other than specified categories of employees listed in Schedule 1A, an “employee protection provision” dealing with the rights and obligations of the parties in the event that the business (or a part of it) is contracted out, transferred, or sold;
- A plain language explanation of the services available for the resolution of employment relationship problems, including a reference to the 90 days within which a personal grievance should be raised;

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13 Employment Relations Act, Section 56(1)(b).
14 Employment Relations Act, Section 62(2)(b).
15 Employment Relations Act, Section 54(1).
• A clause on how the agreement can be modified; and
• The date on which the agreement expires or an event on the occurrence of which the agreement expires.

Pursuant to the Holidays Act, a collective employment agreement also should refer to the employee’s right to be paid at least his relevant daily pay (or, as applicable, average daily pay), plus half of that amount again for time worked on a public holiday. Subsequent union and employer parties may join an existing collective agreement when the parties to the original agreement have agreed to a provision allowing such.

An employer may agree with an employee on terms and conditions that are the same or substantially the same as those in a collective agreement or reached in collective bargaining. However, it will be a breach of the duty of good faith to do so with the intention of undermining the collective agreement or collective bargaining, or when the employer’s actions have the effect of doing so (unlawful passing on).16

A bargaining fee clause also may be included in a collective agreement. Such a clause would apply to employees who are not members of a union but who perform work that falls within the coverage clause of a collective agreement.

Such a clause would require non-union employees to pay a bargaining fee to the union. In return, the employees’ individual terms and conditions of employment would be the same as those specified in the collective agreement. An employee can choose not to pay the bargaining fee, in which case the clause is not binding on him. The terms and conditions of his employment remain the same until such time as they are varied by agreement with the employer.

Bargaining fee clauses are interconnected with passing-on rules. In particular, it would be a breach of good faith for an employer to pass on the terms and conditions agreed with one union in collective bargaining to other employees or unions when the intended effect in doing so is to undermine the collective agreement with the first union.

However, it will not be a breach of good faith to pass on the same or substantially the same terms and conditions if the parties have bargained in good

16 Employment Relations Act, Section 59B. The following matters are considered in deciding whether there is a breach of this rule: (1) whether the employer bargained with the individual employee before agreeing to a term or condition of employment; (2) whether the employer consulted with the union in good faith beforehand; (3) the number of employees bound or covered by the collective agreement compared to the number of those not bound; (4) how long the agreement has been in force; and (5) the employer’s application of the 30-day rule for new employees. Similar rules apply when an employer concludes a collective agreement which has one or more provisions that are the same or substantially the same as those contained in another collective agreement to which the employer is a party.

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faith. As a result, non-union employees may be employed on the same or substantially the same terms and conditions as union employees by:

- Paying a bargaining fee so that they are entitled to the same terms and conditions contained in a collective agreement; or
- Bargaining with the employer for terms and conditions that ultimately end up the same as those contained in a collective agreement.

**Nature of Employment**

A permanent employee is one who is employed for an indefinite period. He may be full-time or part-time. On the other hand, a fixed-term employee is engaged for a particular term, such that the employment will end on a specified date, or upon the occurrence of a specified event, or at the conclusion of a specified project.

The employer should show a genuine reason based on reasonable grounds for requiring the employment to be for a fixed term. Excluding or limiting the employee’s rights under the Employment Relations Act or the Holidays Act, or establishing his suitability for permanent employment, are not genuine reasons for a fixed-term agreement. At the time of entering into the agreement, the employer must advise the employee when or how his employment will terminate and the reason for the fixed term.\(^{17}\) If a fixed-term employment agreement does not meet these requirements, the fixed-term nature of the agreement will be ineffective and the employee is entitled to be treated as a permanent employee.

A casual employee is employed on an “as and when” required basis and has no expectation of ongoing employment.

An employee may be seconded to another organization, i.e., temporarily assigned to work elsewhere. When an employee is seconded, the organization which originally employed the employee remains the employer.

A non-resident may only be employed if he has an appropriate work permit. It is illegal for an employer to employ a non-resident without the appropriate work permit.

The Industry Training Act 1992 (“Industry Training Act")\(^{18}\) governs the employment of apprentices and trainees. It provides for the recognition and funding of industry training organizations and administers the delivery of industry-based training. The Industry Training Act states that an agreement between an employer and an employee in relation to industry training will form part of the employment agreement. Accordingly, the training agreement will be enforceable under the provisions of the Employment Relations Act.

There are certain statutory restrictions on the employment of a minor. An employer is prohibited from employing a child under 16 years of age during

\(^{17}\) Employment Relations Act, Section 66(2).

\(^{18}\) New Zealand Statutes 1992, Number 55.
school hours, unless there is satisfactory evidence that the child is exempted from attending school. ¹⁹

**Transfer or Sale of Business**

*In General*

When a business or part of it is transferred or sold and an employee’s position is surplus, the employee’s position is redundant.

Following the Employment Court’s decision in *Gibbs v. Crest Commercial Cleaning Limited*,²⁰ Parliament enacted the Employment Relations Amendment Act 2006 (ERAA 2006),²¹ which repealed the original Part 6A set out in the Employment Relations Act and replaced it with a new Part 6A.²²

**Specified Categories of Employees**

The specified categories of employees are those in the following industries: (a) food catering services; (b) cleaning; (c) caretaking; and (d) laundry services. They are often referred to as “vulnerable employees”, although that term is not used in statute. They may elect to transfer to the new employer on the same terms and conditions, with service to be treated as continuous.

An employer’s obligations to these specified categories of employees will arise in the event of “restructuring”, which includes contracting out,²³ contracting in,²⁴ subsequent contracting,²⁵ and selling or transferring an employer’s business or part of it to another person.²⁶ Employees are entitled to transfer to the new employer on the same terms and conditions if:

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¹⁹ Education Act 1989 (New Zealand Statutes 1989, Number 80), Section 30.
²⁰ [2005] 1 ERNZ 399.
²¹ New Zealand Statutes 2006, Number 41.
²² Part 6A introduces a two-tiered framework of employment protection for employees in restructuring situations. The new Part 6A expands and clarifies the repealed part and overturns the effect of the *Gibbs* case, which Parliament considered to be wrongly decided, particularly with respect to the scope of the original Part 6A.
²³ This arises when a principal engages an independent contractor, but the work (or some of it) performed by the independent contractor was previously performed by employees of the principal. The employees of the principal are entitled to transfer to the independent contractor or a subcontractor to perform the work.
²⁴ This refers to a situation where a contract between a principal and independent contractor is terminated or expires, and the principal chooses to have the work performed in-house. In such circumstances, employees of the independent contractor may elect to transfer to the principal.
²⁵ This occurs when a contract between the principal and the independent contractor expires or is terminated and the principal engages a new independent contractor. In these circumstances, the employees of the independent contractor or of the subcontractor may choose to transfer to the new independent contractor or subcontractor.
²⁶ Employment Relations Act, Section 69B.

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• There is restructuring;
• The employee will no longer be required by his employer to perform the work he previously performed; or
• The work performed by the employee is or is substantially similar to work which is to be performed by or on behalf of another person.

The employee is entitled to transfer to the new employer even when performance of the work will not begin immediately with the new employer.

When an employee is employed pursuant to a fixed-term employment agreement, he may choose to transfer to the new employer. In certain, limited circumstances he may become a permanent employee by reason of the transfer, but in most cases he will remain a fixed-term employee.27

If only part of the employee’s work is affected by the restructuring, he is entitled to remain with his current employer for the part of the work that will not be performed by the new contracting company. This may result in an employee having two different employers.

Employers should advise employees of the restructuring before it commences so that they can elect to transfer to the new employer on the same terms and conditions. Employees also can bargain with the existing employer for alternative arrangements and, when no agreement is reached, they can elect to transfer to the new employer.

Under the ERAA 2006, an employer may be required to provide to prospective new employers information regarding the employees who may elect to transfer to the new employer. The new employer has the right to request the information28 when it is deciding to terminate a commercial agreement or when it is negotiating an agreement and a restructuring situation would result.

When an employee’s employment agreement already deals with the issue of redundancy in a restructuring situation, this will bind the parties after the transfer. However, if the employment agreement does not deal with the issue, the parties will be able to bargain over redundancy entitlements. If the parties fail to agree, the Employment Relations Authority (“Authority”) can determine specified categories of employees’ redundancy entitlements.

All Other Employees

All employment agreements should include an employee protection provision unless the employee is in one of the specified categories that automatically receives the protections in Part 6A. An employee protection provision sets out

27 Employment Relations Act, Section 69K.
28 The information to which a new employer would be entitled includes the number of employees who would be eligible to elect to transfer, wages and salaries, hours of work, and the cost of employee entitlements.
the process to be followed in the event that a restructuring occurs. The details of the employee protection provision are subject to negotiation, but should include:

- The process the employer will follow in negotiating with a new employer;
- The matters relating to affected employees, employment that the employer will negotiate with the new employer, including whether an affected employee will transfer to the new employer on the same terms and conditions of employment; and
- The process to be followed upon restructuring to determine what entitlements will be available for employees who do not transfer to the new employer.

Although there is no penalty for failing to have an employee protection provision in an employment agreement, it is advisable that employers negotiate such a provision in employees’ employment agreements prior to any restructuring.

Terms and Conditions of Employment

Minimum Pay

The Minimum Wage Act 1983 (“Minimum Wage Act”) sets out a general statutory minimum rate of pay for employees who are 16 years of age and over, with certain exceptions (e.g., people doing recognized industry training).

The minimum wage is prescribed in the prevailing Minimum Wage Order. The minimum new entrant wage applies to 16 and 17 year olds, except those who have completed 200 hours or three months’ work (whichever is shorter) since their sixteenth birthday, or those who supervise or train other employees.

The minimum training wage applies to employees 16 years and over who are doing recognized industry training. The minimum wage was increased to NZ $13.50 per hour for adult workers and NZ $10.80 for new entrants and trainees as of 1 April 2012.

29 Restructuring is defined in this context to include contracting out, selling, or transferring the employer’s business (or part of it) to another person, and does not include: (a) contracting in; (b) subsequent contracting; (c) the sale or transfer of any or all of the shares in a company; and (d) a contract, arrangement, sale, or transfer entered into, made, or concluded while the employer is adjudged bankrupt or in receivership or liquidation.

30 An employee will be an “affected employee” if: (1) as a result of the restructuring, the employee is or will no longer be required by his employer to perform the work he performed; and (2) the type of work performed by the employee or work that is substantially similar is to be performed by or on behalf of another person.

31 New Zealand Statutes 1983, Number 115.


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**Hours of Work**

The Minimum Wage Act provides that the maximum number of hours to be worked in any week, exclusive of overtime, may not exceed 40, unless otherwise agreed in an employment agreement.

When the maximum number of hours fixed by the employment agreement does not exceed 40, the parties should fix the employee’s daily working hours so that they are worked on not more than five days of the week.

**Payment of Wages**

The Wages Protection Act 1983 (“Wages Protection Act”)\(^{33}\) prohibits deduction from an employee’s wages without consent except in accordance with its provisions, and requires wages to be paid in money.

Employers should have the written consent or request of an employee to pay him by postal order, money order, check, or direct credit to a bank account, but such consent or request may be modified or withdrawn in writing at any time.\(^{34}\) An employee may bring an action to recover unlawful deductions or wages that have not been paid in money to the Authority.

**Holidays**

Every employee is entitled to a minimum of four weeks’ paid annual leave after 12 months’ continuous service with the same employer,\(^{35}\) and at least two weeks of uninterrupted holiday.\(^{36}\)

An employee is paid for annual holidays at the rate of his average weekly earnings\(^{37}\) during the 12 months prior to the holiday, or his ordinary weekly pay,\(^{38}\) whichever is greater.

When the leave is to be taken should be agreed between the employer and the employee, but the latter should be allowed to take leave within 12 months of the entitlement arising.\(^{39}\) If there is failure to reach an agreement, the employee may be required to take leave upon the employer giving 14 days’ notice.\(^{40}\)

Employers are permitted to close their businesses down once during a 12-month period, and to choose different closedown periods for each separate part of the

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33 New Zealand Statutes 1983, Number 143.
34 Wages Protection Act, Section 9.
35 Holidays Act, Section 16.
36 Holidays Act, Section 18(2).
37 Average weekly earnings are calculated at the rate of the employee’s gross earnings for the year divided by 52.
38 Ordinary weekly pay is the amount the employee receives under his employment agreement for an ordinary working week, and includes regular allowances, productivity or incentive-based payments, and commission.
39 Holidays Act, Section 18.
40 Holidays Act, Section 19(2).
business. They should give their employees 14 days’ notice if such employees are required to take leave during the closedown period.

If the employee has annual leave entitlements remaining, these will be used, but if the employee has exhausted his entitlement, he may take leave in advance (with the agreement of the employer) or take unpaid leave.41

An employee who is employed for less than 12 months is entitled to holiday pay calculated at eight percent of his total gross earnings. Casual employees generally receive an hourly rate of pay that includes eight per cent of their earnings as holiday pay, as do some employees on fixed-term agreements of less than 12 months. Holiday pay paid in this way should form an identifiable component of the earnings.

It is unlawful for permanent employees to be paid holiday pay as part of their wages. If an employee is not genuinely a casual employee, or if the arrangement extends beyond 12 months and the employee is not genuinely on a fixed-term agreement, such employee is entitled to four weeks’ annual paid holidays in addition to the eight per cent holiday pay already paid.

However, if the employment arrangement was not constructed to avoid granting annual leave, the employee is then entitled to four weeks’ leave, but the holiday pay for that leave is reduced by the holiday payments which have already been made.

Employees also are entitled to 11 public holidays42 per year when they fall on a day that would otherwise be a working day, except for four days over the Christmas and New Year periods, which will be transferred to a Monday or Tuesday if they fall on a Saturday or Sunday. However, where the Saturday or Sunday would otherwise be a working day for an employee, the public holiday is observed on the Saturday or Sunday for that employee.

An employee who works on a public holiday is entitled to one and a half times his relevant daily pay43 for the time worked.44 If the day worked is a usual day of work for the employee, he also is entitled to an alternative holiday.45 An employee can request payment for an alternative holiday (in exchange for the holiday) if 12 months have passed.

In November 2010, the Holidays Amendment Act 2010 (“Holidays Amendment Act”)46 was enacted. It made key changes to the Holidays Act, such as the

41  Holidays Act, Sections 32 and 33.
42  The public holidays are Christmas Day, Boxing Day, New Year’s Day, 2 January, Good Friday, Easter Monday, ANZAC Day, Labor Day, the birthday of the reigning sovereign, Waitangi Day, and the day of the anniversary of the province.
43  Relevant daily pay is the amount of pay the employee would otherwise have received had he worked on the day concerned.
44  Holidays Act, Section 50.
45  Holidays Act, Section 56.
46  New Zealand Statutes 2010, Number 126.
ability to cash up an employee’s fourth week of annual leave, altering calculations of relevant daily pay, additions to the test for determining whether a day would otherwise be a working day, and the ability to transfer the observance of a public holiday.

Sick and Bereavement Leave

After six months’ continuous employment, an employee is entitled to both sick leave and bereavement leave. Such leave should be paid out at the employee’s relevant daily pay.

An employee is entitled to five days’ sick leave for each 12-month period of continuous employment. The entitlement can be used when the employee is sick or injured, or when a person who depends on him for care is sick or injured. An employee may accumulate sick leave up to a current entitlement of 20 days.

If an employee is absent from work for three or more consecutive calendar days (irrespective of whether they are working days), he may be required to produce evidence of illness or injury at his own cost.

An employee may also be required to provide such evidence for a shorter absence if the employer informs the employee of that requirement as soon as possible and agrees to meet his reasonable expenses in obtaining the proof.

Casual employees are entitled to sick and bereavement leave provided that, over a six-month period, they worked at least an average of 10 hours per week and no less than one hour in every week during that period, or no less than 40 hours in every month during that period.

Bereavement leave falls into two categories. When a close relative of an employee dies, the employee is entitled to three days’ leave. An employee may take one day’s bereavement leave if:

• The employer accepts that he has suffered bereavement as a result of a death and the employee has a close association with the deceased; and/or

47 However, leave can only be cashed up where the employee requests such in writing. If leave is paid out incorrectly where an employee did not request this, the employee’s entitlements remain unaffected.

48 Where it is not possible to calculate what the employee would have earned on the day in question, that employee’s gross earnings over 52 weeks are to be divided by the number of whole or part days worked. This calculation is referred to as “average daily earnings”.

49 Holidays Act, Section 63.

50 Holidays Act, Section 65.

51 Holidays Act, Section 66.

52 Holidays Act, Section 68.

53 Holidays Act, Section 63.
• The employee has some responsibility for organizing the deceased’s ceremony; and/or
• The employee has some cultural responsibility towards the deceased.54

Thus, employees do not have an unlimited entitlement to bereavement leave. They are limited to one day or three days for each bereavement, depending on the nature of the bereavement.

Parental Leave

Under the Parental Leave and Employment Protection Act 1987 (PLEPA),55 there are four types of parental leave, namely:

• Special leave up to ten days for a pregnant mother, before maternity leave begins. This is for pregnancy-related reasons such as a doctor’s appointment.
• Maternity leave for a continuous period of up to 14 weeks for the mother, with up to six weeks available before and at least eight weeks after the birth or adoption of the child.
• Partner’s/paternity leave for a continuous period of up to two weeks for the mother’s partner on the birth or adoption of a child.
• Extended leave, which is an extended period of parental leave of up to 52 weeks, less maternity leave taken. This is available only to employees who have worked for the employer for 12 months prior to the expected date of birth or adoption. Extended leave may be shared between the parents, but only in one continuous period each.

Employees may be eligible for maternity or partner’s/paternity leave if they have been employed by the same employer for at least an average of ten hours a week for six months before the expected date of birth or adoption of the child.

Employers are not required to grant parental leave on pay, but New Zealand operates a state-funded statutory paid parental leave scheme. Employees who are eligible under the scheme may be entitled to a taxpayer-funded payment of up to 14 weeks’ parental leave.56

Subject to certain exceptions, an employee’s employment is protected while he is on parental leave. The presumption of protected employment may be rebutted when a redundancy situation has occurred, or in the case of parental leave of four weeks or more, when the employee’s position is a key position and it is not reasonably practicable to have a temporary replacement.57 When a position cannot be kept open, the employer must undertake to give the employee employment preference for 26 weeks from the expiration of the parental leave.

54 Holidays Act, Sections 69 and 70.
55 New Zealand Statutes 1987, Number 129.
56 PLEPA, Sections 71D and 71J.
57 PLEPA, Section 41.
Privacy

The Privacy Act 1993\textsuperscript{58} recognizes an individual’s interest in having some measure of control over information about him. Individuals have a general right of access to personal information about them held by any organization.

Accordingly, employees have the right to see or obtain a copy of information about them held by their employer or former employer, such as diary notes, internal memoranda, and performance appraisals.

However, an employer may refuse to disclose evaluative material\textsuperscript{59} which has been supplied to it subject to an express or implied promise to the supplier of the information that the material would be held in confidence.\textsuperscript{60}

Volunteers

The Volunteers Employment Protection Act 1973 (VEPA)\textsuperscript{61} operates to protect employees who choose to be a member of the territorial or reserve armed forces. During a period of voluntary service or training, the employer is deemed to have granted the employee a leave of absence.

When the employee returns to work before the end of the period of leave of absence, the employer must resume the employment in the occupation in which the employee was last employed before the leave of absence and on no less favorable terms and conditions.

The employer is presumed to be able to keep open the employee’s position until the end of the leave unless, when the period of leave is, or is likely to be, greater than four weeks, the employer proves that the position cannot be kept open because a temporary replacement is not reasonably practicable, or because of the occurrence of a redundancy situation.

The employee’s service with the employer is to be treated as continuous for the purpose of any rights and benefits that are conditional on unbroken service when the employee has taken a leave of absence under the VEPA. No employer may terminate the employment on the grounds that:

\begin{itemize}
  \item The employee has indicated that he wishes to take volunteer leave or is on volunteer’s leave;
  \item The employee is or has been a member of the territorial or reserve forces;
  \item The employee, being a member of the territorial or reserve forces, is entitled or may become entitled to take volunteer leave; or
  \item The employee has taken volunteer leave.
\end{itemize}

\textsuperscript{58} New Zealand Statutes 1991, Number 28.
\textsuperscript{59} Evaluative material is information that has been compiled solely for determining the suitability of the employee for appointment, promotion, continuance in employment, removal from employment, or for receiving an award or contract.
\textsuperscript{60} Privacy Act, Section 29.
\textsuperscript{61} New Zealand Statutes 1973, Number 25.
Implied Terms

In addition to express terms, employment agreements contain a number of terms which are implied by law. In principle, an implied term cannot be inconsistent with an express term of the employment agreement. However, some implied terms are fundamental to employment relationships and cannot be overridden by an employment agreement.

An employee has the implied duty to (a) not disclose confidential information; (b) perform work and comply with the employer’s lawful and reasonable instructions; (c) be competent to perform the work; (d) take reasonable care in performing the work; and (e) act in good faith and with fidelity towards the employer.

On the other hand, an employer has the implied duty to (a) provide work; (b) provide a safe system of work; (c) act fairly and with good faith toward employees; and (d) maintain employee confidentiality.

Health Care

New Zealand operates a public health care system. Employers are not required to contribute to employees’ health care, but many employers offer private medical insurance as part of an employee’s remuneration.

Vocational Training

There is no express requirement for employers to provide vocational training, although it is an implied term of the employment agreement that employers will ensure that employees can undertake the work required of them.

Discrimination

In General

The primary legislation governing discrimination in New Zealand is the Human Rights Act 1993 (“Human Rights Act”). The Human Rights Act applies to employees and independent contractors and prohibits discrimination on the basis of sex (including pregnancy and childbirth), marital status (including a de facto relationship or a civil union), religious or ethical belief, color, race, ethnic or national origins, disability, age, political opinion, employment status, family status, or sexual orientation.

It is unlawful for an employer to discriminate on the basis of any of the prohibited grounds of discrimination in the areas of recruitment, terms and conditions of employment, dismissal, retirement, and resignation. It is unlawful for an employer to refuse or omit to employ a person by reason of any of the

62 New Zealand Statutes, Number 82.
prohibited grounds, provided that work is available and the person is qualified to do the work.

An employer should not discriminate against a person by reason of any of the prohibited grounds by offering less favorable terms and conditions of employment, conditions of work, superannuation, fringe benefits, promotion, and transfer than are made available to other employees of the same or substantially similar capabilities, employed in the same or substantially similar circumstances in work of that description.

An employer is prohibited from dismissing a person, subjecting a person to detriment, retiring a person, or causing a person to retire or resign by reason of any of the prohibited grounds.

The provisions of the Employment Relations Act with respect to discrimination against employees are consistent with the Human Rights Act. In addition, Section 104 of the Employment Relations Act prohibits discrimination by reason of an employee’s refusal to carry out work on health and safety grounds (where the work is likely to cause serious harm to him), or an employee’s involvement in the activities of a union.

A person concerned with procuring employment for other persons or procuring employees for an employer is prohibited from treating any person seeking employment differently from other persons by reason of any of the prohibited grounds.

It also is unlawful for any person to use or circulate any form of application for employment or make any inquiry of or about any applicant for employment which indicates, or could reasonably be understood as indicating, an intention to discriminate. Accordingly, it is a breach of the Human Rights Act to ask job applicants to complete an application form which routinely asks about matters such as sex, age, marital status, or number of children.

An employee should choose whether he wishes to make a complaint under the Human Rights Act or raise a personal grievance under the Employment Relations Act as regards discrimination. This prevents employees from seeking relief for the same grievance in two different jurisdictions.

**Discrimination on Basis of Gender**

There are a number of circumstances in which employment discrimination on the basis of gender is lawful. These include:

- When, for reasons of authenticity, sex is a genuine occupational qualification;
- When reasonable standards of privacy are required;
- When there is domestic employment in a private household;
- When employees live on employer-provided premises and the premises are not equipped to provide, and it is not reasonable to provide, separate sleeping accommodation for each sex;
• When the position is for the purposes of an organized religion and it would not be in accordance with the doctrines or rules of that religion;
• When there is employment of a person on a non-New Zealand ship or aircraft;
• When employment duties are performed wholly or mainly outside New Zealand, if the customs of the country in which the duties are to be performed require a person of a particular sex; and
• When the position is that of a counselor on highly personal matters, such as sexual matters or the prevention of violence.

Preferential treatment granted by reason of a woman’s pregnancy or childbirth, or a person’s responsibility for part-time or full-time care of children or other dependents, is allowed.63

Sexual harassment specifically with regard to employment, including the making of an application for employment, is prohibited. It is unlawful for an employer or an employer’s representative to request another person for sexual intercourse, sexual contact, or any other form of sexual activity which contains an implied or overt promise of preferential treatment or an implied or overt threat of detrimental treatment.

It also is unlawful to use language, visual material, or physical behavior of a sexual nature which is unwelcome or offensive and is either repeated or of such a nature that it has a detrimental effect on the person subjected to it.

The Employment Relations Act provides that an employee may have a personal grievance claim against his employer if he is subjected to sexual harassment during his employment.64 In addition, if an employee claims to have been sexually harassed by a co-worker or customer, he may complain to the employer, and the employer should investigate and, if necessary, take steps to prevent the harassment from recurring. Discrimination on the basis of gender with respect to remuneration is prohibited under the Equal Pay Act of 1972.65

**Discrimination on Basis of Age**

Section 21(1)(i) of the Human Rights Act defines age in this instance as 16 years old and above. Discrimination due to age is allowed in a range of employment-related circumstances, including:

• Employment of a person engaged outside New Zealand on a non-New Zealand ship or aircraft;
• When the duties are performed outside of New Zealand and because of the law of that country, the duties can only be carried out effectively by a person of a particular age;

63 Human Rights Act, Section 74.
64 Employment Relations Act, Section 103(1)(d).
65 New Zealand Statutes 1972, Number 118.
Domestic employment in a private household; and
• When age is a *bona fide* occupational qualification of the job.

Paying a lower rate to an employee who is below 20 years of age or providing preferential treatment based on age to such an employee also is allowed.

**Discrimination on Basis of Physical or Mental Disability**

The Employment Relations Act defines disability as physical disability or impairment, physical illness, psychiatric illness, intellectual or psychological disability or impairment, and any other loss or abnormality of psychological, physiological, or anatomical structure or function, reliance on a guide dog, wheelchair, or other remedial means; or the presence in the body of organisms capable of causing illness.

Different treatment may be accorded to disabled people when:

• It would be unreasonable to expect an employer to provide special services or facilities to make the employment of a disabled person possible;
• The employment of a disabled person would create an unreasonable risk of harm to him or to anyone else, including the risk of infecting others with an illness; and
• The position is one of domestic employment in a private household.

The employer is required to provide appropriate facilities for his disabled employees. Under general law, buildings in New Zealand should provide car parking, access, and sanitary facilities to accommodate the needs of disabled persons.

**Discrimination on Basis of Race or National Origin**

When persons are engaged outside New Zealand on non-New Zealand ships or aircraft, or when the position is that of a counselor on highly personal matters such as sexual matters or the prevention of violence, discrimination on the grounds of color, race, or ethnic or national origins is permitted.66

The Human Rights Act prohibits racial harassment,67 while the Employment Relations Act provides that an employee has a personal grievance when he has been racially harassed in his employment.

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66 Human Rights Act, Section 27(4).
67 Human Rights Act, Section 63. This refers to the use of written or spoken language, visual material, or physical behavior that expresses hostility against or brings into contempt or ridicule any other person on the ground of color, race, or ethnic or national origin; is unwelcome or offensive to that person; or is repeated or of such a significant nature that it has a detrimental effect on that other person.
Discrimination on Basis of Religion

Preferential treatment based on religious or ethical belief is permitted when the treatment is accorded under the Private Schools Conditional Integration Act 1975, where (a) the sole or principal duties of the position require the propagation of a certain belief among adherents of that belief, (b) the position is that of a teacher at a private school, or (c) the position is that of a social worker working on behalf of a religious organization.

Employers should accommodate particular practices carried out by employees arising out of religious or ethical beliefs, provided these do not unreasonably disrupt the employer’s activities.

Indirect Discrimination

The Human Rights Act prohibits indirect discrimination, which is the imposition of a requirement or condition or engaging in conduct and practices which, while seemingly not in contravention of the law, have the effect of giving preference to a person of a particular color, race, ethnic or national origin, sex, marital status, or religious or ethical belief.

An example of indirect discrimination in an employment context is a company requiring all employees to work between eight-thirty in the morning to five o’clock in the afternoon with no exceptions or flexibility. This could result in indirect discrimination on the grounds of family status.

However, such a requirement, condition, conduct, or practice is lawful if the employer can show good reason for its imposition.

It is not discriminatory to take affirmative measures in good faith for the purpose of assisting or advancing persons against whom discrimination is unlawful, who need or may be reasonably supposed to need assistance or advancement to achieve an equal place with other members of the community.

Discrimination on Basis of Union Activity

The Employment Relations Act contains an additional prohibited ground of discrimination, namely, involvement in the activities of a union. There is a rebuttable presumption that an employee has been discriminated against by reason of his involvement in union activities when the employee establishes that he has been treated in a way that would be unlawful if it occurred by virtue of his involvement in union activities, and he establishes the fact of that involvement.

68 New Zealand Statutes 1975, Number 129.
69 Employment Relations Act, Section 104(1). This is defined as being a member or officer of a union, an employee delegate, or a representative.
Collective Bargaining and Worker Participation in Management

Collective Bargaining

Collective bargaining describes the process of negotiation to conclude a collective agreement. The exclusive ability to engage in collective bargaining is a significant power given to unions in New Zealand.

Parties to collective bargaining should deal with each other in good faith, such that they should conclude a collective agreement unless they have a genuine reason not to. Section 32 of the Employment Relations Act sets out a number of minimum requirements:

- The union and the employer should use their best endeavors to enter into an arrangement as soon as possible that sets out a process for conducting the bargaining in an effective and efficient manner;
- The union and the employer should meet from time to time for purposes of the bargaining;
- The union and employer should consider and respond to each other’s proposals;
- Even if a deadlock is reached on a matter, they should continue to bargain on other matters;
- The union and the employer should recognize and respect the role and authority of any person chosen by the other to be a representative or advocate, may not directly or indirectly bargain about matters relating to terms and conditions of employment with anyone for whom a representative acts (unless the union and employer agree otherwise), and may not undermine or do anything that is likely to undermine the bargaining or the authority of the other in the bargaining; and
- The union and the employer should provide each other with information that is reasonably necessary to support or substantiate claims or responses to claims made for purposes of bargaining.

Bargaining for a collective agreement may be initiated by one or more unions or one or more employers. A party initiates bargaining by giving written notice to the other intended party (or parties). If there is no applicable collective agreement in force, a union or employer may initiate bargaining at any time.

If an applicable collective agreement is in force, a union should not initiate bargaining earlier than 60 days before the agreement expires, and an employer should not initiate bargaining earlier than 40 days before the same date.70

To overcome impasses in collective bargaining and facilitate settlement, the Employment Relations Act enables the Authority to provide assistance to the

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70 Employment Relations Act, Section 41(3).
parties in certain circumstances and make non-binding recommendations for the settlement of matters in dispute.

Since the enactment of the ERAA, union access to the workplace has become conditional upon the consent of the employer.\textsuperscript{71} The ERAA also clarified that employers are entitled to communicate directly with their employees during collective bargaining, although these communications continue to be subject to the good faith requirements.

**Worker Participation in Management**

Generally, employers are not required to implement worker participation schemes with respect to management of the business. However, employees should be consulted about their collective interests, including the effect on them of changes to the employer’s business.

The duty of good faith also applies to a proposal by an employer that might impact on its employees, including a proposal to contract out work otherwise done by the employees or to sell or transfer all or part of the business, and making employees redundant. In addition, the Health and Safety in Employment Act 1992 (HSEA)\textsuperscript{72} requires employee participation in the ongoing management of health and safety in the workplace.

**Health and Safety Protection in Workplace**

**In General**

Health and safety issues in employment are governed by the HSEA, which imposes comprehensive duties on employers and employees to ensure a safe workplace, as well as specific duties on employers in relation to hazard management, provision of information, training, and supervision.

A review of the HSEA was undertaken in 2000, which resulted in the enactment of the Health and Safety in Employment Amendment Act 2002.\textsuperscript{73} The amendments increased the coverage of the HSEA, provided for employee participation, and increased penalties under the HSEA.

The HSEA covers all employment situations, including volunteers, persons receiving on-the-job training or work experience, loaned employees (i.e., seconded employees), and work performed by employees on an aircraft or ship.

**Employer Responsibilities**

The HSEA requires employers to:

- Provide and maintain a safe working environment;

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\textsuperscript{71} Such consent should not be unreasonably withheld, and should be advised as soon as reasonably practicable, but no later than two working days after the request.

\textsuperscript{72} New Zealand Statutes 1992, Number 96.

\textsuperscript{73} New Zealand Statutes 2002, Number 86.

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• Provide and maintain facilities for the health and safety of employees while they are at work;
• Ensure that the plant used by employees is safe;
• Ensure that employees are not exposed to hazards 74 while in or near their place of work;
• Develop procedures for dealing with emergencies that may arise while employees are at work;
• Systematically identify existing and potential hazards and regularly assess each hazard and determine whether or not it is significant; 75
• Investigate accidents or serious harm caused to employees to ascertain whether it was caused by or arose from a significant hazard;
• Take all practicable steps to eliminate significant hazards at work, to isolate the hazard if it cannot be eliminated, or to take all practicable steps to minimize the likelihood that the hazard will cause harm if it cannot be isolated;
• Ensure that appropriate protective equipment and clothing is available, accessible to, and used by employees;
• Monitor employees’ exposure to hazards and, with the employees’ informed consent, monitor their health in relation to exposure in places where significant hazards cannot be practicably eliminated;
• Ensure that employees have understandable information about hazards and know emergency procedures, the location of safety equipment, and how to minimize hazards for themselves and other people;
• Ensure that employees have adequate training and supervision in relation to their work;
• Take all practicable steps to ensure that no action or inaction of any employee while at work harms any other person; and
• Take all practicable steps to ensure that no contractor or subcontractor or any employee of the contractor or subcontractor is harmed at the employer’s premises.

Employees

Every employee (or self-employed person) is under a duty to take all practicable steps to ensure that he does not harm himself or anyone else while at work.

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74 A hazard is something that is an actual or potential cause or source of harm, including a situation when a person’s behavior may be an actual or potential cause of harm to himself or another, and a situation arising from physical or mental fatigue, drugs, alcohol, traumatic shock, or other temporary condition that affects a person’s behavior.

75 A significant hazard is one which is an actual or potential cause of serious harm, or harm the severity of which depends on the extent or frequency of exposure, or harm that is not identifiable until a significant time later.
Employers, employees, and any union representing the employees should cooperate in good faith to develop, agree, implement, and maintain a system that sets out the ways in which employee participation will operate in the workplace. All parties have six months to agree on a system, otherwise the HSEA prescribes a number of systems that will apply, depending on the size of the workplace.

Employers with more than 30 employees must develop an employee participation system, while those with fewer than 30 employees need only develop such a system if requested to do so by an employee.\(^{76}\)

**Others**

A person who controls a place of work (other than a home occupied by him) should take all practicable steps to ensure that people in the vicinity of the place of work, people who are working for him in the place of work, and people who consent to be in the place of work and who have paid to be there, or who are customers, are not harmed by hazards in the place of work.

Other people should be warned of unusual, significant, work-related hazards if they have been given express authorization by the occupier of the place to be in the place or have given the occupier oral advice that they will be working in the place under statutory authority. People visiting a place of work under any other circumstances are owed no duty by the occupier.

**Workplace Accidents**

Workplace accidents must be recorded in an accident register to be kept by the employer. When an accident or serious harm occurs at work, an employer must notify the Department of Labor’s Occupational Safety and Health Service (OSH) as soon as possible and, within seven days of the occurrence, provide a written report to the OSH detailing the circumstances of the occurrence.\(^{77}\)

**Fines and Penalties**

An employer who fails to comply with the HSEA, knowing its action or inaction is likely to cause a person serious harm, will be liable to a fine of up to NZ $500,000, and/or the directors and/or senior managers of an employer that is a legal person may be imprisoned for a term of not more than two years.\(^{78}\)

Other breaches of the HSEA, such as failing to take all practicable steps to ensure the safety of employees at work, or failing to comply with an improvement notice or a prohibition notice (in the absence of actual harm), can result in a fine of up to NZ $250,000.\(^{79}\) Officers of a company are directly responsible for ensuring that the company is fulfilling its responsibilities under the HSEA.

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\(^{76}\) HSEA, Section 19C.

\(^{77}\) HSEA, Section 25(3).

\(^{78}\) HSEA, Section 49(3).

\(^{79}\) HSEA, Section 50(1).
the HSEA. Directors or officers may be personally liable if they have participated or acquiesced in any breach of the HSEA.

**Private Prosecution**

The HSEA does not give a person who has been harmed a direct right to bring an action against an employer or any other person. Health and safety inspectors have the right to institute proceedings in relation to offenses under the HSEA.

However, if a health and safety inspector does not take such action, members of the public including injury victims, their families, or unions may bring prosecutions for breaches of the HSEA in certain circumstances.80

**Smoke-Free Environments Act 1990**

The Smoke-Free Environments Act 199081 requires every employer to take all reasonably practicable steps to ensure that no person smokes at any time in a workplace.

There are limited exceptions, such as patients or residents of hospitals, residential disability care institutions, and rest homes in dedicated smoking rooms in which smoking is permitted, and employer-owned vehicles with the written consent of all of its users.

**Workers’ Compensation and Survivors’ Benefit**

**In General**

The Accident Compensation Act 2001 (the “Act”82 provides accident insurance for all citizens, residents, and temporary visitors to New Zealand who suffer personal injury caused by an accident in New Zealand. This is a no-fault accident compensation scheme which is funded from employer levies and general taxation and is administered by a state organization, the Accident Compensation Corporation (ACC).

The Act prevents a person from bringing legal proceedings for damages arising out of a personal injury, if such injury is covered by the Act. However, a person may bring proceedings for exemplary damages even if the personal injury is covered by the Act. An accident is defined as:

- A specific event or series of events other than a gradual process that involves the application of force or resistance external to the human body, the sudden movement of the body to avoid such force or resistance, or a twisting movement of the body;

80 HSEA, Section 54A.
81 New Zealand Statutes 1990, Number 108.
82 New Zealand Statutes 2001, Number 49.
The inhalation or oral ingestion of any solid, liquid, gas, or foreign object when the inhalation or ingestion occurs on a specific occasion (not including inhalation or ingestion of a virus or bacteria or when caused by a criminal act);

Any exposure to the elements or extremes of temperature or environment within a defined period of time not exceeding one month that causes disability for more than one month or death;

Any burn or exposure to radiation or rays of any kind on a specific occasion that is not caused by exposure to the elements; or

The absorption of any chemical through the skin within a period of time not exceeding one month.

Section 26 of the Act defines personal injury as including death, physical injury, and mental injury suffered because of physical injury. In certain limited situations, mental injuries which are not necessarily caused by accident or physical injuries are covered by the Act. These include those caused by certain criminal offenses (essentially sexual offenses) and work-related mental injuries.

Work-related injuries are funded by levies paid by employers. A work-related personal injury is an injury suffered by an employee:

While at any place for the purposes of his employment, including a place that itself moves or a place to or through which the employee moves;

During any temporary interruption to work, such as a meal break at the place of employment;

While traveling to or from the place of employment at the start or finish of the day’s work, if the transport is provided by the employer for the purpose of transporting employees, and is driven by or at the direction of the employer; or

While traveling between the place of employment and another place by the most direct route for the purposes of necessary treatment in respect of a work injury.  

If the work-related personal injury is a mental injury, it should have been caused by a sudden event that could be reasonably expected to cause mental injury and which the person experienced, saw, or heard directly to be covered under the Act.

An employee who wishes to claim under the Act in relation to a work-related personal injury should lodge a claim with the ACC. An employee who suffers a work-related injury may be eligible for:

- Rehabilitation, comprising treatment, social rehabilitation, and vocational rehabilitation;

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83 Accident Compensation Act, Section 28.
Employer-paid compensation for the first week after a work injury; 
Earnings-related weekly compensation; and 
A lump-sum payment for permanent impairment.84

**Survivor Benefits**

If an employee who has died had a spouse or family member dependent on him, those persons may be able to claim a lump sum called a survivor’s grant when there is a surviving spouse, child, or dependent of the deceased person, weekly compensation for dependents of the deceased, or a funeral grant.

Weekly compensation is payable to the surviving spouse at the rate of 60 per cent of the earnings-related compensation the deceased would have been entitled to if they had lived but been totally incapacitated. Children and other dependents are entitled to 20 per cent of this amount.

**Employers’ Obligations**

Employers’ obligations in respect of accident compensation are:

- The payment of levies in respect of every employee to cover the cost of work-related accidents; and 
- The payment of 80 per cent of wages for the first week an employee has time off as a result of a work-related accident.

The amount of the employer’s levy is determined by the ACC and related to the amount of earnings paid, estimated to be paid, or deemed to have been paid by the employer to his employees. Independent contractors engaged under a contract for services, or those employed on a commission or labor-only basis, are responsible for their own levy payments.

Employers’ levies are placed in an Employer’s Account, and the funds held in this account are used for financing the treatment, services, rehabilitation, related transport costs, compensation, grants, and allowances in respect of work injuries or occupational diseases.

In determining an employer’s levy, the ACC will consider the risk of the employer’s business activity and the number and cost of injuries sustained by levy payers within that employer’s risk category. In addition, the ACC will consider the employer’s own experience rating, which is based on the employer’s injury rates and its rehabilitation or return to work rates.

An employer may apply to join the ACC Partnership Program (“Program”), which encourages eligible employers to take responsibility for their own workplace health and safety management by effectively self-insuring.

84 Accident Compensation Act, Section 69.
An employer participant in the Program assumes the responsibility for the management and cost of his employees’ work-related injuries and illnesses for a nominated period. An employer who participates in the Program pays a reduced levy.

After the nominated period, the ACC may assume responsibility for the claim if an injured employee is still receiving entitlements, depending on the terms of the agreement entered into between the employer and the ACC as part of the Program. However, that is not usual.

Dispute Resolution

In General

Under the Employment Relations Act, employment relationship problems include personal grievances, disputes, and any other problem relating to or arising out of the employment relationship.

The Department of Labor’s mediation service, the Authority, and the Employment Court have jurisdiction over employment relationship problems.

Personal Grievance

In General

An employee may raise a personal grievance if he considers that he has been:

- Unjustifiably dismissed;
- Disadvantaged in his employment, or one or more conditions of his employment has been affected to his disadvantage, by an unjustifiable action of his employer;
- Discriminated against in his employment;
- Sexually or racially harassed in his employment;
- Subjected to duress in his employment in relation to his membership or non-membership in a union or employee’s organization; or
- Treated in a way that does not comply with Part 6A of the Employment Relations Act (which relates to a sale or transfer of business). 85

An employee cannot bring a personal grievance in relation to a dispute about the interpretation, application, or operation of an employment agreement. An employee’s right to raise a personal grievance may be further circumscribed if the employment agreement contains a trial period provision (which may last for up to 90 days).

If an employer seeks to dismiss an employee during or at the end of a trial period, that employee may not bring a personal grievance or other legal

85 Employment Relations Act, Section 103.

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proceedings in respect of this dismissal. This does not prevent other types of personal grievances (e.g., sexual harassment or discrimination) from being brought, nor does it alter the application of the duty of good faith to the employment relationship. Trial periods are only enforceable if they are agreed to, in writing, before the employee commences working.

Procedure

Every employment agreement should include a plain language explanation of the services available for the resolution of employment relationship problems.

A personal grievance should be raised within 90 days from the date on which the alleged personal grievance occurred or came to the notice of the employee. An employee can only raise a claim after the 90 day period has expired if the employer consents or the Authority grants leave for the grievance to be raised late due to exceptional circumstances.

If the grievance is not resolved between the parties, they should seek mediation assistance. Mediation services are provided by the Department of Labour, or the parties may use an independent mediator.

The 2004 amendments to the Employment Relations Act contemplate that mediation services may become available to parties in work relationships that are not employment relationships (such as contractors and their principals) on a voluntary basis.

When a settlement has been reached at mediation, the parties can request that the mediator sign a document setting out the terms of the settlement. The settlement can be enforced by the Authority. Payment required by any agreed terms of settlement should be paid directly to the other party and not to his representative, unless such representative is a solicitor.

The ERAA introduced the ability to allow a mediator to make recommendations on how best to resolve the employment relationship problem, with the written authorization of the parties. Such recommendations may be rejected by either party and only become binding if no party rejects them within a specified period.

Disputes

Disputes about the interpretation, application, or operation of an employment agreement may be pursued by a party by way of an application to the Authority.

The Authority may make a determination on the matter, but it does not have jurisdiction to make a determination on the fixing of terms and conditions of employment.

86 Employment Relations Act, Section 114(1).
87 Employment Relations Act, Section 149A.
Employment Relations Authority

If the matter is not resolved through discussions or mediation, the parties may seek a determination from the Authority. The Authority has exclusive jurisdiction to make determinations about employment relationship problems, including disputes about the interpretation, application, or operation of an employment agreement, matters on whether a person is an employee, and personal grievances.

When a matter comes before the Authority, it is required to consider whether mediation services have been used to resolve it. It should direct that mediation or further mediation be used unless it considers that it will not contribute constructively to resolving the matter, it will not be in the public interest, or it will undermine the urgent or interim nature of the proceedings.

The Authority is intended to provide fast and cost-effective dispute resolution. However, the ERAA introduced a number of amendments, such as allowing the Authority to award monetary penalties against a person who obstructs or delays its investigation, or to dismiss frivolous or vexatious claims or defenses of claims. The Authority is now able to treat cases that have been inactive for three years as withdrawn.

Further amendments have been made to the provisions which govern the Authority’s proceedings and which determine whether a matter is heard in the Authority or the Employment Court in the first instance.

Employment Court

A party dissatisfied with the Authority’s determination can apply to the Employment Court for a rehearing. The party can elect to have a specific part of the Authority’s determination heard by the court or a full rehearing of the entire matter (hearing de novo).

A question of law or an entire matter may be referred or removed directly from the Authority to the Employment Court in certain circumstances.

Court of Appeal and Supreme Court

A decision of the Employment Court can be appealed to the Court of Appeal as erroneous on a point of law, with leave from the Court of Appeal.

The Supreme Court Act 2003 allows parties to appeal decisions of the Court of Appeal to the Supreme Court. Leave to appeal is required, and will only be granted if the Supreme Court is satisfied that the appeal involves a matter of general or public importance, or the matter is of general commercial significance. A decision of the Employment Court also may be appealed directly to the Supreme Court in exceptional circumstances.

88 New Zealand Statutes 2003, Number 53.
Remedies

If the Authority or a court determines that the employee has a personal grievance, it has the power to award a range of remedies. It may:

- Reinstate the employee to his former position or place the employee in a position no less advantageous to him;
- Reimburse the employee a sum equal to the whole or any part of the wages or other money lost by him as a result of the grievance; and
- Require the employer to pay compensation to the employee for humiliation, loss of dignity and injury to his feelings, and/or loss of any benefit which the employee might reasonably have been expected to obtain if the personal grievance had not arisen.\(^89\)

If the Authority or a court finds that any workplace conduct or practice is a significant factor in the personal grievance, it may recommend to the employer certain actions to be taken to prevent similar employee relationship problems arising in the future. If the Authority or the court finds that an employee has been sexually or racially harassed in his employment, it may recommend to the employer certain actions to be taken in respect of the person who was guilty of the harassing behavior, or any other action necessary to prevent further harassment.

When an employee has been unjustifiably dismissed, reinstatement may be awarded but it is no longer the primary remedy.\(^90\) The Employment Relations Act also provides for interim reinstatement pending the hearing of the personal grievance. The Authority or the court should consider the extent to which the actions of the employee contributed to the situation that gave rise to the personal grievance and, if appropriate, reduce the remedies that would otherwise have been awarded accordingly.

Termination of Employment

In General

An employment relationship is generally terminated by (a) mutual agreement, (b) resignation, or (c) dismissal. The parties can terminate the employment relationship by mutual agreement at any time.

Subject to the terms of the agreement in relation to notice or any fixed term, an employee can unilaterally terminate the relationship by resigning voluntarily. Finally, an employer can terminate an employee’s employment for cause. An employer cannot terminate an employee’s employment without cause.

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89 Employment Relations Act, Section 123.
90 The EREA Removed the “primary remedy” status of reinstatement and instead only permits an order of reinstatement to be made if it is “practicable and reasonable” to do so.
**Notice Period**

The notice period for termination to be given by either of the parties is usually agreed at the outset and set out in the employment agreement.

If the agreement does not provide for a notice period, the Authority or the Employment Court will infer from it a reasonable period of notice. What is reasonable will depend on the circumstances, including the nature of the employment, the period of employment, and the seniority of the employee.

**Procedures for Termination of Employment by Employer**

**In General**

To unilaterally terminate an employee’s employment, an employer should demonstrate that the dismissal is both substantively justified and carried out in a procedurally fair manner.

The test of whether a dismissal or action taken by an employer against an employee was justified is an objective one: whether the action taken is one that a fair and reasonable employer could have chosen to do, in all circumstances, at the time the dismissal or unjustifiable action occurred.91

**Substantive Justification**

In some circumstances, misconduct by an employee is so serious that it justifies instant dismissal without prior warning and without notice. For conduct to constitute serious misconduct, it should deeply impair or be destructive of the basic confidence or trust which is essential to the employment relationship.

Less serious forms of misconduct such as poor performance, breach of company policy, repeated lateness, or poor timekeeping do not justify dismissal but may warrant a warning or other disciplinary action. The employee should be warned that further misconduct may constitute grounds for dismissal.

**Procedural Fairness**

An employer should carry out a dismissal in a manner which is procedurally fair. What is procedurally fair will depend on the circumstances. The following factors must be considered by the Authority or a court:

- Did the employer sufficiently investigate the allegations (having regard to available resources)?
- Did the employer raise its concerns with the employee?
- Did the employee have a reasonable opportunity to respond?
- Did the employer genuinely consider the employee’s explanation?

91 Employment Relations Act, Section 103A. The amended test was changed by the Eorra. This reflects the fact that there can be a range of reasonable options available to an employer in some circumstances.
The Authority or court may also consider any other factors it thinks appropriate. In addition, warning or disciplinary procedures contained in the employment agreement should be followed.

Further, the ERA provides that minor or technical defects in an employer’s procedure, which did not result in the employee being treated unfairly, should not render a dismissal or action unjustified.

**Redundancy Compensation**

An employer is not obliged by statute to pay redundancy compensation. Whether an employee is entitled to redundancy compensation will depend on the terms of the employment agreement. If the employment agreement is silent on the point, none is payable.

Most individual employment agreements do not include redundancy compensation. However, many collective agreements provide for the payment of redundancy compensation on an agreed formula.

When an employment agreement provides for the payment of redundancy compensation, the agreement usually includes a technical redundancy clause. This excludes the payment of redundancy compensation when, on the transfer or sale of the business, the employee retains employment on certain terms and conditions. Technical redundancy provisions prevent employees from claiming redundancy compensation while retaining their positions.

**Unemployment Benefit**

Income support is provided by way of a taxpayer-funded unemployment benefit. Employers are not required to contribute to an unemployment fund.

To be eligible for unemployment benefit, the person should not be in full-time employment but seeking, available, and willing and able to undertake it. The person also should have taken reasonable steps to find full-time employment.

Applicants for unemployment benefit should be over 18, or over 16 and married or in a civil union with one or more dependent children. A person is not eligible for unemployment benefit if he is a full-time student, is unemployed because of a strike, or is undertaking employment-related training.

The rate at which unemployment benefit is paid depends on the age of the person, civil status, whether the person has a dependent child, and the financial position of his partner.

While receiving unemployment benefit, the recipient is obliged to take reasonable steps to obtain suitable employment, attend and participate in any interviews for suitable employment, and accept any offer of suitable employment.

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92 Social Security Act 1964 (New Zealand Statutes, Number 136), Section 89.
Job Retraining Programs and Placement Programs

There are no compulsory job retraining or placement programs in New Zealand. However, if a person is receiving unemployment benefit, he may be required to participate in an activity designed to prepare him for employment. If he fails to comply without good and sufficient reason, his unemployment benefit may be suspended.

Recipients of unemployment benefit enter into jobseeker agreements which set out development activities that they are required to undertake, such as participation in work experience or employment-related training. In addition, certain beneficiaries may receive financial assistance to attend recognized training courses under Work and Income, New Zealand’s training incentive allowance program.

New Zealand Superannuation

Superannuation is governed by the New Zealand Superannuation and Retirement Income Act 2001, which works alongside the KiwiSaver Act 2006. The law establishes a taxpayer-funded superannuation fund which is held for the purpose of paying superannuation. This is the main social security benefit for the elderly.

Superannuation is available to any person who has reached 65 years of age, is ordinarily a resident of New Zealand, has completed ten years’ residence in New Zealand since the age of 20, and has resided in New Zealand for not less than five years since the age of 50.

The rate at which superannuation is paid depends on whether the person who is eligible for superannuation is married or in a civil union, living alone, or single and not living alone. Superannuation is taxed at the standard tax rate and each person who is eligible for superannuation is taxed separately.

KiwiSaver

In General

The KiwiSaver Act came into force in July 2007, and establishes a government-sponsored work-based savings scheme known as KiwiSaver. It is a voluntary scheme intended to encourage long-term saving by New Zealanders.

Currently, the government provides a NZ $1,000 tax-free contribution upon the opening of a KiwiSaver account, and provides a member tax credit (paying 50 cents for every dollar an employee contributes up to the maximum amount of NZ $521.43). The scheme is open to all citizens and people entitled to be in New Zealand indefinitely until they reach the superannuation qualification age.

93 New Zealand Statutes 2001, Number 84
94 New Zealand Statutes 2006, Number 40.
All employees who start “new employment” are automatically enrolled in the scheme, but they are able to opt out between day 13 and day 55 after their start date. Self-employed people such as independent contractors and beneficiaries also can opt in, but they need to make payments directly to Inland Revenue or their chosen scheme.

Employees enrolled in the scheme elect to contribute two per cent, four per cent, or eight per cent of their gross salary or wages to their KiwiSaver account. For new employees, contributions are to be deducted from the first pay. If they subsequently opt out of the scheme between day 13 and day 55, then all payments made are refunded.

An employee cannot withdraw his savings from a KiwiSaver scheme until he is eligible for superannuation, or after he has been in the scheme for five years, whichever is the longer period. There are certain exceptions to this rule, such as permanent emigration, serious illness, or significant financial hardship.

KiwiSaver savings also can be withdrawn to be used for purchasing a first home in certain circumstances. Employees also are able to take a “contributions holiday”, which can be between three months and five years long, after 12 months of contributing to the scheme.

Role of Employers

Employers are responsible for giving an information pack about KiwiSaver to new and existing employees who are interested in the scheme. Employers also should pass employees’ details to Inland Revenue to enable them to be enrolled. Employers should deduct KiwiSaver contributions from employees’ pay before tax and they are required to give employees investment statements from their chosen KiwiSaver provider, if they have one.

Employers also are required to make compulsory contributions to their employees’ KiwiSaver schemes (or complying superannuation funds) through the Inland Revenue. No compulsory employer contributions are required for employees who are not KiwiSaver members or who are on a “contributions holiday”.

Compulsory employer contributions are currently capped at a minimum of two per cent of an employee’s gross salary or wages. Employers can agree to contribute more than the two percent minimum, or they can make voluntary contributions over and above the minimum if they wish. The New Zealand Government announced that the compulsory employer contribution rate would increase from two percent to three percent of gross salary and wages from 1 April 2013. However, no Order in Council has been promulgated to give effect to this increase.

Private Superannuation Schemes

Employers are not statutorily required to provide employees with superannuation, but many employers offer membership in a private
superannuation scheme as part of an employee’s remuneration. Employers can voluntarily elect to register their superannuation scheme under the Superannuation Schemes Act 1989 (“Superannuation Schemes Act”). Registration is desirable as it sets out the rules and regulations that govern potential problems between the parties and provides security to prospective members in knowing that the scheme is regulated and subject to supervision and disclosure requirements.

To register under the Superannuation Schemes Act, it is necessary for certain details to be provided to the Government Actuary, such as the trustees of the scheme, how members enter the scheme and terminate membership, the contributions that are payable, the conditions for and methods of calculation of benefits, the number of trustees and how they are to be appointed and retired, and the circumstances under which the scheme may be wound up and the assets of the scheme distributed.

95 New Zealand Statutes 1989, Number 10.

(Release 1 – 2012)
Introduction

Northern Ireland’s system of employment law largely mirrors that in the rest of the United Kingdom, with the notable exception of the statutory disciplinary resolution procedures that continue to apply at present.

Employment law in Northern Ireland is contained in a largely separate system of legislation, in the form of Orders in Council and Statutory Rules. Many employment rights in the United Kingdom are contained in the Employment Rights Act of 1996, while these are contained in the Employment Rights (Northern Ireland) Order of 1996 in Northern Ireland.¹

The Disability Discrimination Act of 1995 and the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) that apply United Kingdom-wide service provision changes are covered by separate legislation in Northern Ireland called the Service Provision Change (Protection of Employment) Regulations (Northern Ireland) 2006. Implementation of Northern Ireland legislation tends to follow some months behind equivalent measures in the rest of the United Kingdom.

Enforcement of Employment Rights and Dispute Resolution

In General

Employment rights are enforced by application to an industrial tribunal in respect of complaints other than those of religious or political discrimination that are brought before the Fair Employment Tribunal. The procedure is very similar to that in the rest of the United Kingdom, as are time limits and remedies.

Northern Ireland does not have any equivalent to the Employment Appeals Tribunal and, while a tribunal can be asked to review its decision, the only appeal lies with the Court of Appeal on a point of law.

¹ Northern Ireland legislation can be accessed at the Stationary Office website at http://www.northernireland-legislation.hmso.gov.uk.
Labor Relations Agency

The Labor Relations Agency (LRA) is the equivalent of the Advisory, Conciliation, and Arbitration Service (ACAS) in the rest of the United Kingdom and provides a similar range of advice, information, and services. All tribunal applications are copied to the LRA and assigned to a conciliation officer who advises the parties of the LRA’s role in conciliating complaints.

The LRA is fairly proactive in encouraging conciliation and can be of great benefit to practitioners by providing unbiased advice to an unrepresented party, particularly an employee.

The LRA also offers a system of statutory arbitration in respect of complaints for unfair dismissal where both parties are willing to give up the right to have the matter decided by an industrial tribunal.

The procedure was introduced in 2002 and take up has been very low to date. A panel of arbitrators has been appointed and the process has some attractions, notably confidentiality and speed. The arbitration process is intended to be informal, with the arbitrator asking any question and with no cross-examination of witnesses by the opposing side.

One drawback of the scheme is that it does not extend to discrimination complaints, which are all too often used to bolster unfair dismissal complaints. There also is little attraction for the parties in going to arbitration in respect of an unfair dismissal claim only to have to return to the tribunal to deal with a discrimination allegation.

Settling Claims

A binding settlement of claims for breach of statutory employment rights can only be effected in two ways. The first is by way of an agreement under the auspices of an LRA conciliation officer. This potentially offers the most comprehensive and binding settlement available to an employer.

The alternative method is by way of a written compromise agreement, signed by the parties, where the employee has received advice from a “relevant independent advisor” who carries insurance or has professional indemnity cover in respect of that advice. While such an advisor can be a properly certified trade union representative or advice center worker, it will more frequently be a lawyer.

The difficulty with a compromise agreement is that it can only effect a binding settlement of the claims specifically raised by the employee. This can give rise to an absurdity where the agreement is drafted to suggest that the employee is complaining of discrimination on every conceivable ground.
Fair Employment and Discrimination

Unlike in the rest of the United Kingdom, Northern Ireland has had legislation prohibiting discrimination on the grounds of religious belief and political opinion in place since 1976. The Fair Employment and Treatment (Northern Ireland) Order of 1998 (“1998 Order”) is now the governing legislation in this area.

The 1998 Order also is broader than the Employment Equality (Religion or Belief) Regulations of 2003 in outlawing discrimination on the grounds of political opinion and sets out detailed monitoring obligations that are not found in the legislation applicable in England and Wales.

The 1998 Order outlaws discrimination on the grounds of religious belief and political opinion in much the same way as discrimination on the grounds of sex is outlawed by the Sex Discrimination Act of 1975 in the United Kingdom, with the same distinction between direct and indirect discrimination and employers’ liability as a result of the discriminatory actions of their employees. The principles and case law in sex, race, and religious belief or political opinion cases are largely transferable and applicable across the different pieces of legislation.

An employer will generally be liable where an employee has been subjected to sectarian comments or intimidation in the workplace, or where flags and emblems of one community have been displayed and the employer has not taken appropriate action. This can pose great difficulties for an employer who does not have exclusive control over the working environment or over all those with whom the complainant should work, such as a construction site or where some services in an organization are subcontracted.

The obligation not to discriminate on the grounds of religious belief or political opinion under the 1998 Order extends to all employers, those with statutory power to appoint employees for others, employment agencies, training providers, bodies awarding qualifications, and vocational organizations.

The 1998 Order also outlaws discrimination against contract workers and by partnerships of six or more in relation to existing partners or the admission of new partners. It also prohibits discrimination in other areas, including the provision of goods and services, and the sale of land or property that is publicly advertised, as well as discrimination by or in relation to barristers.

Certain occupations are exempt from the application of the 1998 Order, such as (a) clergymen and ministers of religion; (b) teachers in schools; (c) employment in a private household; and (d) jobs which are required to be done by a person holding or not holding a particular religious belief or political opinion.
Equality Commission

In General
The Equality Commission ("Commission") was established under the Northern Ireland Act of 1998 and is charged with promoting equality and the elimination of discrimination in Northern Ireland.

Along with its educational and advisory role, the Commission may assist individuals in pursuing complaints of unlawful discrimination up to and including legal assistance at hearing.

Monitoring
The 1998 Order, similar to preceding legislation, provides for a system of monitoring by employers of their workforce. All employers with more than ten employees are required to register with the Commission and to submit an annual monitoring return providing a breakdown of their workforce by reference to the employees’ community background, i.e., Protestant Unionist or Roman Catholic Nationalist.

Registered employers also should monitor applicants and appointees and include their information on the monitoring returns. All public sector employers and private sector businesses with more than 250 employees should provide information about employees who have been promoted and those who have left.

Periodic Review
All registered employers have an obligation to review their recruitment, training, and promotion practices once every three years to determine whether Protestants and Roman Catholics are securing fair participation in employment.

This is known as an “Article 55 Review” and the Commission has produced model report structures as well as a general guide for employers on this.

Investigation and Enforcement
The Commission has wide-ranging powers to investigate any employer’s practices at any time, and to seek undertakings from an employer that it will take affirmative action where necessary to secure fair participation. Where an employer does not provide such an undertaking, the Commission may issue a legally enforceable directive to carry out affirmative action.

Where an employer fails to comply with its monitoring or Article 55 Review obligations, the Commission may notify the employer regarding the breach. The employer can face criminal penalties, including a fine of up to GBP 5,000, and may be tagged as an “unqualified person” and thus ineligible for government grants or public contracts.
Codes of Practice

Employers should always have regard to the Fair Employment Code of Practice ("Code"), which sets out their obligations. The Code also sets out the standards by which employers can expect to be judged and to which the Fair Employment Tribunal may have regard in assessing an employer’s conduct.

Other codes of practice have been issued for use in Northern Ireland in relation to other types of unlawful discrimination. The Model Harassment Policy and Procedure issued by the Commission contains practical guidance for employers dealing with all types of discriminatory behavior.

Affirmative Action

While positive discrimination is not lawful, the 1998 Order does permit employers to take certain types of affirmative action with a view to securing fair participation for both Roman Catholics and Protestants. The permitted types of affirmative action are:

- The encouragement of applications for employment or training from people in under-represented groups;
- Targeting training in a particular area or at a particular class of person;
- The amendment of redundancy procedures to help achieve fair participation;
- The provision of training for non-employees of a particular religious belief, after approval by the Commission; and
- Recruiting from the unemployed.

Any sort of affirmative action should only be undertaken in consultation with the Commission.

Statutory Questionnaire

Where a person suspects that he has been the victim of religious or political discrimination, a statutory questionnaire may be served on the employer or potential employer as a precursor to making an application to the Fair Employment Tribunal. The questionnaire sets out the facts providing grounds for the suspected discrimination and seeks an explanation for the alleged discriminatory treatment.

An employer who deliberately and without reasonable cause fails to reply within a reasonable period, or whose reply is evasive or equivocal, is vulnerable to an adverse inference from such behavior by the Fair Employment Tribunal upon request of a complainant.
Fair Employment Tribunal

Enforcement by an aggrieved individual of a complaint of religious or political discrimination in employment is very similar to the enforcement regime in the rest of the United Kingdom. The main difference is that it is by way of an application to the Fair Employment Tribunal (“Tribunal”), an entity separate from the industrial tribunals, and one that exists primarily to hear complaints of discrimination on the grounds of religious belief or political opinion. The Tribunal has separate rules of procedure.

The Tribunal also can deal with related complaints of other types of unlawful discrimination or unfair dismissal that would otherwise have been dealt with by an industrial tribunal. In general, Northern Ireland is a fairly litigious jurisdiction. The field of employer-employee relations is no different, and visitors from other parts of the United Kingdom are sometimes surprised at the level of awards for injury to feelings in discrimination cases, although the level of awards in the rest of the United Kingdom is increasing.

Fair employment cases frequently take two to three years to come to a hearing and are often listed and run for a week or more. A complainant will often be asking the Fair Employment Tribunal to infer discrimination from a failure to follow procedures and inconsistencies in the employer’s explanations and evidence.

This inevitably requires a detailed examination of all the evidence, as it may only be the cumulative effect of all the employer’s actions that will persuade the Fair Employment Tribunal to draw the adverse inference. Costs orders are only made by the Fair Employment Tribunal in exceptional circumstances, as in an industrial tribunal.

Race Discrimination

The Race Relations Act of 1976 outlawed discrimination on the grounds of color, race, nationality, or ethnic or national origins in the rest of the United Kingdom, but Northern Ireland did not have parallel legislation until the Race Relations (Northern Ireland) Order of 1997 (“1997 Order”) became law.

The 1997 Order differs from the Race Relations Act of 1976 by specifically including the Irish traveler community as a racial group that is entitled to protection against discrimination. The 1997 Order does not apply to any group of persons defined by reference to religious belief or political opinion, as they are already covered by the Fair Employment legislation.
Statutory Disciplinary and Grievance Procedures

Although statutory disciplinary and grievance procedures were abolished in the rest of the United Kingdom in April 2009, statutory disciplinary procedures continue to apply in Northern Ireland. The Employment Act (NI) 2011 repealed the statutory grievance procedure.
The Philippines

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Introduction

The current attitude of the State toward employment leans in favor of greater protection for labor. The present Constitution (“1987 Constitution”) guarantees the rights of all workers to self-organization, collective bargaining and negotiations, and peaceful concerted activities, including the right to strike in accordance with law. Employees are granted the right to security of tenure, humane conditions of work, and a living wage.

The rationale behind the full protection of labor is the recognition by law of the inherent economic inequality between labor and management, and the intent to put the two parties on relatively equal positions.

Although the guarantee of full protection of labor has been enshrined since the Constitution of 1935 (“1935 Constitution”), the protection that employees currently receive is not the same as it was in the past. The aggressive stance of the government in protecting labor has been a product of a constant struggle to fight for better employment terms and conditions and industrial peace.

There was hardly any law regulating labor and employment in the Philippines prior to the 1935 Constitution, except for a few provisions in the Code of Commerce and the Spanish Civil Code. The initial priority of labor legislation was the regulation of the employer’s responsibility for personal injuries and deaths of employees at work. Act Number 1874 granted employees a right of action against their employers for damages due to injury or death resulting from the negligence of the employer or a person whose negligence the employer is liable for.

Early labor legislation also sought to assure the employee of his freedom to dispose of his earnings. Act Number 2549 made it unlawful for any entity to force, compel, or require any employee to purchase goods or personal property from the employer or someone else. It also prohibited the payment of wages by tokens, tickets, or other objects other than the legal currency.

The country was then influenced to a certain extent by the laissez faire doctrine of unrestricted freedom of the individual, which may have impeded labor legislation. When the maternity leave provision of Act Number 3071 was
declared unconstitutional for interfering with the “liberty of contract”, efforts to push for more important benefits for employees were arrested. Subsequent labor legislation was mostly limited to protecting the right of employees to receive payment for furnishing labor.

The ratification of the 1935 Constitution developed a new perspective, providing for a government sensitive to the needs of the underprivileged. Commonwealth Act Number 103 created the Court of Industrial Relations (CIR), which essentially had the power to fix minimum wages, enforce compulsory arbitration, and prescribe consequent penalties for violations.

However, industrial conflicts continued to crop up despite the adoption of compulsory arbitration. In 1953, Republic Act Number 875 shifted the framework of labor relations policies from compulsory arbitration to collective bargaining. It severely restricted the compulsory arbitration powers of the CIR, which was divested of the power to set wages, hours of employment, and other terms and conditions of employment.

Presidential Decree Number 442 of 1972 (“Labor Code”) revised and consolidated labor and social laws, and institutionalized the National Labor Relations Commission (NLRC), which replaced the CIR.

The institutionalization of the NLRC was in consonance with the view that labor controversies should be left for disposition not to an ordinary court but to an agency with training, experience, and background to handle them.

The Labor Code is divided into provisions on labor standards and labor relations. Labor standards refer to minimum requirements prescribed by existing laws, rules, and regulations relating to wages, hours of work, cost of living allowance, and other monetary and welfare benefits, including occupational, safety, and health standards. Labor relations refer to the status, rights, duties, and institutional mechanisms that govern the individual and collective interactions of employers, employees, or their representatives. The Labor Code has undergone several amendments to meet the changes and demands of labor issues.

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1 People vs. Pomar, G.R. Number L-22008 (3 November 1924).
2 Act Number 3688 of 1930 and Act Number 3959 of 1932.
Legal Relationship of Employer and Employee

In General

Laws or jurisprudence do not have a working definition of “employment”, but it is generally understood to mean “direct-hiring”, where a person directly engages the services of another so that the former becomes the latter’s employer.5

The use of the “four-fold test” has been recognized as the means by which the existence of an employment relationship can be ascertained.6 Under this test, the elements of an employer-employee relationship are the following: (a) selection and engagement; (b) payment of wages; (c) power of dismissal; and (d) power of control over the employee’s conduct.

The power of control over the employee’s conduct is considered as the most important index of the existence of an employer-employee relationship. It is not essential for the employer to actually supervise the employee’s performance of duties, as it is enough that the employer has the right to wield such power.

Thus, an employer should have control over the ends to be achieved but also over the means, manner, and method of the performance of the work. When an entity’s control over another is limited only to the results of the work, the latter will not be considered an employee.

Contracting or outsourcing is permissible but highly regulated. In a contracting or subcontracting arrangement, a principal agrees to put out or farm out to a contractor or subcontractor the performance or completion of a specific job, work, or service within a definite or predetermined period, regardless of whether such job, work, or service is to be performed or completed within or outside the premises of the principal.7

In a legitimate contracting arrangement, no employer-employee relationship may arise between the independent contractor and the principal or the employees of the contractor and the principal. An independent contractor is one who:

- Carries on an independent business and undertakes the contract work on his own account and under his own responsibility according to his own manner and method, free from the control and direction of the employer or principal in all matters connected with the performance of work, except as to the results thereof; and

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5 De Guzman, Employment Law in the Philippines (2007).
6 Philippine Airlines, Inc. vs. NLRC, G.R. Number 120506 (28 October 1996); Progress Homes vs. NLRC, G.R. Number 106212 (7 March 1997).
7 Department of Labor and Employment (DOLE), Department Order Number 18-02 dated 21 February 2002.
• Has substantial capital or investment in the form of tools, equipment, machineries, work premises, and other materials which are necessary in the conduct of his business.\(^8\)

Labor-only contracting is prohibited by law, such that an employer-employee relationship is created by operation of law between the principal and the employees supplied by the labor-only contractor. There is labor-only contracting when:

• The contractor does not have substantial capital or investment which relates to the job, work, or service to be performed, and the employees recruited, supplied, or placed by such contractor or subcontractor are performing activities which are directly related to the main business of the principal; or
• The contractor does not exercise the right to control the performance of the work by the contractual employees.

An agent is not considered an employee, although the definition of an “agent” — i.e., one who binds himself to render some service or to do something in representation or on behalf of another, with the consent or authority of the latter.\(^9\)

In determining whether an employment relationship or an agency exists, courts cannot limit themselves to simply considering a case from a labor law perspective. They also should take into account the Civil Code provisions on agency, the applicable special law, and the contract between the parties.

The Labor Code concept of “control” also should be distinguished from that which exists in a principal-agent relationship. The principal should have his say in directing the course of the principal-agent relationship, but he does not need to have control as pervasive as that of an employer.

A partner also is not an employee, being one who binds himself to contribute money, property, or industry to a common fund, with the intention of dividing the profits among the partnership.\(^10\) Whatever service the partner renders for the partnership is not compensated by wages but by his share in the profits. The obligations of a partner to his co-partners and third persons are governed by Articles 1679 - 1699 of the Civil Code, while mutual agency arises among partners.

Corporate officers also are not considered employees. An office is created by the charter of a corporation and an officer is elected by the directors or stockholders, while an employee does not usually occupy an office and is generally employed by the managing officer of the corporation, who also determines his

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9 Republic Act Number 386 of 1949 (“Civil Code”), art. 1868.
10 Civil Code, art. 1665.
compensation. A corporate officer’s dismissal is always a corporate act or an intra-corporate controversy between a stockholder and a corporation.

**Contract of Employment**

An employee is generally made to execute a written employment contract upon engagement. However, a written employment contract is not required for the existence of an employment relationship. A contract is valid whether it is verbal or written.

What is important is the understanding between the parties that one is to render personal service to or for the benefit of the other, and their recognition of the right of one to order and control the performance of the work and to direct the manner and method of performance. However, it is preferable to have a written employment contract that is signed by the person who applied for the job or who was offered employment.

**Capacity of the Parties**

The legal capacity of the parties is indispensable for the existence of consent, which is an essential element for the existence of an employment contract. There is no effective consent in law without the capacity to give such consent.

In general, age, insanity, imbecility, the state of being a deaf-mute, penalty, prodigality, family relations, alienage, absence, insolvency, and trusteeship, among others, modify or limit capacity to act. However, a person’s capacity to act is not limited by religious belief or political opinion. Emancipation takes place upon the attainment of the age of majority, which is eighteen years old unless otherwise provided.

**Special Categories of Employees**

*Part-Time Employees*

While the Labor Code does not specifically characterize part-time employees, they are nevertheless recognized in law. The Department of Labor and Employment (DOLE) has adopted the International Labor Organization’s definition of part-time work, i.e., a single, regular, or voluntary form of employment with hours of work substantially shorter than those considered as normal in the establishment.

Part-time employees are extended the same protection under the Labor Code as full-time workers with respect to security of tenure, payment of statutory benefits, and retirement. However, the employer may proportionately decrease

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11 Civil Code, art 39.
12 Executive Order Number 209 (“Family Code”), art 234.
the daily wage and wage-related benefits granted by law as part-time employees put in less hours of work.

Foreign Employees

An alien seeking employment in the Philippines should first obtain an alien employment permit with the DOLE, as well as the required working visa from the Bureau of Immigration.\textsuperscript{14} The issuance of the permit is conditioned upon a determination of the non-availability of any person in the Philippines who is competent, able, and willing at the time of application to perform the services that the alien seeks to perform.

The alien employment permit system aims to restrict the employment of aliens so as not to displace local labor in domestic employment opportunities. The 1987 Constitution has limited the ownership of certain businesses to Filipinos, but it does not prohibit foreigners from becoming employees in such businesses.

Foreign nationals found working without the requisite permit will be fined.\textsuperscript{15} However, no similar penalties or fines have been provided with respect to employers who allow foreign nationals to work for them without the necessary permit. The following categories of foreign nationals are exempted from the requirement of an alien employment permit:

- All members of the diplomatic services and foreign government officials accredited by the Philippine government;
- Officers and staff of international organizations of which the government is a cooperating member, and their legitimate spouses desiring to work in the Philippines;
- Foreign nationals elected as members of a corporation’s governing board who do not occupy any other position but only have voting rights in the corporation; and
- All foreign nationals exempted by special laws and other laws that may be promulgated by Congress.\textsuperscript{16}

The right of foreign employees to freedom of movement is not secured by a pact among Asian countries not to discriminate against foreigners with respect to employment. Nevertheless, discrimination is not tolerated. Employees who perform the same kind of work should receive the same pay and benefits regardless of nationality. Employees accorded the same position and rank are presumed to be performing the same type of work.

\textsuperscript{14} Labor Code, art 40.
Children

The minimum employable age is 15, but a child who is 15 years of age but below 18 will not be allowed to work for more than eight hours a day or 40 hours a week. He also should not be made to work from ten o'clock in the evening to six o'clock in the morning the following day. On the other hand, a child below 15 years of age should not be employed except:

- When he works directly under the sole responsibility of his parents or legal guardian and where only members of his family are employed; or
- Where his employment or participation in public entertainment or information through cinema, theater, radio, television, or other forms of media is essential.

An employment contract should be concluded by his parents or legal guardian, with his express agreement and the approval of the DOLE.

Apprentices

Apprenticeship pertains to practical training on the job supplemented by related theoretical instruction. It may be undertaken through a written apprenticeship agreement with an individual employer or any of the entities recognized by the DOLE.

He should be at least 15 years old and should possess vocational aptitude, the capacity for appropriate tests, and the ability to comprehend and follow oral and written instructions. The apprenticeship agreement should be duly approved by the Technical Education and Skills Development Authority (TESDA), otherwise the apprentice will be considered a regular employee. Every apprenticeship agreement should contain the following:

- Full names and addresses of the contracting parties;
- Date of birth of the apprentice;
- Name of the trade, occupation, or job in which the apprentice will be trained and the dates on which such training will begin and will approximately end;
- The approximate number of hours of on-the-job training and supplementary theoretical instructions which the apprentice will undergo during his training;
- A schedule of the work processes of the trade or occupation in which the apprentice will be trained and the approximate time to be spent on the job in each process;
- The graduated scale of wages to be paid the apprentice;

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17 Labor Code, art 139.
18 Republic Act Number 7610 of 1992 (“Republic Act Number 7610”), art VIII, s 12.
19 Republic Act Number 7610, art VIII, s 12.
20 Labor Code, art 58(a).
21 Nitto Enterprises vs. NLRC, G.R. Number 114337 (29 September 1995); Century Canning Corporation vs. Court of Appeals, G.R. Number 152894 (17 August 2007).
• The probationary period of the apprentice during which either party may summarily terminate the agreement; and
• A clause that if the employer is unable to fulfill his training obligation, he may transfer the agreement, with the consent of the apprentice, to any other employer who is willing to assume such obligation.22

_Learners_

A learner is a person hired as a trainee in industrial occupations that are non-apprenticeable and which may be learned through practical training on the job within three months, whether or not such practical training is supplemented by theoretical instruction.23 The employment of a learner should be covered by a learnership agreement duly approved by TESDA. The agreement should contain:

• The names and addresses of the parties;
• The occupation to be learned and the duration of the training period, which should not exceed three months;
• The wage of the learner, which should be at least 75 per cent of the applicable minimum wage; and
• A commitment to employ the learner as a regular employee, if he so desires, upon completion of training.24

_Impact of Transfer of Business_

_Sale of Assets_

Unless the purchaser in a _bona fide_ sale of an enterprise agrees to do so, he is not required to continue employing the employees of the seller. The seller should pay separation pay and other benefits founded on law, policy, or contract. The most that the purchaser may do, for reasons of public policy and social justice, is to give preference to qualified separated employees in the filling of vacancies in the facilities of the purchaser.25

There is no law requiring a _bona fide_ purchaser of assets of an ongoing concern to absorb the employees of the latter, much less give the employees absorbed the same benefits and conditions of employment as the employees of the purchaser. This is because a labor contract merely creates an action _in personam_ and does not create any real right which should be respected by third parties.26

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22 Omnibus Rules, Book II, Rule VI, s 18.
23 Omnibus Rules, Book II, Rule VII, s 1.
24 Labor Code, art 75.
25 _MDII Supervisors and Confidential Employees Association vs. Presidential Assistant on Legal Affairs_, G.R. Numbers L-45421, L-45422, and L-45423 (9 September 1977).
26 _Sundowner Development Corporation vs. Drilon_, G.R. Number 82341 (6 December 1989).
However, when the sale was in bad faith and done solely to defeat the right of the employees to self-organization, the purchaser or the transferee will be required to continue with the employment of the seller or transferor’s employees.\textsuperscript{27} The successor employer also will inherit the obligations incurred by the previous employer where the former is an alter ego of the latter in that they are controlled substantially by the same interests.

\textit{Stock Purchase}

By acquiring the shares of stock of a corporation, succession of employment rights and obligations occurs between the purchaser and the employees of the selling corporation.

Not only should the purchaser retain the employees; he should likewise recognize their length of service in the previous employer. All terms and conditions of employment also should remain the same unless the successor employer chooses to provide better terms and conditions.

\textit{Merger}

In a merger, two or more corporations unite but one retains its corporate existence, absorbing or merging in itself the other corporation which disappears as a separate entity. In a merger, the surviving corporation will automatically assume the assets and liabilities of the corporation that will be merged into it.\textsuperscript{28} However, this does not include the rights and obligations of the latter under employment contracts and collective bargaining agreements (CBAs).

According to the Supreme Court, the Corporation Code does not mandate the absorption of the employees of the non-surviving corporation in case of a merger. Employment is a personal consensual contract and absorption by the surviving corporation of a former employee of the merged corporation without the employee’s consent is a violation of his freedom to contract.

Without a provision in the articles of merger requiring the surviving corporation to assume all employment contracts of the other corporation as a condition for the merger, the surviving corporation may or may not employ the other corporation’s employees. However, the employees retain the prerogative to allow themselves to be absorbed or not.\textsuperscript{29}

\textsuperscript{27} \textit{Majestic and Republic Theaters Employees’ Association vs. CIR}, G.R. Number L-12607 (28 February 1962).

\textsuperscript{28} \textit{Batas Pambansa Bilang 68 of 1980 (“Corporation Code”), s 80.}

\textsuperscript{29} \textit{BPI vs. BPI Employees Union}, G.R. Number 164301 (10 August 2010).
Terms and Conditions of Employment

Remuneration and Minimum Wage Laws

Wage is defined as remuneration or earnings, however designated, capable of being expressed in terms of money, whether fixed or ascertained on a time, task, piece, or commission basis or other method of calculating the same, which is payable by an employer to an employee under a contract of employment for work or services done or to be done. It includes the fair and reasonable value, as determined by the Secretary of Labor, of board, lodging, or other facilities customarily furnished by the employer to the employee.30

The Regional Tripartite Wages and Productivity Board (“Regional Board”) prescribes the minimum wage rates for agricultural and non-agricultural employees and workers in every region. When conditions in the region so warrant, the Regional Board will investigate and study all pertinent facts. Based on the criteria prescribed by Article 124 of the Labor Code,31 the Regional Board will proceed to determine whether a Wage Order should be issued. A Wage Order should specify the region, province, or industry to which the prescribed minimum wage rates will apply, and the exemptions, if any.

The Secretary of Labor regulates the wages of employees who are paid by the results or are engaged in piecework, preferably through time and motion studies or in consultation with representatives of workers’ and employers’ organizations, guided by the prevailing applicable minimum daily wage for eight hours of work.

Hours of Work

In General

The maximum normal hours of work is eight hours a day,32 but there is no minimum hours of work prescribed by law. Employees should be given at least 60 minutes time off for regular meals during the work day.33 Meal periods of not less than 20 minutes also may be given provided that they are credited as compensable hours worked. Meal time which is less than twenty minutes becomes a rest period and is considered as compensable working time. There are

30 Labor Code, art 97(f).
31 In determining regional minimum wages, the Regional Board should consider the following factors, among others: (a) demand for living wages; (b) wage adjustment vis-à-vis the consumer price index; (c) cost of living and its changes; (d) needs of workers and their families; (e) need to induce industries to invest in the countryside; (f) improvements in standards of living; (g) prevailing wage levels; (h) fair return of the capital invested and the employers’ capacity to pay; (i) effects on employment generation and family income; and (j) equitable distribution of income and wealth.
32 Labor Code, art 83.
33 Labor Code, art 85; Omnibus Rules, Book III, Rule I, s 7.
instances when the meal break may be shortened to less than 60 minutes (but not less than 20 minutes) with full pay, to wit:

- Where the work is non-manual in nature or does not involve strenuous physical exertion;
- Where the establishment regularly operates at least sixteen hours a day;
- In case of actual or impending emergencies or there is urgent work to be performed on machineries, equipment, or installations to avoid serious loss to the employer; and
- Where the work is necessary to prevent serious loss of perishable goods.

**Overtime**

Subject to certain exceptions, an employee who works beyond eight hours a day is entitled to overtime pay. However, undertime work on any particular day should not be offset by overtime work on any other day.35

A work day is understood to be the 24-hour period which commences when the employee regularly starts to work or when his regular shift begins.

Any work in excess of eight hours within the 24-hour period is considered as overtime work, regardless of whether the work covers two calendar days. Conversely, any work of eight hours not falling within the 24-hour period is not considered as overtime work.36

Overtime pay is equivalent to 25 per cent of the employee’s basic pay, but work performed beyond eight hours on a holiday or rest day should be paid at least an additional 30 per cent.37

**Night Work**

An employee will be paid a night shift differential of at least 10 per cent of his regular wage for each hour of work performed from ten o’clock in the evening to six o’clock in the morning.

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34 Under Book III, Rule I, s 1 of the Omnibus Rules, these include: (a) employees of the government and any of its political subdivisions, including government-owned and/or controlled corporations; (b) employees of retail and service establishments regularly employing not more than five workers; (c) domestic helpers and persons in the personal service of another; (d) managerial employees; (e) field personnel and other employees whose time and performance is unsupervised by the employer, including those who are engaged on task or contract basis, purely commission basis, or paid a fixed amount for performing work irrespective of the time consumed in such performance.

35 Labor Code, art 88.

36 Department of Labor Manual, s 4323.01.

37 Labor Code, art 87.
Rest Days

Every employer should give his employees a rest period of at least 24 consecutive hours after every six consecutive normal workdays.\textsuperscript{38} It is not necessary for the rest day to fall on a weekend.

Sick Leave and Vacation Leave

The Labor Code does not require employers to grant sick leave and vacation leave, but employees who have rendered at least one year of service should be given a yearly service incentive leave of five days with pay.\textsuperscript{39} Other kinds of leave which the law requires to be granted to employees under special circumstances include the following:

- Maternity leave of 60 calendar days with pay for normal delivery, and 78 days with pay for Caesarean delivery,\textsuperscript{40} to be enjoyed by a female employee for her first four deliveries, including miscarriages;
- Paternity leave of seven working days with pay for married male employees, for the first four deliveries of their legal wives;\textsuperscript{41}
- Solo parent leave of seven working days with pay, to enable the solo parent to perform parental duties and responsibilities requiring his physical presence;\textsuperscript{42}
- Battered woman leave of up to 10 days (extendible without pay when required), in addition to other paid leaves under law and company policies, allowing an employee who is a victim of physical, sexual, or psychological violence to apply for the issuance of a protection order that will shield her from further violence and provide her related relief;\textsuperscript{43} and
- Special leave benefits of two months with full pay based on gross monthly compensation, for a female employee following her surgery caused by gynecological disorders, provided that she has rendered continuous aggregate employment service of at least six months for the last 12 months.\textsuperscript{44}

Holidays

Non-working holidays may be regular or special.\textsuperscript{45} Employees who are required or permitted to work during regular holidays should be paid a holiday premium equivalent to 100 per cent of their daily wage on top of their regular daily salary.

\textsuperscript{38} Labor Code, art 91.
\textsuperscript{39} Labor Code, art 95.
\textsuperscript{40} Republic Act Number 7322, which amended Republic Act Number 1161 ("Social Security Law").
\textsuperscript{41} Republic Act Number 8187.
\textsuperscript{42} Republic Act Number 8972.
\textsuperscript{43} Republic Act Number 9262.
\textsuperscript{44} Republic Act Number 9710.
\textsuperscript{45} The regular holidays are New Year’s Day (1 January), Maundy Thursday, Good Friday, \textit{Araw ng Kagitingan} (9 April), Labor Day (1 May), Independence Day (12
Special days are non-working holidays where employees are not paid any salary if they do not render any actual work. Employees who render work during special days are generally given a holiday premium equivalent to thirty per cent of their daily wage on top of their regular daily salary.

**Health Care Coverage**

The National Health Insurance Program (NHIP) provides health insurance coverage and affordable and accessible healthcare services for citizens. It is mandatory for employers to enroll their employees in the NHIP.

The contributions for the NHIP come from both the employer and the employee. The amount of contribution depends on the amount of salary earned by the employee and will be determined by the Philippine Health Insurance Corporation (“Philhealth”), the corporation which manages and administers the NHIP.

Benefits covered by the NHIP include in-patient hospital care, out-patient care, health education packages, emergency and transfer services, and other healthcare services determined by the Philhealth as cost-effective. However, non-prescription drugs and devices, alcohol abuse or dependency treatment, cosmetic surgery, optometric services, fifth and subsequent normal obstetrical deliveries, and other cost-ineffective procedures as defined by Philhealth are not covered.

**Vocational Training**

The TESDA is primarily responsible for formulating and continuing coordinated and fully integrated technical education and skills development policies, plans, and programs.

Several offices under the TESDA are tasked with the administration, management, development, and/or approval of vocational training programs. One such program is the Dual Training System, where the educational institution and its partner establishment share the responsibility of training, the

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June), National Heroes Day (last Sunday of August), Bonifacio Day (30 November), Christmas Day (25 December), Rizal Day (30 December), *Eid ul-Fitr*, and *Eid al-Adha*. The special days are Ninoy Aquino Day (21 August), All Saints’ Day (1 November), and the last day of the year (31 December).

46 Technical education refers to the education process designed at the post-secondary and lower tertiary levels, officially recognized as non-degree programs aimed at preparing technicians, paraprofessionals, and other categories of mid-level workers by providing them with a broad range of general education, theoretical, scientific, and technological studies, and related job skills training. Technical education includes vocational training.
former essentially through theoretical instruction and the latter through practical training.\textsuperscript{47}

**Discrimination**

**Discrimination on the Basis of Gender**

Article 135 of the Labor Code prohibits an employer from discriminating against any female employee with respect to terms and conditions of employment solely on account of her sex. Acts of discrimination include:

- Paying a lesser compensation, including wage, salary, or other form of remuneration and fringe benefits to a female employee as against a male employee, for work of equal value; and
- Favoring a male employee over a female employee with respect to promotion, training opportunities, and study and scholarship grants solely on account of his sex.

It also is unlawful for an employer to require as a condition for employment or continuation of employment that a female employee should not get married, or to stipulate that upon getting married, a female employee will be deemed resigned or separated, or to actually dismiss, discharge, discriminate, or otherwise prejudice a female employee merely by reason of her marriage.\textsuperscript{48}

A female employee also should not be discharged on account of her pregnancy, or while on leave or in confinement due to her pregnancy, or be discharged or refused admission upon her return to work for fear that she may again be pregnant.\textsuperscript{49} Republic Act Number 7877 of 1995 (“Anti-Sexual Harassment Act”) prohibits sexual harassment in the employment environment, among others, but it is applicable to male and female employees alike.

Sexual harassment is committed in a work-related or employment environment when the sexual favor is made as a condition in the hiring, employment, re-employment, or continued employment of an individual, or in granting him favorable compensation, terms, conditions, promotions, or privileges. It also is committed when the refusal to grant the sexual favor results in limiting, segregating, or classifying the employee which would discriminate, deprive, or diminish employment in any way or otherwise adversely affect him.\textsuperscript{50}

\textsuperscript{47} Rules and Regulations Implementing the Dual Training System Act of 1994, Sec. 1 (b) (1994).
\textsuperscript{48} Labor Code, art 136.
\textsuperscript{49} Labor Code, arts 137(2) and 137(3).
\textsuperscript{50} Anti-Sexual Harassment Act, s 3(a)1.
It also is committed when such acts would impair the employee’s rights or privileges under existing laws, or if the acts would result in an intimidating, hostile, or offensive environment for the employee.\(^{51}\)

An employer or head of office will be solidarily liable for damages arising from acts of sexual harassment committed in the employment environment if he is informed of such acts by the offended party and no immediate action is taken.

**Discrimination on the Basis of Age**

The Labor Code only prohibits child discrimination, in the sense that no employer should discriminate against any person with respect to terms and conditions of employment on account of his age.\(^{52}\)

At first glance, this may be interpreted to apply even to employees of old age, but the fact of its being placed under the chapter on employment of minors proves otherwise. Other than this direction, no other provision on discrimination on the basis of age can be found in any law.

**Discrimination on the Basis of Physical or Mental Handicap**

Handicapped workers are those whose earning capacity is impaired by age or physical or mental deficiency or injury.\(^{53}\) They may be employed when their employment is necessary to prevent curtailment of employment opportunities and when it does not create unfair competition in labor costs or impair or lower working standards.\(^{54}\)

No disabled person should be denied access to opportunities for suitable employment. A qualified disabled employee is subject to the same terms and conditions of employment, compensation, privileges, benefits, fringe benefits, incentives, or allowances as a qualified able-bodied person.

No entity should discriminate against a qualified disabled person by reason of his disability with regard to job application procedures, hiring, promotion, discharge, employee compensation, job training, and other terms, conditions, and privileges of employment. The following constitute acts of discrimination:

- Limiting, segregating, or classifying a disabled job applicant in a manner that adversely affects his work opportunities;
- Using qualification standards, employment tests, or other selection criteria that screen out or tend to screen out a disabled person, unless they are shown to be job-related for the position in question and are consistent with business necessity;

\(^{51}\) Anti-Sexual Harassment Act, ss 3(a)2 and 3(a)3.

\(^{52}\) Labor Code, art 140.

\(^{53}\) Labor Code, art 78.

\(^{54}\) Labor Code, art 79.
• Utilizing standards, criteria, or methods of administration that (a) have the effect of discrimination on the basis of disability or (b) perpetuate the discrimination of others who are subject to common administrative control;

• Providing compensation to a qualified disabled employee by reason of his disability that is less than the amount to which a non-disabled person performing the same work is entitled;

• Favoring a non-disabled employee over a qualified disabled employee with respect to promotion, training opportunities, and study and scholarship grants, solely on account of the latter’s disability;

• Reassigning or transferring a disabled employee to a job or position he cannot perform by reason of his disability;

• Dismissing or terminating the services of a disabled employee by reason of his disability, unless the employer can prove that he impairs the satisfactory performance of the work involved to the prejudice of the business entity, and that the employer first sought to provide reasonable accommodations for disabled persons;

• Failing to effectively select or administer employment tests which accurately reflect the skills, aptitude, or other factor of the disabled applicant or employee which the tests purport to measure, rather than the impaired sensory, manual, or speaking skills of such applicant or employee, if any; and

• Excluding disabled persons from membership in labor unions or similar organizations.

If suitable employment for disabled persons cannot be found through open employment, the State should endeavor to provide it by means of sheltered employment, with due regard to individual qualities, vocational goals, and inclinations. Handicapped workers also may be hired as apprentices or learners if their handicap will not effectively impede the performance of job operations in the particular occupation for which they are hired. After the lapse of the period of apprenticeship, they will be eligible for employment if found satisfactory.

Consistent with the principle of equal opportunity, the State should take appropriate vocational rehabilitation measures that will develop the skills and potentials of disabled persons and enable them to compete favorably for available productive and remunerative employment opportunities in the labor market.

55 Republic Act Number 7277 ("Magna Carta for Disabled Persons"), s 32.
56 Magna Carta for Disabled Persons, Section 4i. Sheltered employment refers to the provision of productive work for disabled persons through workshops providing special facilities, income-producing projects, or homework schemes with a view to giving them the opportunity to earn a living, thus enabling them to acquire a working capacity required in open industry.
No license or permit for the construction, repair, or renovation of buildings and workplaces will be granted or issued unless the owner or operator installs architectural facilities or structural features that will reasonably enhance the mobility of disabled persons, i.e., sidewalks, ramps, or railings. If feasible, all such existing buildings or establishments may be renovated or altered to enable disabled persons to have access to them.

**Discrimination on the Basis of Race or National Origin**

While the Constitution mandates a bias in favor of Filipino goods, services, labor, and enterprises, it also recognizes the need for business exchange with the rest of the world on the basis of equality and reciprocity, and limits the protection of Filipino enterprises only against unfair foreign competition and trade practices.

Thus, the promotion of the preferential use of Filipino labor, domestic materials, and locally produced goods does not mean that discrimination on the basis of race or national origin is encouraged.

**Discrimination on the Basis of Religion**

The Constitution prohibits any form of discrimination by reason of religious belief, while the Labor Code is perceptive to the religious restrictions of particular employees. For instance, the employer generally determines and schedules an employee’s weekly rest day, but he is required to respect the preference of employees when such preference is based on religious grounds.

Members of religious sects, whose belief does not allow them to join any association, cannot be compelled or coerced to join labor unions even when such unions have closed shop agreements with the employers. The law does not coerce them to join, and neither does the law prohibit them from joining.

Employers also are required to observe certain religious holidays since the law declares Maundy Thursday, Good Friday, and Eid ul-Fitr as non-working holidays. Muslim holidays are likewise recognized in certain parts of the country.

**Collective Bargaining and Workers’ Participation in Management**

**Rights and Duties under Collective Bargaining Laws**

In the absence of an agreement or other voluntary arrangement providing for a more expeditious manner of collective bargaining, it is the duty of the employer and the employees’ representatives to bargain collectively.

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57 Constitution, art III, s 5.
58 Labor Code, art 91(b).
59 Labor Code, art 251.
This requires the performance of a mutual obligation to meet and convene promptly and expeditiously in good faith to negotiate an agreement on wages, hours of work, and other terms and conditions of employment, including the adjustment of grievances or questions arising under such agreement and executing a contract incorporating such agreement if requested by either party.

This duty is especially applicable when there is no CBA existing in the employer company. Where there is already an existing CBA, the duty to bargain collectively means that neither party may terminate nor modify the CBA during its lifetime. However, they may propose changes to the CBA within sixty days prior to its expiration.\(^\text{60}\)

The labor organization designated or selected by a majority of the employees in an appropriate collective bargaining unit becomes the exclusive employees’ representative in such unit. An employer who negotiates with a labor organization that is not the exclusive employees’ representative is guilty of unfair labor practice.

Proposals on wages, hours, and other terms and conditions of employment are statutory or mandatory. An employer’s duty to bargain is limited to mandatory bargaining subjects, and he is free to bargain or not on other matters. However, his refusal to negotiate a mandatory subject of bargaining is an unfair labor practice. While the law requires both the employer and the union to bargain collectively, it does not compel the parties to actually reach an agreement.

**Workers’ Participation Schemes**

Individual employees or groups of employees have the right at any time to present grievances to the employer. They also have the right, subject to applicable rules and regulations, to participate in policy and decision-making processes in their workplace insofar as these processes will directly affect their rights, benefits, and welfare.

Another way to foster employee participation aside from collective bargaining is the formation of Labor-Management Councils (LMCs). The workers’ representatives in LMCs will be elected by at least a majority of all employees in an establishment.

An LMC can exist where there is no union or it can coexist with a union. It can represent employees across the enterprise, present grievances regardless of the grievant’s rank, and proffer proposals unhindered by formalities.

Employers are generally free to regulate, according to their own discretion and judgment, all aspects of employment, but employees should be able to participate in the formation of policies affecting their rights. When the exercise of management prerogatives affects not only the business operations of the

\(^{60}\) Labor Code, art 253.
company but also the rights of employees, management should at least properly inform the employees of its decisions or modes of action.

Health and Safety Protection in the Workplace

Occupational hazards refer to various environmental factors or stresses that can cause sickness, impaired health, or significant discomfort in workers and can be classified as chemical, physical, biological, or ergonomic. The Labor Code provides for health, safety, and social welfare benefits which employers should provide their employees.

Every employer should keep and maintain his workplace free from work hazards that are causing or likely to cause physical harm to the workers or damage to property. He should take steps to train a sufficient number of his supervisors or technical personnel in occupational safety and health, and should observe the following guidelines in the training of his personnel:

- In every non-hazardous establishment or workplace with fifty to 400 workers each shift, at least one of the supervisors or technical personnel should be trained in occupational health and safety and should be assigned as part-time safety man. Such safety man will be the secretary of the safety committee.
- In every non-hazardous establishment or workplace with over 400 workers per shift, at least two of its supervisors should be trained and a full-time safety man should be provided.
- In every hazardous establishment or workplace with twenty to 200 workers each shift, at least one of its supervisors or technical men should be trained to work as part-time safety man, who also will be appointed as secretary of the safety committee.
- In every hazardous establishment or workplace with over 200 workers each shift, at least two of its supervisors or technical personnel should be trained, and one of them will be appointed full-time safety man and secretary of the safety committee.
- The employment of a full-time safety man is not required where the employer enters into a written contract with a qualified consulting organization that will develop and carry out his safety and health activities. Such consultant should conduct plant visits at least four hours a week, is subject to call anytime to conduct accident investigations, and is available during scheduled inspections or surveys by the Secretary of Labor and Employment or his authorized representatives.

Employers also are required to provide medical services to their employees. Every employer should keep in his establishment first aid medicines and equipment as the nature and conditions of work may require. He also should

61 Rules and Regulations Implementing Executive Order Number 307, Annex I.
62 Omnibus Rules, Book IV, Rule II, s 5.
take steps for the training of a sufficient number of employees in first aid treatment. It is the duty of every employer to furnish his employees with free medical and dental attendance and facilities consisting of:

- The services of a full-time registered nurse when he has fifty to 200 employees, except when he does not maintain hazardous workplaces, in which case the services of a graduate first aider should be provided where no registered nurse is available;\(^{63}\)
- The services of a full-time registered nurse, part-time physician, and dentist, and an emergency clinic, when he has 200 to 300 employees; and
- The services of a full-time physician, dentist, full-time registered nurse, a dental clinic, and an infirmary or emergency hospital with one bed capacity for every 100 employees when he has more than 300 employees.

A physician or dentist in hazardous workplaces should stay in the premises for at least two hours in a working day if engaged on a part-time basis, and at least eight hours in a working day if engaged on a full-time basis. A physician and dentist may be engaged on a retained basis where the undertaking is non-hazardous in nature.

An emergency hospital or dental clinic is not required where there is a hospital or dental clinic that is accessible from the establishment and the employer makes arrangements for the reservation therein of necessary beds and dental facilities for the use of his employees.\(^{64}\) The hospital or dental clinic should not be more than five kilometers away from the workplace if situated in an urban area, or should be accessible by motor vehicle in twenty-five minutes of travel if situated in a rural area.\(^{65}\)

**Workmen’s Compensation and Survivors’ Benefits**

Presidential Decree Number 626 established the Employees’ Compensation and State Insurance Fund, which is a tax-exempt employees’ compensation program that allows employees and their dependents, in the event of work-connected disability or death, to promptly secure adequate income benefit and medical or related benefits.

All covered employers are required to remit to a common fund a monthly contribution equivalent to one per cent of the monthly salary credit of every covered employee. The employers’ contributions make up the State Insurance Fund (SIF), which is the source of the compensation to be paid to a claimant.

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\(^{63}\) The Secretary of Labor should provide appropriate regulations on the services required where the number of employees does not exceed fifty and should determine hazardous workplaces.

\(^{64}\) Labor Code, art 158.

\(^{65}\) Omnibus Rules, Book IV, Rule II, s 5.
employee or his dependents in case the employee suffers from a work-connected injury or disease.

The compensation is in the form of medical supplies and services and/or cash income if the employee is unable to earn because of the injury or disease. Death benefits and funeral benefits also are given. A claim is created when a work-related injury or disease befalls an employee. Within five days, he should notify his employer who, in turn, should enter the notice in the logbook. However, notice to the employer is not required in some cases.

Within five days after making the entry, the employer should report the work-connected sickness, injury, or death to the Social Security System (SSS) or the Government Security Insurance System (GSIS), as the case may be. The SSS and GSIS serve as administering agencies of the Employees’ Compensation Program. The Employees’ Compensation Program provides the following benefits to the employee or his dependents:

- Cash income benefits for temporary total disability, permanent partial disability, or permanent total disability;
- Carer’s monthly allowance of PHP 575 for permanent disabilities;
- Lifetime pension to primary beneficiaries in case of death, and five-year pension of at least PHP 15,000 to secondary beneficiaries;66
- Funeral benefit of PHP 10,000 for the private sector and PHP 3,000 for the public sector;
- Medical services during confinement in an Employees Compensation Commission (ECC)-accredited hospital, including (a) ward services during confinement in an ECC-accredited hospital, (b) subsequent domiciliary care by an ECC-accredited physician, and (c) medicines; and
- Rehabilitation services for employees who incurred a disability as a result of a work-related injury or sickness, including (a) physical rehabilitation therapy, artificial arms and limbs, crutches, and wheelchairs, among others, and (b) vocational education or training, PHP 1,000 monthly transportation allowance, and free project materials.67

66 The beneficiaries entitled to the pension benefit upon the employee’s death are his dependent spouse until remarriage and his dependent children. In their absence, his dependent parents and, subject to the restrictions imposed on dependent children, his illegitimate children and legitimate descendants are the secondary beneficiaries. A dependent pertains to (a) a legitimate, legitimated, or legally adopted child who is unmarried, not gainfully employed, and not over 21 years of age, (b) such child over 21 years of age but who is incapacitated and incapable of self-support due to a physical or mental defect that is congenital or acquired during minority, (c) a legitimate spouse living with the employee, or (d) the employee’s parents who are wholly dependent on him for regular support.

Termination of Employment

Restrictions on Termination

In this jurisdiction, the power to dismiss an employee is a recognized prerogative inherent in the employer’s right to freely manage and regulate his business. To equip employers with the authority needed to manage their business or enterprise, they are given a mass of rights which are collectively referred to as “management prerogative”, which essentially refers to the right of an employer to regulate all aspects of employment.

However, the exercise of management prerogative is not without limitations. A worker may not be dismissed except for a just or valid cause provided by law, and only after due process is properly observed. The dismissal should be in compliance with substantive due process, i.e., the act of dismissal should be legal, and procedural due process, i.e., the manner of dismissal should be legal.

The employer has the burden of proof to show that the dismissal is for a just cause, in accordance with the guarantee of security of tenure. The determination of the existence and sufficiency of a just cause should be exercised with fairness and in good faith after observing due process. Only the following grounds for termination of employment are sanctioned by the Labor Code:

- The services of an employee who has been engaged on a probationary basis may be terminated for a just cause or for failure to qualify as a regular employee in accordance with reasonable standards made known to the employee at the time of his engagement. An employee who is allowed to work after a probationary period becomes a regular employee.

- An employer may terminate an employee for any of the following “just causes” under Article 282 of the Labor Code: (a) serious misconduct or willful disobedience of the lawful orders of the employer or his representative in connection with the employee’s work; (b) gross and habitual neglect of duties; (c) fraud or willful breach of the trust reposed in the employee; (d) commission of a crime or offense against the person of the employer or any immediate member of his family or his representative; and (e) other analogous causes.

- Under Article 283 of the Labor Code, an employer also may terminate the services of an employee for “authorized causes”, such as the installation of labor-saving devices, redundancy, retrenchment to prevent losses, or the closing or cessation of operations under certain conditions.

- Under Article 285 of the Labor Code, an employer also may terminate the services of an employee who is found to be suffering from any disease and whose continued employment is prohibited by law or is prejudicial to his

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68 Constitution, art XIII, s 3; Labor Code, as amended, art 279.
69 Labor Code, art 281.
health or the health of his co-employees, subject to the payment of separation pay.

• Under Article 287 of the Labor Code, an employer may terminate the services of an employee who has reached the age of sixty-five due to compulsory retirement, unless there is another retirement age agreed upon.

• Under Article 285 of the Labor Code, an employee may terminate the employment relationship through his voluntary resignation.

Notice Periods and Procedural Requirements

For termination of employment based on just causes (employee fault or negligence) under Article 282 of the Labor Code, the following procedure should be observed:

• A written notice served on the employee specifying the ground for termination, and giving him a reasonable opportunity within which to explain his side. “Reasonable opportunity” means every kind of assistance that management should accord to the employee to enable him to adequately prepare for his defense, i.e., at least five calendar days from receipt of the notice. The notice should contain a detailed narration of the facts and circumstances that will serve as basis for the charge. It also should specifically mention which company rules, if any, are violated.

• A hearing or conference during which the employee, with the assistance of counsel if he so desires, is given an opportunity to respond to the charge, present his evidence, or rebut the evidence presented against him. An actual formal “trial-type” proceeding, although preferred, is not absolutely necessary to satisfy the employee’s right to be heard. A formal hearing or conference becomes mandatory only when (a) requested by the employee in writing, (b) substantial evidentiary disputes exist, (c) a company rule or practice requires it, or (d) similar circumstances justify it.

• A written notice of termination served on the employee indicating that, upon due consideration of all the circumstances, grounds have been established to justify his termination. Notices should be served on the employee’s last known address.

For termination of employment based on authorized causes (due essentially to management decisions) under Article 283 of the Labor Code, there should be a written notice to the employee and the appropriate Regional Office of the DOLE at least thirty days before the effective date of termination, specifying the ground for termination.70 If the termination is brought about by the completion of the contract or a phase thereof, no prior notice is required.

If the termination is brought about by the failure of an employee to meet the employer’s standards in case of probationary employment, service of a written

70 Omnibus Rules, Book VI, Rule I, § 2.
notice on the employee within a reasonable time from the effective date of termination is sufficient. Due process lies in apprising the probationary employee of the standards against which his performance will be continuously assessed, and not in notice and hearing.

**Severance or Separation Pay**

An employee’s entitlement to separation pay depends on the ground for the termination of his services. Separation pay is due if the termination is for authorized causes. If an employee is dismissed for just cause, he is not entitled to reinstatement or separation pay and backwages.

However, separation pay has been granted as a measure of social justice even when an employee has been validly dismissed, as long as the dismissal is not due to serious misconduct or reflective of personal integrity or morality. The Supreme Court usually considers the nature of the offense, the years of service, and the frequency of the employee’s violations in determining whether or not an award of separation pay is proper.

When an employee is illegally dismissed but reinstatement is no longer feasible due to strained relations, separation pay also may be awarded. Separation pay in lieu of reinstatement also may be awarded if the employee decides not to be reinstated.

An employee who voluntarily resigns from employment is not entitled to separation pay, unless there is a stipulation for such payment in the employment contract or in the CBA, or if a payment of the amount is sanctioned by established employer practice or policy.

In awarding separation pay in lieu of reinstatement, the amount should be equivalent to one month’s salary for every year of service reckoned from the first day of employment until the finality of the decision. Payment of separation pay is in addition to payment of backwages. If separation pay is awarded instead of reinstatement, backwages will be computed from the time of illegal termination up to the finality of the decision. The specific computations for separation pay under Article 283 of the Labor Code are as follows:

- In case of termination due to the installation of labor-saving devices or redundancy, the affected worker will be entitled to a separation pay equivalent to at least one month’s pay, or to at least one month’s pay for every year of service, whichever is greater.
- In case of retrenchment to prevent losses and closure or cessation of operations not due to serious business losses or financial reverses, the

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71 Escario vs. NLRC, G.R. Number 160302 (27 September 2010).
72 Aklan College, Inc. vs. Guarino, G.R. Number 152949 (14 August 2007).
73 Agricultural and Industrial Supplies Corporation vs. Siazar, G.R. Number 177790 (25 August 2010).
separation pay will be equivalent to one month’s pay, or at least one-half month’s pay for every year of service, whichever is greater.

In both cases, a fraction of at least six months is treated as a full year. For dismissal on account of disease, separation pay is equivalent to at least one month’s salary or to one-half month’s salary for every year of service, whichever is greater, with a fraction of at least six months considered as one full year.74

Consequences of Illegal Termination

Reinstatement

The normal consequences of an illegal dismissal are reinstatement without loss of seniority rights and payment of backwages computed from the time compensation was withheld up to the date of actual reinstatement.

A decision of a labor arbiter reinstating a dismissed or separated employee, insofar as the reinstatement aspect is concerned, is immediately executory even pending appeal. The employee should either be admitted back to work under the same terms and conditions prevailing prior to his dismissal or separation or, at the option of the employer, merely reinstated in the payroll.

The posting of a bond by the employer will not stay the execution for reinstatement.75 Upon finality of the decision, the employee who is unjustly dismissed is entitled to reinstatement without loss of seniority rights and full backwages.

Damages

Where the Labor Arbiter finds that malice or bad faith attended the illegal dismissal, the employee may be awarded damages, which may be actual or compensatory, moral, nominal, temperate or moderate, liquidated, and exemplary or corrective.76

Actual or compensatory damages should be duly proved with a reasonable degree of certainty. On the other hand, no proof of actual pecuniary loss is necessary for moral, nominal, temperate, liquidated, or exemplary damages to be awarded. The assessment of such damages, except liquidated ones, is left to the discretion of the court, according to the circumstances of each case.

Attorney’s Fees

As a general rule, attorney’s fees and expenses of litigation other than judicial costs cannot be recovered in termination cases in the absence of any award

74 Labor Code, art 284.
75 Labor Code, art 223.
76 Civil Code, art 2197.
granted by a court. Attorney’s fees may be awarded if the dismissal is in bad faith, and are normally equivalent to ten per cent of the monetary award.\textsuperscript{77}

\textbf{Job Retraining or Placement Programs}

There is currently no unemployment insurance program in the Philippines. The SSS for employees in the private sector, the GSIS for employees in the public sector, and the ECC for both sectors only provide for death, permanent or total disability, and retirement or pension benefits, but not unemployment insurance income.

While there is no program requiring mandatory job retraining or placement programs, the government has recognized the need for the retraining or reintegration of the unemployed,\textsuperscript{78} the marginalized,\textsuperscript{79} and those whose jobs are affected by the promulgation of new laws.\textsuperscript{80}

\textbf{Retirement, Social Security, Healthcare, and Old Age Pensions}

\textbf{Retirement}

Retirement presupposes that the employee entitled to it has reached the compulsory retirement age or has rendered the required number of years as provided for in the CBA, the employment contract or company policy or, in the absence thereof, in Republic Act Number 7641 (“Retirement Pay Law”).

Article 287 of the Labor Code, as amended by the Retirement Pay Law, provides that, in the absence of a retirement plan or agreement, an employee who has reached the age of 60 or more, but not beyond 65 (compulsory retirement age), who has served at least five years in the company, may retire and will be entitled to retirement pay equivalent to at least one-half month salary for every year of service.

Unless the parties provide for broader inclusions, one-half month salary is equivalent to fifteen days plus one-twelfth of the thirteenth month pay and the cash equivalent of not more than five days of service incentive leaves.

Article 287 of the Labor Code only applies where: (a) there is no CBA or other applicable employment contract providing for retirement benefits; or (b) there is a CBA or other applicable employment contract providing for retirement benefits, but it is below the requirements set by law.

The Retirement Pay Law essentially applies to all employees in the private sector, regardless of their position, designation, or status and irrespective of the method by which their wages are paid. However, it does not cover employees of

\textsuperscript{77} Labor Code, art 111.
\textsuperscript{78} Republic Act Number 7796.
\textsuperscript{79} Republic Act Number 8371.
\textsuperscript{80} Republic Act Number 8749, Chapter 7, s 49.
retail, service, and agricultural establishments or operations employing not more than ten employees.81

Social Security, Healthcare, and Pensions

The workmen’s compensation legislation adopts the compensation fund type by establishing the Employees’ Compensation Program. It covers all employees regardless of the nature of their employment, and employers with at least one employee regardless of the capitalization and nature of their business.

Upon permanent total disability, an employee member who has paid at least 36 monthly contributions prior to the semester of disability is entitled to the monthly pension. If he has not paid the required monthly contributions, he is entitled to a lump sum benefit equivalent to the monthly pension times the number of monthly contributions paid to the SSS or 12 times the monthly pension, whichever is higher.

An employee member who has received a lump sum benefit, and who is reemployed or has resumed self-employment not earlier than one year from the date of his disability, is again subject to compulsory coverage and is considered a new member.82 The monthly pension and dependents’ pension is suspended upon the reemployment or recovery of the disabled employee member from his permanent total disability or his failure to present himself for examination at least once a year upon notice by the SSS.

The death of the pensioner with permanent total disability entitles his primary beneficiaries to the monthly pension. If he has no primary beneficiaries and he dies within sixty months from the start of the monthly pension, his secondary beneficiaries become entitled to a lump sum benefit equivalent to the total monthly pension corresponding to the balance of the five-year guaranteed period excluding the dependents’ pension.83

If the pensioner’s disability is permanent partial and occurs before 36 monthly contributions have been paid prior to the semester of disability, the benefit is a percentage of the lump sum benefit. If the disability is permanent total84 and occurs after thirty-six monthly contributions have been paid prior to the semester of disability, the benefit is the monthly pension for permanent total disability payable within the period designated in a schedule under the SSS Law.85 Employees also are entitled to sickness benefits, maternity leave benefits,

81 Labor Advisory on Retirement Pay Law of 24 October 1996.
82 Social Security Law, s 13-A(a).
83 Social Security Law, s 13-A(c).
84 The following disabilities are deemed permanent total: (a) complete loss of sight of both eyes; (b) loss of two limbs at or above the ankle or wrists; (c) permanent complete paralysis of two limbs; (d) brain injury resulting in incurable imbecility or insanity; and (e) other cases determined and approved by the SSS.
85 Social Security Law, s 13-A(f).
paternity leave benefits, parental (solo parent) leave, battered woman leave, and service incentive leave.

Summary of Social Costs
Under the Employees’ Compensation Program, an employer is required to register his employees, keep a logbook to record contingencies, notify the ECC of contingencies, and pay the monthly contribution. For the private sector, the monthly contribution is PHP 10 or one per cent of the employee’s monthly salary credit, while it is one per cent of the Average Monthly Salary Credit but not more than PHP 30 per month for the government sector.

The employer should deduct and withhold from an employee’s monthly salary and remit to the SSS the employee’s contribution in an amount set according to his salary, wage, compensation, or earnings during the month, following the schedule set by the Social Security Commission.

The employer also should contribute in accordance with the schedule set by the Social Security Commission. The remittance of such contributions by the employer should be supported by a quarterly collection list to be submitted to the SSS. Employers and employees also should contribute to the medical insurance or benefits of employees in accordance with the schedule set by Philhealth.

Conclusion
Labor and employment laws in the Philippines are inherently tilted towards the worker. The Labor Code even translates this policy into a rule of statutory construction, such that all doubts should be resolved in favor of labor.86

Given the express mandate of the Constitution, it appears that the law will continue to favor the worker, but this predilection of the law will cause the Supreme Court to take a more active role in balancing the rights of workers and employers. After all, the constitutional policy to provide full protection to labor is not meant to be a sword to oppress employers. Thus, the Supreme Court, in a recent case, held that its commitment to the cause of labor does not prevent it from sustaining the employer when he is in the right.87

While the Labor Code has been amended several times, such amendments were done in a piecemeal fashion. There has been a recent conscious effort to entirely amend the Labor Code. Lawmakers recognize that labor laws should adapt to the emerging trends of globalization, technological advancement, and other trends affecting an employee’s working conditions.

86 Labor Code, art 3.
87 Magsaysay Maritime Corp. vs. NLRC, G.R. Number 186180 (22 March 2010).
However, it is expected that some of these efforts will be met with resistance from groups representing the workforce who view that labor legislation does not adequately protect workers’ rights. It is difficult to predict whether these efforts will lead anywhere as these will largely depend on the political will of those who are pushing for the amendments. Nevertheless, if legislators are able to balance the rights of workers with those of employers, there is no reason why the Labor Code cannot be amended successfully.
Poland

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Introduction
The main legal act of Polish labor law is the Labor Code. The Labor Code specifies the rights and duties of all workers, regardless of both the work sector and the legal basis for employment.

However, the Labor Code does not contain all the provisions and rules of Polish labor law; there also are separate Acts on, for example, group redundancies and trade unions, and secondary regulations (particularly regulations issued by the Minister of Labor and Social Policy).

This division of laws allows the Labor Code itself to remain stable while, for example, the Council of Ministers can periodically regulate the minimum wage. Importantly, other sources of law that apply to employees may not worsen the employee’s situation as it stands under the Labor Code.

Where not regulated by the provisions of labor law, the provisions of the Polish Civil Code of 1964 apply accordingly to employment relationships, unless they are contrary to the provisions of labor law. Labor law compliance is controlled by the State Labor Inspectorate pursuant to the State Labor Inspectorate Act of 13 April 2007.

Sanctions for breaching labor law provided for in this Act include orders to remove any breaches confirmed and fines. Unless otherwise stated, all the provisions of law described below refer to the Labor Code of 1974.

Legal Relationship between Employers and Employees

Employee and Employer
An employee is a person employed on any of the following bases:

- An employment contract;

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2 Journal of Laws, Number 89, item 589, as amended.
• An appointment;
• An election;
• A nomination; and
• A cooperative contract of employment.

The employment contract is the most common way of entering into an employment relationship in the private sector.

Employment relationships established on the basis of nomination or appointment apply to those employed in particular public sector units, for example, in health care centers, welfare units, military units, local government units, and public education units.

An employee is any person more than 18 years and "young adults" (generally, between 16 and 18) employed on the basis of an employment contract, appointment, election, nomination, or cooperative contract of employment indicated above. Special parts of the Labor Code, as well as secondary acts, apply to young adults.

An employer is any organizational unit, even if it has no legal personality, and any natural person, if it employs employees. Persons limited in their capacity to perform legal acts (i.e., between 13 and 18 or partly deprived of legal capacity due to mental illness, mental deficiency, or other types of mental disorder) may establish employment relationships and perform legal acts within such relationships without the consent of their legal representatives.

**Employment Relationship**

Under an employment relationship, the employee undertakes to perform specified work for the employer under the employer’s supervision and in a place and at the time specified by the employer, and the employer undertakes to employ the employee in return for remuneration.

Establishing an employment relationship and specifying work and pay conditions, regardless of the legal basis of this relationship, require a declaration of intent from the employer and the employee. The employment relationship is commenced on the date defined in the contract as the first day of work and, if the date is not defined, on the date the employment contract is executed.

Provisions of employment contracts and other legal instruments under which an employment relationship is established cannot be less favorable to the employee than the provisions of the Labor Code and other labor law regulations governing employment. If they are less favorable, they will be null and void by force of law and replaced by appropriate provisions of labor law.

**Employment Contract**

An employment contract must be concluded in writing and must specify, in particular:

(Release 1 – 2012)
• The parties, execution date, and contract type;
• The type of work, place of performance, and start date;
• The working hours (full or part time); and
• The remuneration corresponding to the type of work and a list of the remuneration components.

Polish law has been adjusted to comply with the provisions of Council Directive 91/533/EEC of 14 October 1991 on the obligation of employers to inform employees of the conditions applicable to the contract or employment relationship. Therefore, in addition to the above obligations, the employer should give the employee written information containing the following data no later than within seven days of execution of the employment contract:

• Length of the employee's normal working day or week;
• How often remuneration is paid;
• Holiday entitlement; and
• Length of notice periods.

If the employer is not obliged to introduce work rules (i.e., if it employs less than 20 staff or there is a collective labor agreement), the employer must additionally inform the employee of details such as night-time hours; place, date and time of remuneration payment; and the method adopted for employees to confirm their arrival and presence at work and justify absence from work.

If a foreign employee works in Poland in any of the following circumstances, the terms and conditions of his employment regarding working time, rest periods, holiday, overtime pay, minimum wage, occupational health and safety, parental rights, minor employees’ rights, non-discrimination, and temporary workers’ rights cannot be less favorable than those provided for in Polish labor law, even if the employment relationship is governed by a foreign law:

• Due to an arrangement between his employer and a Polish entity;
• In a Polish branch of his employer; or
• As an employee of a foreign temporary employment agency.

An employment contract can be concluded for a non-fixed term, for a fixed term, or for the time needed to carry out a specific task. The difference between the latter two is that the length of the fixed-term employment contract is defined by calendar periods (i.e., months or years), while the length of the specific task contract is defined by the time needed to complete the work to be carried out.

If an employee has to be replaced during a justified absence from work, the employer may engage another employee for that purpose under a fixed-term employment contract covering the period of absence. All such contracts may be

preceded by an employment contract for a trial period not exceeding three months.

In general, under the Labor Code, entering into another employment contract for a fixed term has the same legal consequences as entering into a non-fixed term employment contract if the parties had earlier concluded fixed-term employment contracts for two consecutive periods, and if the gap between termination of the earlier contract and start of the later contract was not more than one month.

Foreigners and Foreign Entities

As a rule, foreign employees need to obtain a work permit to work legally in Poland. However, citizens of the European Union (EU) and some other countries, including Switzerland, Norway, Ireland, and Lichtenstein, are exempt from this obligation. As a rule, a work permit can be issued by the wojewoda (head of executive body of a province) if:

- The foreigner’s remuneration is not lower than that paid to a Polish employee in a similar position; and
- The wojewoda confirms that the vacancy cannot be filled by a person registered as unemployed or seeking employment or if the recruitment organized for the employer turns out to be ineffective.

Several exceptions to these requirements are provided for in specific regulations. A work permit is issued on the employer’s request and is the basis on which a working visa is obtained by a foreign national intending to work in Poland from the Polish consulate or embassy in his place of residence.

Foreigners may also legalize their residence in Poland by obtaining a temporary residence permit if their stay in Poland is to exceed three months, subject to certain exceptions. Foreign entities may employ Polish nationals under an employment contract concluded under the law chosen by the parties.

Transfer of Undertakings

Where an undertaking or part thereof is transferred to another employer, the new employer becomes, by force of law, a party to the previous employment relationship. If part of an undertaking is transferred to another employer, the former and the new employers are jointly and severally liable for the obligations under the employment relationship which originated before the transfer. Not later than 30 days before the intended transfer, both employers (former and new) must inform their trade unions in writing of the transfer details, including

- The anticipated date of the transfer;
- The reasons for the transfer;
- The legal, social, and economic implications of the transfer for the employees; and
- Any measures considered in relation to the employees.
If there are no trade unions at a given employer’s establishment, this information should be given directly to the employees. If the employer plans to change the terms and conditions of employment of the employees affected by the transfer, it should consult the trade unions beforehand. An employee who is taken over may terminate his employment within two months of the transfer date, informing the new employer of his decision seven days in advance.

**Terms and Conditions of Employment**

*Remuneration for Work*

The minimum wage for employees employed full time is specified by the Council of Ministers. The general rule is that the employer cannot offer employees wages lower than the minimum specified. In 2012, the minimum wage is PLN 1,500.

According to the Labor Code, conditions on remuneration for work and the awarding of other work-related benefits should be specified in collective labor agreements or, in the absence of such agreements, for employers with at least 20 staff, in the pay rules.

Remuneration should correspond to the type of work performed and the qualifications required for work performance, and should take into account the quantity and quality of the work performed. Remuneration is due for work performed. An employee retains the right to remuneration during a period when he does not work only if provided for in the provisions of labor law.

However, no remuneration is payable for inadequate performance of services or for making defective products. Partial payment of remuneration in a non-cash form is permitted only when provided for by statutory provisions of labor law or a collective labor agreement. Unless covered by a collective labor agreement, the conditions of remuneration for work and the awarding of other work-related benefits to employees employed at state-owned companies are set by way of regulations issued by competent ministers.

*Protection of Remuneration for Work*

Employees cannot renounce their right to remuneration or transfer the right to another person. If deductions are made from remuneration (e.g., for maintenance payments), they may not, as a rule, amount to more than three-fifths of the remuneration, while an amount equal to the minimum wage is exempt from deductions.

An employer may withhold amounts other than those related to enforceable titles (i.e., those deductions ordered from an employee's salary in a court or enforcement procedure) only if the employee gives his written consent.

*Rewards and Bonuses*

Employees who substantially contribute to the performance of the undertaking’s tasks through exemplary fulfillment of their duties and those who show initiative...
at work and improve work effectiveness and quality may be given rewards and bonuses by the employer.

Other benefits include benefits due during a period of temporary incapacity to work due to sickness, maternity benefit, retirement or disability severance pay, and death benefit.

**Working Time**

Working time is the time when an employee is at the employer’s disposal in the workplace or another place designated for the performance of work. In Poland, working time may not exceed eight hours per day and an average of 40 hours per week over an average five-day working week within the adopted reference period of generally not more than four months. Working time can be extended to up to 12, 16, or sometimes 24 hours a day if justified by the type of work or work organization provided for in the Labor Code.

Working time can be continuous for work which for technical reasons cannot be interrupted. Where an employer operates a continuous working system, working time can be extended to 43 hours on average per week in a reference period of not more than four weeks, and, on one day in each week in this reference period, daily working time can be extended to 12 hours.

The requirements for a working time register are set forth in the Minister of Labor and Social Policy Regulation of 28 May 1996 on keeping employment documentation and the method of keeping employee personal files.4

Under the Regulation, the working time register should particularly include information on:
- Work performed on Sundays;
- Work performed at night;
- Overtime;
- Work performed on public holidays;
- On-duty service performed by the employee;
- Vacations; and
- Sick leave and other justified and unjustified absences from work.

**Overtime**

Work performed in excess of working time standards constitutes overtime. Overtime is only permissible in the case of rescue operations having to be carried out for the protection of human life or health, or for the protection of property and special needs of the employer. For overtime, in addition to the usual remuneration, the employee will receive:

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4 *Journal of Laws*, Number 62, item 286, as amended.
• One-hundred per cent of remuneration for overtime at night, on Sundays, and on public holidays that are not working days for the employee under the working time schedule binding upon him; and

• Fifty per cent of remuneration for overtime on any other day.

These amounts also are payable for each hour worked in excess of the weekly working time standard in the adopted reference period. Additional remuneration for overtime need not be paid if, in return for the overtime, the employee, at his own request, takes additional time off equal to the number of overtime hours worked. The employee, in return for the overtime, also can be granted additional time off without a request.

In this case, the employer must grant time off no later than by the end of the reference period of one and a half times the number of hours of overtime worked. This cannot, however, lead to a reduction in the remuneration due to the employee for a full month's work. Generally, employees cannot work more than 150 overtime hours per calendar year. However, a collective labor agreement, work rules or, in the absence of these, an employment contract, can provide for a higher overtime limit. In this case, employees’ weekly working hours, including overtime, cannot exceed an average of 48 hours a week.

An employer may require an employee to be prepared to work outside the normal working hours specified in the employment contract at the workplace or at any other location specified by the employer (on stand-by). Stand-by time is not treated as part of the employee's working hours if the employee does not actually perform any work during this time. Stand-by time may not violate the employee's right to the rest periods specified in the Labor Code.

Work at Night, Sundays, and Public Holidays

Night time is deemed eight hours between 9 p.m. and 7 a.m. that can be determined by the employer. An employee who works at night has the right to additional remuneration for each hour worked during night time of 20 per cent of the minimum wage hourly rate set by the Council of Ministers. Pay for working at night time is paid in addition to any additional remuneration for overtime.

Sundays and public holidays (there are 13 public holidays each year in Poland) are days free from work. Employees can only work on such days in certain circumstances, such as in a continuous working time system or for emergency service employees. In the calendar year in which an employee starts work for the first time, he accrues holiday entitlement after each month of work at 1/12 of the holiday entitlement he is entitled to after one year of work. During each succeeding calendar year, the employee acquires the right to subsequent holiday. In general, the holiday entitlement is:

• Twenty working days if the employee has been employed for less than 10 years; and

• Twenty-six working days after 10 years of work.
The length of employment on which the holiday entitlement depends includes former employment and education (for example, graduation from university is treated as eight years’ employment). During leave, an employee’s pay is calculated in accordance with the Minister of Labor and Social Policy Regulation of 8 January 1997 on the detailed procedure for granting holiday, calculating and paying remuneration for holiday leave and cash in lieu of holiday leave (Journal of Laws, number 2, item 14, as amended). An employee may also make a written request for unpaid leave to be granted by the employer at its discretion.

**Discrimination**

Employees have equal rights when performing identical duties, applying in particular to the equal treatment of men and women at work. Any direct or indirect discrimination in employment relationships, particularly in respect of sex, age, disability, race, nationality, beliefs (particularly political views or religious beliefs), and trade union membership is prohibited.

The Labor Code contains detailed provisions on the equal treatment of men and women prohibiting direct or indirect discrimination based on sex. Women and men should be treated equally as regards the establishment and termination of employment relationships, the conditions of employment, promotion, and access to training in order to improve occupational qualifications. Discrimination also covers:

- Actions encouraging other persons to violate the principle of equal treatment at work;
- Unacceptable behavior, the aim or result of which is to infringe upon the dignity of or demean or humiliate an employee (harassment); and
- Unacceptable behavior of a sexual nature or concerning an employee’s sex, the aim or result of which is to infringe upon the dignity of or demean or humiliate the employee, such behavior consisting of physical, verbal, or non-verbal components (sexual harassment).

A person in relation to whom the employer infringes the principle of equal treatment of men and women is entitled to compensation of not lower than the minimum wage.

**Protection of Women's Work and Employees' Rights Connected with Parenthood**

Women may not be employed in work that is particularly onerous or harmful to health. Generally, an employer cannot give notice of termination or terminate a woman's employment contract during pregnancy or maternity leave. Pregnant women and employees taking care of a child of up to four years of age cannot work overtime or at night.
An employee entitled to childcare leave can apply for a reduction in his working hours (not more than half time) and the employer must consent thereto. In this case, the employee is protected against employment termination for a maximum of 12 months. Maternity leave entitlement is as follows:

- Twenty weeks in the event of giving birth to one child at one birth;
- Thirty-one weeks in the event of giving birth to two children at one birth;
- Thirty-three weeks in the event of giving birth to three children at one birth;
- Thirty-five weeks in the event of giving birth to four children at one birth; and
- Thirty-seven weeks in the event of giving birth to five or more children at one birth.

For the period of maternity leave, the employee is entitled to maternity benefit. Employees also have the right to unpaid childcare leave. The right to unpaid childcare leave of three years is reserved for employees who have been employed for a period of at least six months and are bringing up a child themselves, but only until the child is four.

A father-employee bringing up a child (up to 12 months) is entitled to two weeks’ paternity leave (optional).

A female employee is also entitled to additional maternity leave of four or, in the case of a multiple birth, six weeks. The length of this leave is to be gradually extended until 2014, when employees will be entitled to six additional weeks for one child or eight weeks for a multiple birth. If a female employee decides to take advantage of this entitlement, she files an application with her employer, who is then obliged to consent. Under certain circumstances, a father-employee bringing up a child is entitled to additional leave on the same conditions as maternity leave.

**Employment of Young Adults**

Employing a person less than 16 years of age is prohibited. A young adult is a person who has attained the age of 16 but not yet the age of 18. Since 2008 persons who have attained the age of 15 but not yet the age of 18 will be considered as young adults. Young adults can be employed only if they have completed at least basic secondary school and present a medical certificate stating that work of a particular type is not hazardous to their health.

Young people who do not have occupational qualifications may be employed only for the purpose of occupational training. There are special rules governing
the conclusion and termination of employment contracts for the purpose of occupational training.

Pursuant to rules set forth in the Minister of Labor and Social Policy Regulation of 5 December 2002, in some situations it is admissible to employ young adults who have not completed basic secondary school, persons under the age of 16 who have completed basic secondary school and persons under the age of 16 who have not completed basic secondary school, and persons who have not yet attained the age of 16.

Young employees are obliged to supplement their education until they reach the age of 18. Young employees receive special health protection under the Labor Code, including initial and periodical examinations and check-ups. The working time of a young adult under 16 cannot be more than six hours per day, and for those over 16, eight hours per day. A young adult cannot work overtime or at night.

Special leave rules apply to young adults. Six months after beginning their first employment, a young adult acquires the right to leave of 12 working days. After one year, he acquires the right to leave of 26 working days. However, in the calendar year in which he reaches the age of 18, he has the right to the leave of 20 working days.

Collective Bargaining

Under the Labor Code, a collective labor agreement provides for the terms and conditions of employment and the mutual obligations of the parties to the agreement. Collective labor agreements should be negotiated in good faith and with respect for the legitimate interests of the other party. A collective labor agreement must be executed in writing for a fixed or non-fixed term. A collective labor agreement can be terminated:

- Upon a joint declaration to that effect by the parties;
- At the end of the period for which it was concluded; and
- At the end of the notice period if it is to be terminated by one of the parties.

Work Rules

A company which is not bound by a collective labor agreement (specifying organization and order at work) and employs at least 20 employees is obliged to introduce work rules. According to Polish labor law, work rules set forth the organization and order at work, and the related rights and duties of the employer and employees. Work rules should in particular provide for:

- Organization of work, terms and conditions for staying on the employer’s premises after working hours, employees’ equipment, tools and materials, as

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5 Journal of Laws, Number 214, item 1808.
well as work clothing and shoes and materials for individual protection and personal hygiene;

• Working time systems and schedules and reference periods;
• Night work;
• Date, place, time, and frequency of remuneration payment;
• Specification of jobs prohibited for minor employees and women;
• Types of work and list of positions allowed for minors in order to undergo occupational training;
• Duties regarding work health and safety and fire protection regulations, including the manner of warning employees of professional risks related to the work performed; and
• Manner of confirming attendance at work by employees, and justifying absences from work adopted by the employer.

Work rules are adopted by the employer in agreement with the trade union present at the employer’s premises; if there is no trade union, work rules are drawn up solely by the employer.

**Trade Unions**

In addition to the provisions of the Labor Code, there are a number of Acts on collective labor law, including the Trade Unions Act of 23 May 1991. According to the Act, all employees may form trade unions except for selected employees in the public sector.

The most important right of trade unions is the right to be consulted by the employer of employee dismissals. The employer may notify the establishment's trade union representing the employee in writing of any intention to terminate a non-fixed-term employment contract and must give the reason for doing so.

The trade union can then give the employer substantiated objections in writing to the intended employment contract termination. The employer must take the trade union’s opinion into account when deciding to terminate the employment contract.

Other trade union rights include the right to influence to some degree the level of financial liability of an employee who causes damage to his employer. Additionally, in the event of a transfer of employees, the employer has to give the trade union details of the transfer.

The employer also has certain information and consultation obligations towards trade unions in the event of collective redundancies.

If an employee's union rights are infringed, he may seek redress in court. Remedies include reinstatement of or compensation for the employee, or a fine.

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6 *Journal of Laws*, Number 79, item 854, as amended.
for the employer. The settlement of collective disputes and the right to strike are governed by separate legislation.

**Health and Safety Protection in Workplace**

*Fundamental Duties of Employee*

The employer is responsible for work health and safety in the workplace. The employer is obliged to protect the life and health of employees by ensuring safe and hygienic work conditions through the appropriate use and application of science and technology and is particularly obliged to:

- Organize work in a manner ensuring safe and hygienic work conditions;
- Ensure that regulations and rules on work health and safety are observed in the workplace;
- Ensure that orders, requests, decisions, and regulations of bodies supervising working conditions are followed; and
- Ensure that state labor inspector recommendations are implemented.

The employer and the person managing the employees must be aware of the provisions on protection at work, including the provisions and rules on work health and safety. When employees employed by different employers work in the same place at the same time, the employers are obliged to:

- Cooperate with one another;
- Appoint a coordinator to supervise the work health and safety of all the employees working in the same place; and
- Establish rules of cooperation, including procedures to be applied in the event of danger to the life or health of employees.

An employer starting up activity is obliged to notify, in writing and within 30 days of the start-up of such activity, a competent labor inspector and a competent State sanitary inspector of the place, type, and range of such activity and of the anticipated number of employees, and to provide a written statement on the means and procedures to be applied to fulfill the requirements for work health and safety for a given type of activity.

*Rights and Duties of Employees*

When working conditions do not conform to the provisions on work health and safety and pose a direct hazard to the life or health of an employee or when the work carried out by the latter may pose a hazard to other persons, the employee has the right to cease carrying out the work and notify a superior thereof immediately.
Buildings and Work Premise

Employers are obliged to ensure that the construction and reconstruction of buildings in which work premises are to be located are carried out on the basis of designs which take into account work health and safety requirements and have been approved by licensed experts.

Machines and Other Technical Devices

Machines and other technical devices must be designed and constructed in such a manner that they ensure safe and healthy working conditions and comply with ergonomic principles. Machines and technical devices must be equipped with safety guards where appropriate.

Chemicals and Work Processes

Employees working with chemicals and in work processes that are especially harmful to health or otherwise hazardous are protected under special provisions. Employees working in positions with health hazard factors exceeding the maximum admissible concentration and intensity may not work more than eight hours per day.

Preventive Health Protection

An employer is obliged to inform employees of any occupational risk connected with the work and of the rules on protection against hazards and to apply the appropriate measures. The employer also is obliged to assess and document occupational risks connected with work performed. Persons to be employed must undergo an initial medical examination.

An employer cannot allow employees to work in a particular post without a valid medical certificate confirming that there are no medical contraindications to the work. Employees must undergo periodical medical examinations, which are carried out on the basis of an agreement between the employer and a medical services provider. Employers must provide employees in the workplace with suitable hygiene and sanitary facilities, with the means necessary for personal hygiene, and with first aid in the event of accidents.

Accidents at Work and Occupational Diseases

In the event of an accident at work, the employer has to take the measures needed to eliminate or limit the hazard, provide first aid to injured persons, establish the circumstances of and reasons for the accident and, following a compulsory procedure, adopt appropriate measures to prevent similar accidents. Employers are obliged to immediately report any case of occupational disease or

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suspicion of such disease to the State Sanitary Inspectorate and the labor inspector.

Employers also are obliged to conduct systematic analyses of the reasons for accidents at work, occupational diseases, and other diseases connected with the working conditions and to apply suitable preventive measures based on the analysis results.

Benefits connected with accidents at work and occupational illnesses are defined in the Act on Benefits in Connection with Accidents at Work and Occupational Illnesses of 30 October 2002. The benefits specified in the Act are reserved for employees who suffer injury to their health as a result of an accident at work, an occupational illness, or for family members of workers who die as a result of such accidents or illness.

Training

Employers have to provide employees with training in work health and safety before allowing them to start work and to provide periodic training in this respect.

Training is not required where the employee is to work in the same position in which he worked with the same employer immediately before concluding a subsequent employment contract with that employer. Employees are required to undergo work health and safety training to the extent needed to perform their duties. Training should be repeated periodically.

Personal Protective Equipment, Protective and Work Clothing

Employers are obliged to provide employees with free personal equipment to protect them against factors in the working environment which are hazardous and harmful to health and to instruct employees in the use of such equipment.

Work Health and Safety Service

Employers with more than 100 staff must set up a work health and safety service to deal with work health and safety as a consultative and supervisory body. Employers with up to 100 employees should delegate the performance of work health and safety services to an employee carrying out other work.

Work Health and Safety Committee

Employers with more than 250 staff must set up a work health and safety committee as an advisory and opinion-giving body. The committee’s task is to monitor working conditions, periodically evaluate the level of work health and safety, give opinions on the measures for preventing accidents at work and occupational diseases taken by the employer, offer suggestions for the

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8 Journal of Laws, Number 199, item 1674, as amended.
improvement of working conditions, and cooperate with the employer in fulfilling the latter's duties regarding work health and safety.

Pursuant to article 1, section 4, of the Council of Ministers Regulation of 2 September 1997 on Work Health and Safety Services, any employer with more than 600 staff must employ at least one full-time work health and safety officer for every 600 employees.

**Workers' Compensation and Survivors' Benefits**

*Death of the Employer or Employee*

An employment relationship expires on the death of the employee. Following the employee's death, the property rights resulting from the employment relationship devolve, in equal parts, to the spouse and other persons satisfying the requirements for receiving a family pension. If there is no such person, the rights become part of an inheritable estate.

Employment contracts with employees expire on the employer’s death unless the employer’s business is transferred to other persons or entities (including heirs). If the employment contract expires, the employee shall have the right to compensation equal to remuneration for the notice period or equal to remuneration for two weeks if the employment contract is for a fixed term or for specific work.

*Death Benefit*

In the event of the death of an employee during the employment relationship or during a period in which the employee is receiving benefits following termination of the employment relationship due to incapacity to work due to illness, the employee's family has the right to a death benefit from the employer. The amount of the benefit depends on how long the employee worked for that employer and is equivalent to:

- One month's remuneration if the employee had worked for less than 10 years;
- Three months' remuneration if the employee had worked for at least 10 years; and
- Six months' remuneration if the employee had worked for at least 15 years.

Death benefits are payable to the spouse and other family members satisfying the conditions required to receive a family benefit. Death benefits are equally divided between all the family members entitled to them. If only one member of the employee's family is entitled to the death benefit, he will receive half of the amounts specified above.

No death benefit is payable if the employer insured the life of the employee and the family has the right to compensation from an insurance company, provided

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9 *Journal of Laws*, Number 109, item 704, as amended.
that such compensation is not lower than the death benefit. In cases where the compensation is lower than the death benefit, the employer must pay the family the difference between the compensation and the death benefit.

**Benefits Due During Period of Temporary Incapacity to Work**

In a period of incapacity to work due to illness or isolation because of a contagious disease that lasts 33 days in total per calendar year (or, in the case of employees who have reached the age of 50, 14 days), the employer pays an employee 80 per cent of his remuneration.

The employer’s internal regulations may provide for a higher amount. For a period of incapacity to work due to an accident at work, an accident while traveling to or from work, an occupational disease, or a disease during pregnancy that lasts 33 days in total per calendar year, the employee retains the right to 100 per cent of his remuneration.

From day 34 (or 15, in the case of employees aged 50 or over) of any illness, employees are entitled to sickness benefit financed by the Social Security Office (ZUS). Sickness benefit is paid by an employer employing over 20 persons or by the Social Security Office in other cases.

**Dispute Resolution**

**In General**

An employee may pursue in court any claims arising out of the employment relationship. Before submitting a case to court, the employee may request conciliation proceedings before a conciliation commission. The employer and employee must try to settle any claims under an employment relationship amicably.

**Conciliation Proceedings**

Conciliation commissions are appointed to settle disputes involving claims of employees connected with employment relationships. A conciliation commission initiates proceedings on the written or oral application of an employee.

A conciliation committee tries to settle a case amicably within 14 days of the employee’s application being filed. Any settlement must be in accordance with the law and the principles of community life. If no settlement is reached in proceedings before the conciliation commission, the commission may, on the employee's application, transfer the case to a labor court.

**Labor Courts**

Labor courts may consider claims arising out of or connected with the employment relationship arising out of other employment relationships to which
the provisions of labor law apply by virtue of separate provisions, against establishments for compensation for occupational accidents or work-related diseases, and those of employers against employees for damage inflicted by employees on the establishment.

There are time limits within which an employee must submit an appeal against his employment termination. If employment is terminated without notice, the employee has 14 days to appeal, and seven days if his employment is terminated with notice.

**Limitation of Claims**

A claim under an employment relationship becomes time barred three years from the day on which the claim becomes enforceable. An employer’s claim for redress of damage caused by an employee from failing to fulfill or improperly fulfilling his employee's duties becomes time barred one year from the day on which the employer learns of the damage caused by the employee.

In any event, however, the limitations period is no longer than three years from the damage being caused.

Where an employee intentionally causes damage, the time limitation provisions of the Polish Civil Code apply to any claim for reparation.

**Termination of Employment**

**Termination of Employment Contract**

*In General*

Generally, an employment contract can be terminated:

- By mutual agreement of the parties;
- Upon a declaration by one of the parties with observance of the notice period (termination with notice);
- Upon a declaration by one of the parties without observance of the notice period (termination without notice, possible only in the cases specified in the Labor Code); and
- At the end of the period for which it was concluded or on completion of the work for which it was concluded.

A trial period employment contract may be terminated once it has lapsed or, prior to this, with notice. Declarations of both parties on termination of the employment contract (with or without notice) must be made in writing.

The general rule of labor law is that a declaration by the employer of termination of an employment contract concluded for a non-fixed term, or of termination of an employment contract without notice, should give reasons. It is left to the discretion of the labor courts to decide what constitutes just cause for dismissal.
However, as a rule, the reason for terminating a non-fixed employment contract must be fair, just, and objective.

*Termination of Employment Contract with Notice*

Either party may give notice of termination of an employment contract concluded for a trial period or for a non-fixed term. Additionally, where an employment contract is concluded for a fixed term of more than six months, the parties may provide for earlier termination of the contract with two weeks’ notice. The notice period for an employment contract executed for a trial period is:

- Three working days if the trial period does not exceed two weeks;
- One week if the trial period is longer than two weeks; and
- Two weeks if the trial period is three months.

The notice period for a non-fixed term employment contract depends on how long the employee worked for that employer and is:

- Two weeks if the employee had worked for less than six months;
- One month if the employee had worked for at least six months but no longer than three years; and
- Three months if the employee had worked for at least three years.

If the employee holds a position involving financial liability for property entrusted to him, the parties may agree in the employment contract that, in the case of termination, the notice period will be:

- One month if the employee had worked for less than six months; and
- Three months if the employee had worked for at least six months, whereby, during the notice period, the employee is entitled to the following paid time off to look for other employment:
  - Two working days for a notice period not longer than one month; and
  - Three working days in a three-month notice period.

*Termination of Employment Contract without Notice*

An employer can terminate the employment contract without notice due to a fault on the part of an employee who:

- Seriously violates his basic duties;
- Commits an offense while the employment contract is valid rendering further employment in the position impossible, if the offense is obvious or has been confirmed by a final and non-revisable court judgment; or
- Due to his own fault, loses a license needed to perform the duties connected with the position.
The employer also can terminate the employment contract without notice if the employee is unfit to work due to illness:

- For longer than three months, if the employee has worked for that employer for less than six months; and
- For longer than the period in which he received sickness benefit as well as the period in which he received rehabilitation allowance for the first three months (if granted to the employee) if the employee has worked for that employer for at least six months.

Rights of Employee in Cases of Unjustified or Unlawful Notice

An employee may appeal to the labor court against a notice of termination of an employment contract. If it is deemed that the notice of termination of a non-fixed-term employment contract is unjustified or contrary to the provisions on termination of employment contracts, the labor court, on the employee's request, may award him compensation or declare the termination notice ineffective, and if the contract has already been terminated, order the employee to be reinstated at work on the former conditions or compensation to be paid to the employee.

Due compensation is the amount of remuneration due for a period ranging from two weeks to three months, but not less than the remuneration for the notice period.

Rights of Employee in Cases of Unlawful or Unjustified Termination without Notice

In general, in the case of unjustified termination of an employment contract by the employer, the employee is entitled to claim from the labor court reinstatement on former conditions or due compensation.

Due compensation is the amount of remuneration for the notice period. Compensation for termination of an employment contract concluded for a fixed term or for the time needed to complete a specified work is the remuneration due for the time until the contract was to continue, although not more than three months’ remuneration is due to the employee.

Rights of Employer in Cases of Unjustified Termination by Employee without Notice

An employee may terminate an employment contract without notice if:

- The employer holds a medical certificate stating that the work performed has a harmful effect on the employee’s health, and the employer, within the time set in the medical certificate, fails to transfer the employee to another position appropriate for his health and corresponding to his professional qualifications; and
- The employer is in serious breach of his basic duties towards the employee. In these circumstances, the employee is entitled to compensation of the

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remuneration due for the notice period and, if the employment contract was entered into for a fixed term or for the time needed to complete a specified work, remuneration for a period of two weeks.

The employee’s statement on terminating the employment contract without notice must be submitted in writing and must give grounds justifying the termination. If the employee does not give reasons for terminating the contract without notice, the employer may claim compensation corresponding to the amount of damage incurred.

**Expriy of Employment Contract**

An employment contract expires:

- Upon the death of the employer;
- Upon the death of the employee; and
- Following an employee's three-month absence from work due to temporary criminal arrest, unless the employer had hitherto terminated the employment contract without notice due to a fault on the employee's part.

**Group Redundancies**

Issues connected with group redundancies are regulated by the Act on Special Rules on Terminating Employment for Reasons not Attributable to Employees of 13 March 2003.\(^{10}\)

In accordance with the provisions of the Redundancy Act, "group redundancy" occurs when an employer with at least 20 staff terminates the employment of a specific number of its employees for reasons not attributable to the employees within a period of no more than 30 days. In particular, collective redundancy occurs when it covers at least:

- Ten employees if the employer has fewer than 100 staff;
- Ten per cent of employees if the employer has at least 100 but fewer than 300 staff; and
- Thirty employees if the employer has 300 or more staff.

The Redundancy Act governs the cooperation between the employer and the trade unions during the process to terminate employment relationships within group redundancy. It also provides for severance pay to be paid to employees dismissed in the following amounts:

- One month's remuneration if the employee has worked for the employer for less than two years;
- Two months' remuneration if the employee has worked for the employer for between two and eight years; or

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\(^{10}\) *Journal of Laws*, Number 90, item 844, as amended, the “Redundancy Act”.

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• Three months' remuneration if the employee has worked for the employer for more than eight years.

The total amount of severance pay cannot be more than 15 times the minimum wage.

**Retirement, Social Security and Health Care, Retirement Pensions**

**In General**

The statutory retirement age in Poland is 60 for women and 65 for men (currently, there is a discussion in the Polish Parliament on increasing and equaling the retirement age for men and women to the age of 67). The monthly pension amount depends, among other things, on the:

- Sum of valorized pension premiums gathered on an individual account;
- Valorized initial capital settled on 1 January 1999; and
- Retirement date.

**Labor Code**

The following provisions of the Labor Code continue to apply to pensions:

- An employee satisfying the conditions entitling him to receive a disability or retirement pension and whose employment relationship expired in connection with disability or retirement shall have the right to cash severance pay of one month's remuneration; and
- An employer may not terminate the employment contract of an employee who is to reach retirement age in fewer than four years if their employment period would enable them to acquire the right to receive a retirement pension after having attained such age.

**Summary of Social Costs**

Social security contributions consist of pension, disability, accident, and sickness insurance. Social security contributions are obligatory and remitted by employers. They are financed by both employers and employees. Employers must deduct the appropriate amounts from the employees' salaries and remit the contributions monthly to the social security office by the 15th day of the month following that for which they are payable. The amounts of contributions for each kind of insurance are:

- Pension, 19.52 per cent (employer 9.76 per cent and employee 9.76 per cent);
- Disability, six per cent (employer 4.5/6.5\(^{11}\) per cent and employee 1.5 per cent);

\(^{11}\) As of 1 February 2012 the amount of contribution made by the employer was increased to 6.5 per cent.
• Accident, 0.67 per cent to 3.33 per cent (fully paid by the employer); and
• Sickness, 2.45 per cent (fully paid by the employee).

Employers also must pay a contribution of 2.45 per cent to the Labor Fund and of 0.1 per cent to the Employees’ Guaranteed Benefits Fund. There also is an obligatory contribution of nine per cent to health insurance, though health insurance contributions are deductible from an employees’ tax of up to 7.75 per cent.

Conclusion

Thanks to the Labor Code having been in existence for more than 30 years, labor law in Poland is well established. Changes that can be expected in the near future will probably apply to working time and holidays.
Romania

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**Introduction**

Romania’s movement toward membership in the European Union (EU) required a new Labor Law to mirror new economic and social realities. Law Number 53/2003 (“Labor Law”) marked the beginning of a new era in the evolution of Romanian legal norms related to labor.

Under Article 276 of the Labor Code and international obligations assumed by Romania, labor legislation will be permanently harmonized with European norms, the conventions and recommendations of the International Labor Organization (ILO), and international labor law.

**Legal Relationship of Employer and Employee**

**In General**

The Labor Law defines an employer as “a natural or legal person who, according to the law, may employ personnel under individual employment contracts”.

On the other hand, an employee is a person who undertakes to perform work for and under the authority of an employer for a remuneration called wage. An employee may only be a natural person who should meet all the conditions provided by the law (eg, ability to enter into an individual employment contract) and is not legally disqualified.

For instance, government and Parliament members cannot, at the same time, be employed as president, vice president, director, or manager of national companies, autonomous administrations, and insurance companies.

An individual employment contract should be concluded on the basis of the parties’ written consent, in the Romanian language, and in written form. The employer has the obligation to conclude the individual employment contract in written form before the beginning of the employment relationship.

The individual employment contract is valid only if concluded in writing, is bilateral or synallagmatic, commutative (ie, the performance of the employee...
and employer should be known upon entering the contract), *intuitu personae*, and with successive execution (ie, the work is performed in a spread-out manner and not at once, even if there is a contract concluded for an established period or part-time).

**Capacity of Parties**

Under the Labor Law, a natural person acquires legal capacity to work at the age of 16. However, he may become an employee at the age of 15 with the agreement of his parents or legal representatives, related to activities corresponding to his physical development, skills, and knowledge, unless his health, development, and vocational training are harmed.

Employment in difficult, unhealthy, or dangerous workplaces (which are to be established by Government Decision) may only take place after the age of 18. Employment of persons under the age of 15, as well as of persons placed under legal guardianship, is prohibited.

Beside the conditions of age and judgment, persons who wish to become employees also should meet additional conditions, which are found not only in the Labor Law but also in other legal documents pertaining to labor, civil, administrative, or criminal law.

The special incapacity mainly resides in requirements related to the protection of health (ie, prohibition from employing pregnant women in difficult, harming, or dangerous workplaces), to age, and to certain criminal punishments.

While a legal person employer may enter into valid individual employment contracts from the moment of its establishment as a legal person, a natural person employer may only enter into individual employment contracts upon attainment of full legal capacity, ie, the age of 18.

**Special Categories of Employees**

*Part-Time Employees*

A part-time employee is one whose normal work hours, calculated weekly or as a monthly average, is lower than that of a similar full-time employee. An individual part-time employment contract may be concluded only in writing, and an employer may hire part-time employees with individual employment contracts of an unlimited or limited duration.

A reference employee is a full-time employee in the same organization, having the same type of contract and performing the same type of or similar activity as an employee hired under a part-time individual contract, with due regard to other issues such as length of service, qualification, and professional skills.

When there is no similar employee in the same organization, the provisions in the applicable collective labor agreement will be considered. When there is no
applicable collective labor agreement, the provisions of the law in force will be taken into account.

An employee hired under a part-time employment contract will enjoy the rights of full-time employees under the terms of the law and the applicable collective labor agreement. Wages should be paid in proportion to the time actually worked, in relation to the rights established for the normal work schedule.

An employer should, as far as possible, consider the demands of employees to be transferred from a full-time to a part-time workplace or vice versa, or to extend the work schedule, should such opportunity arise. The employer may timely notify employees of the availability of part-time or full-time workplaces.

**Leased Employees**

Temporary employees made available for the employer by a temporary employment agent should have access to all services and facilities granted by the user undertaking, under the same conditions as other employees.

The user undertaking should provide the temporary employee with work and personal protection equipment, except where the assignment contract requires the temporary employment agent to do so. The user also should provide proper work conditions for the temporary employee according to the laws in force.

The user should inform its temporary employees of all existing vacant workplaces to ensure the equality of chances with other employees hired under a full-time individual employment contract, by posting an announcement in a place visible to all such employees, and the employer should ensure the temporary employees’ access to professional training courses organized for employees.¹

The temporary employee should enjoy the wage paid by the temporary employment agent. The wage received for each assignment may not be lower than that received by an employee of the user undertaking performing the same or similar activity.

The temporary employee may conclude an individual employment contract with the user undertaking at the end of the assignment. Any clause prohibiting the employment of the temporary employee by the user undertaking after the assignment is void.

Such contract also may be concluded during the mission, with the express agreement of the temporary employment agent. Should the employer hire a temporary employee after a mission, the length of the assignment performed should be taken into account when assessing the pecuniary and other rights provided for in the labor legislation.

¹ Government Decision Number 1256/2011, art 19.
**Foreign Employees**

A foreign citizen’s legal capacity to enter into an individual employment contract in Romania is governed by the law of the State of his citizenship (*lex patriae*). However, if the foreign law contravenes legislation that may provide more advantageous employment conditions for the future employee, Romanian law should apply.

In Romania, the legal capacity of foreign citizens and stateless persons to enter into individual employment contracts is theoretically the same as that of Romanian citizens.

However, special provisions bar foreigners from occupying certain work positions, such as judges and prosecutors, court clerks, or civil servants. Similar to the illegal employment of Romanian citizens, the illegal employment of foreign citizens and stateless persons is punished by a fine established and enforced by the Labor Inspection Office and the Immigration Office.

**Apprentices and Trainees**

An on-the-job apprenticeship should be organized on the basis of an apprenticeship contract, i.e., a particular individual employment contract under which the employer should, in addition to paying a wage, provide the apprentice with vocational training in a certain trade connected to the employer’s field, and the apprentice undertakes to participate in vocational training activities and work under the supervision of the employer.

An on-the-job apprenticeship contract should be of limited duration, between 12 months and three years. The organization, performance, and supervision of apprenticeships are regulated by a special law.

A person employed under an apprenticeship contract should enjoy provisions applicable to all other employees as far as they are not contrary to those specific to his status as an apprentice. His wages should be at least equal to the national minimum gross basic salary.

Any person may be hired as an apprentice, provided that he is between 16 to 25 years old, does not hold a certified qualification for the occupation for which the on-the-job apprenticeship is organized, and has graduated at least from the compulsory education programs for certain professions. The apprenticeship contract may be concluded only with the agreement of the legal representatives of the candidate.

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2 Law Number 303/2004, art 14, Paragraph 2(a).
3 Law Number 567/2004, art 33, Paragraph 1.
4 Law Number 188/1999, art 54(a).
5 Emergency Ordinance Number 56/2007, art 27.

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Child Labor

Government Decision Number 600/2007 requires the employer to take all necessary measures to ensure young employees’ safety and health. The employer should inform the employees in writing of possible risks and measures that have been taken to protect their safety and health.

The obligation of protection also refers to risks entailed by the young employees’ lack of experience or the insufficient acknowledgement of existing or possible risks. The employment of young people is prohibited for activities that:

- Exceed their physical or psychological capacity;
- Involve exposure to toxic carcinogenic agents which lead to hereditary genetic alterations, with harmful effects on the unborn baby during pregnancy, or with any other harmful effect on a human being;
- Involve exposure to radiation;
- Present risks of accident; and
- Endanger health due to extremely low or high temperatures or noise and vibrations.

The work schedule may not exceed six hours per day and 30 hours per week, and young employees may not work during the night or extra time. They should have a meal break of at least 30 continuous minutes, if the daily schedule exceeds 4.5 hours, a weekly break of at least two consecutive days (usually on Saturdays and Sundays), and an additional yearly leave of at least three workdays.

Transfer of Business

Under EU Directive 77/187 and the Labor Law, employees’ rights are protected if there is a transfer of the business, the department, or some parts thereof. The assignor’s rights and obligations, which arise from an employment contract or relationship existing upon the transfer, should be totally transferred to the assignee.

The transfer cannot be considered a reason for the individual or collective dismissal of the employees by the assignor or assignee. Prior to the transfer, the assignor or assignee should inform and consult the trade union or employees’ representatives with regard to the legal, economic, and social implications of such transfer.

Terms and Conditions of Employment

Remuneration

An employee should have the right to a wage expressed in money for the activity performed under the individual employment contract. Any
discrimination based on sex, sexual orientation, genetic characteristics, age, national affiliation, race, color, ethnicity, religion, political option, social origin, disability, family situation or responsibility, and trade union affiliation or activity when setting and providing the wage is prohibited.

The wage includes the basic payment, benefits, extra payment, and other supplements, is confidential, and should be paid before any other pecuniary obligations of the employer. Wages should be established by individual negotiations and/or collective bargaining between the employer and employees or their representatives.

The national minimum gross basic pay with guaranteed payment, corresponding to the normal work schedule, is established by Government Decision after consulting the trade unions and employers’ organizations.

If the normal work schedule is less than eight hours a day, the minimum gross hourly basic pay should be computed by dividing the national minimum gross basic pay by the average number of monthly hours under the approved legal work schedule.

An employer may not negotiate and establish basic pay lower than the national minimum gross hourly basic pay in an individual employment contract. For employees to whom the employer, according to the collective labor agreement or individual employment contract, provides food, accommodation, or other facilities, the amount in money due for the activity performed may not be lower than the national minimum gross wage provided for in the law.

The wage should be paid in money at least once a month at the date laid down in the individual employment contract, applicable collective labor agreement, or rules of procedure. Payment in kind of a part of the wage may only be possible if it has been expressly provided for in the applicable collective labor agreement or individual employment contract.

Law Number 285/2010 provides for minimum hierarchy coefficients that apply to the minimum salary negotiated for a unit in the public sector. The Labor Law also establishes certain minimum thresholds for bonuses granted under the conditions of the contract for the following:

- Ten per cent of the basic salary for extremely difficult, special, dangerous, or embarrassing work conditions;
- Ten per cent of the minimum salary negotiated at the organization level for toxic work conditions;
- At least 75 per cent of the basic salary for extra time and time worked on legal holidays that have not been compensated by paid free hours;
- At least five per cent of the basic salary for three years of service and a maximum of 25 per cent for a length of service of at least 20 years; and
- Twenty-five per cent of the basic salary for night work.
**Working Hours**

The distribution of work time within the week should usually be uniform, of eight hours per day for five days with two days of rest. Thus, the normal length of work time for full-time employees is eight hours per day and 40 hours per week, and the work performed over the normal weekly work schedule is called overtime.

Based on the specific features of the organization or activity performed, an unequal distribution of work time may be chosen, while observing the normal length of work time of 40 hours per week. A 12-hour daily length of work time should be followed by a rest period of 24 hours.

For workplaces where, due to the specific activity, work time cannot be limited to the normal daily schedule, special types of work time systems may apply, such as in shifts, continuous shifts, and divided schedules. Such workplaces and the specific methods of application and control of the work performed are established by the National Collective Employment Contract at branch, group of units, and unit levels.

Work time may not exceed 48 hours per week, including overtime. However, the length of work time, including the overtime, may be extended beyond 48 hours per week, provided that the average work hours, calculated over four calendar months, do not exceed 48 hours per week. For certain branches and sectors, reference periods above four months but not exceeding 12 months may be negotiated.

For certain activities, workplaces, and categories of employees, the work schedule may be partial according to certain work quota fractions. Upon request, part-time employees may be employed in full-time positions if there are vacant positions and if they meet the requirements.

The hours of work carried out upon request of the employer, over the normal work schedule established in the organization, require the employees’ consent. Employees should work overtime if requested by the employer for the prevention and removal of the effects of natural catastrophes, accidents, or other *force majeure* cases. Overtime should be compensated by hours off paid within the next 60 days after performance.

An employer may establish individualized work schedules with the agreement of or at the request of the concerned employee if provided for in the collective labor agreements applicable at the employer’s level or, in their absence, in the rules of procedure.

The individualized work schedules should involve a flexible organization of work time, and the daily length of work time should be divided into two periods: (a) a fixed period where the entire personnel is simultaneously present at the workplace, and (b) a variable mobile period where the employee chooses the time of arrival and departure compliant with the daily work time.
For employees under the age of 18, the length of work time is six hours per day and 30 hours per week, and they may not work overtime.

**Night Work**

Work performed between 10 o’clock in the evening and 6 o’clock in the morning is considered night work. A night employee is one performing night work of at least three hours of his daily work time, or one performing night work amounting to at least 30 per cent of his monthly work time.

The normal length of work time for a night employee may not exceed an average of eight hours a day, calculated over a period of not more than three calendar months, in compliance with the legal provisions on the weekly rest period.

The normal length of work time for night employees whose activity takes place under special or distinct work conditions may not exceed eight hours within any 24-hour period during which they perform night work, unless the extension is stipulated in the applicable collective employment contract and only if such a provision does not infringe the express provisions of the collective employment contract applicable at a superior level.

An employer frequently using night work should notify the territorial labor inspectorate. Employees who are about to perform night work of at least three hours should be subject to a free medical examination before starting the activity and regularly thereafter. The conditions for performing medical examinations and their frequency should be established by a regulation approved by Joint Order of the Minister of Labor, Family, and Social Solidarity and the Minister of Health.

Employees performing night work and having problems acknowledged to be connected to it should be transferred to day work for which they are suitable, and people under the age of 18 may not perform night work. Pregnant and post-natal women and breastfeeding mothers may not be required to perform night work.

Night workers benefit either from a work schedule reduced by one hour for the days when they perform at least 3 hours of night work, or from a bonus for each hour of night work.

**Rest Periods, Vacations, and Holidays**

Should the daily length of work time exceed six hours, employees should have the right to a meal and other breaks, under the terms provided for in the applicable collective labor agreement or rules of procedure.

Except if otherwise provided in the applicable collective labor agreement and rules of procedure, the breaks may not be included in the normal daily length of work time. Employees should have the right, between 2 workdays, to a rest
period that may not be shorter than 12 consecutive hours. In the case of shift work, the rest period between the shifts may not be shorter than eight hours.

The weekly rest period should be taken on two consecutive days, usually Saturday and Sunday. Should the rest during Saturday and Sunday be detrimental to the public interest or the normal course of the activity, the weekly rest period also may be taken on other days laid down in the applicable collective employment agreement or rules of procedure. In this case, the employees should enjoy an extra pay, as laid down in the collective employment agreement or individual employment contract.

In exceptional cases, the weekly rest period days may be taken on a cumulative basis, after a continuous activity that may not exceed 14 calendar days, with the authorization of the territorial labor inspectorate and with the agreement of the trade union or the representatives of the employees.

In the case of urgent work, the immediate performance of which is necessary for the organization of rescue measures for persons or goods of the employer to avoid imminent accidents or eliminate the effects of these accidents on the materials, installations, or buildings of the organization, the weekly rest period may be suspended for the personnel necessary to perform these works, and the employees whose weekly rest period has been suspended should have the right to twice the compensation provided for overtime work.

Public holidays are as follows:

- 1 and 2 January;
- The first two Easter days;
- 1 May;
- Whit Sunday and Whit Monday;
- The Dormition of the Mother of God (15 August);
- 30 November, Saint Andrew
- 1 December;
- The first two Christmas days; and
- Two days for each of the three annual religious holidays of declared legal religious denominations other than Christian, for persons belonging to those denominations.

The applicable collective labor agreement may fix other days off. Provisions related to holidays may not apply to workplaces where the activity cannot be interrupted due to the character of the production process or the specific features of the activity.

Appropriate work schedules for health and food and beverage establishments should be fixed by Government Decision to ensure medical assistance and the supply of essential foodstuffs.
Employees’ work under the organizations described above should be provided with adequate compensatory time off within the next 30 days. If no days off are granted on justified grounds, the employees should benefit, for the activity performed during the public holidays, from an extra pay added to the basic pay, which may not be lower than 100 per cent of the basic pay corresponding to the activity performed within the normal work schedule.

In addition to daily and weekly rests and legal holidays, employees also are entitled to paid annual leaves for rest or to other paid leaves, such as days off for family events or for dealing with personal matters. Paid annual leave for rest is guaranteed for all employees and cannot be assigned, waived, or abridged.

The annual leave should be at least 20 workdays. The actual length of the annual leave should be laid down in the applicable collective labor agreement or individual employment contract and should be granted in proportion to the activity performed in a calendar year. Thus, public holidays and paid days off laid down in the applicable collective labor agreement may not be included in the annual leave.

Disabled employees, blind employees, employees under the age of 18, and employees who work under difficult conditions benefit from an additional rest leave of at least three workdays per year.

The leave should be taken each year, but it may be taken in the next year in cases expressly provided for in the law or in the applicable collective labor agreement. An employer should grant a leave until the end of the next year to all employees who, within a calendar year, did not take their entire leave. Compensation in money for leave not taken may be allowed only upon cessation of the employment contract.

A leave should be taken on the basis of a collective or individual schedule laid down by the employer after consulting the trade union or representatives of the employees, as far as the collective schedule is concerned, or after consulting the employee, as far as the individual schedule is concerned.

The schedule for the next year should be prepared by the end of the current calendar year. During the leave, the employee should receive a leave benefit which may not be lower than the basic pay, benefits, and permanent extra pay due for that period, as provided for in the individual employment contract.

Collective employment contracts may establish that, depending on the financial possibilities of the company, there should be a holiday bonus in addition to leave payment. The annual rest leave may be divided upon the request of the employee, but one of the fractions should be of at least 10 workdays. The other fraction should be scheduled and taken by the end of the current year.

Employees have the right to paid days off not included in the length of the leave in case of extraordinary family events. Extraordinary family events and the number of paid days off should be fixed by law, applicable collective labor

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agreement, or rules of procedure. For example, employees may be entitled to paid days off for the following special family events or other situations:

- Employee’s marriage;
- Marriage of a child of the employee;
- Birth of employee’s child;
- Death of spouse, children, parents, or parents-in-law;
- Death of grandparents, brothers, or sisters;
- Blood donors, according to law; and
- Change of workplace within the same organization and change of residence to another locality.

Employees are entitled to unpaid leave to deal with certain personal issues. The length should be established by the collective employment contract or rules of procedure. Employees may request for paid or unpaid leave for professional training. Collective employment contracts will establish the criteria for annual rest leave and additional leave longer than those provided in the Labor Law.

**Sick Leave**

When the employee is temporarily unable to work due to disease or accident, the individual employment contract should be suspended as he cannot work for reasons that are beyond his control. This leads to the lack of pay for the period of the incapacity, and payment of compensation for temporary work capacity.

Under Article 13 of Government Emergency Order Number 158/2005, the maximum period for which such compensation may be paid is 183 workdays within a year, counted from the first day of the illness. This duration is longer in the case of special illnesses (eg, tuberculosis).

**Health Care**

Employers should provide access to a labor medical service, which may be in the form of an autonomous facility organized by the employer or a service provided through an association of employers.

Employees under an individual employment contract have the status of insurance holders, and they benefit from a set of basic social security services, according to Law Number 95/2006. The obligation to pay contributions to the health care insurance system applies to legal or natural persons that employ persons under an individual employment contract or based on special status set by law.

Social security includes medical services, health care services, medicine, medical equipment, medical devices, and other services set by law and to which insured employees are entitled.
Vocational Training
An employer should ensure the participation of every employee in vocational training, which may take place on either the employer or the employee’s initiative. When participation in vocational training courses or internships has been initiated by the employer, all expenses generated by such participation should be borne by the employer.

The vocational training method, the rights and obligations of the parties, the length of vocational training, and other issues related to vocational training, including the contractual obligations of the employee to the employer, should be agreed upon by the parties and included in addenda to the individual employment contract.

Discrimination
In General
One of the fundamental principles that govern employment relationships in Romania is the principle of equal treatment and the prohibition of discrimination under Article 16, Paragraph 1 of the Constitution and Article 5 of the Labor Law.

Romania ratified the Convention for the Protection of Human Rights and Fundamental Freedoms in 1994 and Protocol Number 12 to the Convention in 2006. Government Ordinance Number 137/2000 on the prevention and punishment of all types of discrimination (“Ordinance”) contains special provisions related to equal treatment within employment relationships and has had a significant impact on labor law and jurisprudence.

Law Number 324/2006 transposes into the national law the regulations set forth by Council Directive 2000/CE, regarding the application of the principle of equal treatment of persons without discrimination on grounds of race or national

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6 Article 14 of the Convention provides: “The enjoyment of the rights and freedoms set forth in this Convention will be secured without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”
8 Article 1 of the Protocol provides: “The enjoyment of any right set forth by law will be secured without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, or other status. No one will be discriminated against by any public authority on any ground such as those mentioned in Paragraph 1”.
Articles 6 to 8 of the Ordinance regulate equal treatment in matters of employment. Under Article 6, discrimination of a person in matters related to an employment relationship or social protection qualifies as contravention, manifested in the following areas:

- The entering, suspension, modification, or cessation of an employment relationship;
- The establishment and modification of duties, workplaces, or wages;
- The granting of social rights other than wages;
- Professional training, specialization, reconversion, and promotion;
- The application of disciplinary measures;
- The right to associate with a trade union and the access to its facilities; and
- Any other conditions of work, under the terms of the law.

The refusal of a natural or legal person to employ a person on the grounds listed above, and the conditioning of an employment through an exam or a contest launched by the employer by belonging in one of the situations listed by the law as discrimination criteria, qualify as contravention under Article 7 of the Ordinance.

Employers should ensure confidentiality of data regarding race, nationality, ethnicity, religion, sex, sexual orientation, or other personal data of persons in search of a workplace. It also is illegal for employers to discriminate against employees in terms of awarded social rights.

The principle of non-discrimination also is developed by Law Number 202/2002 on the equality of chances between men and women. While the Ordinance addresses the combating of all acts of discrimination on all grounds, Law Number 202/2002 only regulates discrimination on grounds of sex. Both laws have common features but also significant differences, such as designation of the authority competent to solve complaints of discrimination and the procedure for acknowledgement of discrimination.

The Ordinance governed the founding of the National Council for the Combating of Discrimination (“Council”), together with Government Decision Number 1194/2001, regarding the organization and operation of the institution.

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13 Official Gazette 301/2002, republished in Official Gazette 150/2007. Article 2 regulates: “The measures taken for the implementation of the equality of opportunities between men and women and for the prohibition of direct and indirect discrimination on grounds of sex apply in the areas of labour, education, health, culture and information, participation in decision making, as well as in other areas, set forth by specific laws.”
The Council is controlled by Parliament and offers a guarantee for non-discrimination according to internal laws in force and international documents that Romania has ratified.

**Discrimination Criteria**

The Labor Law prohibits the discrimination on grounds of sex, sexual orientation, genetic characteristics, age, nationality, race, color, ethnicity, political option, social origin, family situation or responsibility, handicap, and belonging to or performing of a trade union activity.

Government Ordinance Number 137/2000 punishes discrimination against a person for belonging to a certain race, nationality, ethnicity, religion, or social or disfavored category, or for grounds of opinions, age, sex, or sexual orientation, in a relationship of employment and social protection, with the exceptions set forth by law.

Law Number 202/2002\(^{14}\) regulates measures for the elimination of all types of discrimination on the ground of sex in all areas of public life, by promoting the consideration of the different capacities, needs, and aspirations of men and women and their equal treatment. The Law transfers into internal law a number of EU laws in the field.\(^{15}\) The Law applies to all persons, public servants, or contractual employees from the public and private sector, including public institutions.

“Equal work” means the paid activity which, after comparison with another activity based on the same indicators and measuring units, reflects the use of similar or equal professional knowledge and skills and the carrying out of similar or equal amount of intellectual and/or physical effort.

“Sex-based discrimination” is the direct and indirect discrimination, harassment, and sexual harassment of a person by another at their workplace or at any other place where he works.

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The law expressly defines harassment as any behavior dictated by criteria of race, nationality, ethnicity, language, religion, social category, convictions, gender, sexual orientation, belonging to a disfavored category, age, handicap, status of a refugee or asylum seeker, or any other criterion that leads to the creation of an intimidating, hostile, degrading, or offensive background.

The employer may not discriminate by practicing methods that are disadvantageous to persons of a certain sex in respect to work relationships. The only exception is where, due to the nature of the specific professional activities or to the environment of the activity, a certain sex is an authentic and established requirement, under the condition that the pursued objective should be legitimate, and the requirement should be proportional.

Sexual harassment is the manifestation of an undesired behavior with sexual connotation, expressed physically, verbally, or non-verbally, having as an object or effect the harming of a person’s dignity and the creation of an intimidating, hostile, degrading, humiliating, or offensive environment. Adverse behavior that comes as a reaction to a complaint or legal action related to the breaching of the principle of equal treatment and non-discrimination also is prohibited.

The National Agency for Equal Treatment of Women and Men has been established as a specialized institution within the central public administration to ensure the observation and control of the application of Law Number 202/2002.

**Discrimination on the Basis of Gender**

As an essential condition for the signing of an employment contract, the employee should present a medical certificate attesting that he is able to perform the required activity. \(^{16}\) On the other hand, the employer is expressly prohibited from requesting a pregnancy test, as pregnancy may not be a reason for discrimination. \(^{17}\)

In 2003, the government issued Emergency Ordinance Number 96/2003 \(^{18}\) on the protection of maternity at workplaces, providing certain measures of social protection for pregnant employees, mothers, post-partum women, and breastfeeding mothers who are in an employment relationship.

Employees should inform their employer, in writing, about their state and should present a medical certificate issued by the family physician. Employers should subsequently take necessary measures to prevent employees from being exposed to risks that may affect their health and safety, and may not require such

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16 Labor Law, art 27.
17 Under Article 10 of Law Number 202/2002, it is forbidden to request a woman candidate, in view to the employment, to carry out a pregnancy test and/or to sign a written engagement that she would not get pregnant or give birth during the applicable individual employment contract.
employees to perform work that may damage their health, pregnancy, or a newborn child.

For all the activities that may present specific risks as listed in an annex to the Ordinance, the employer should evaluate, on a yearly basis and upon any modification of work conditions, the nature, degree, and duration of exposure for such employees. The employer should respect confidentiality concerning the pregnancy of the employee and may not communicate it to other employees unless the employee agrees in writing.

Employers also should provide time for antenatal consultations of up to 16 hours per month, if required, without reducing employee wages. Employees whose employment has been terminated for reasons that they consider to have been related to their situation have the right to challenge the employer’s decision at a competent court of law.

**Discrimination as to Physical or Mental Disability**

Law Number 448/2006\(^\text{19}\) protects persons who, because of diseases of a physical, mental, or sensory nature, do not possess the ability to normally perform daily activities, consequently needing protection during recovery, integration, and social inclusion.

The special legal provisions address children and adults with a handicap, Romanian citizens, citizens of other countries, or stateless persons for the period when they reside or live in Romania. The law reserves a special chapter to professional orientation and training and to the employment of such disabled persons.

Thus, any handicapped person who wishes to integrate or reintegrate in a work position has free access to professional evaluation and orientation, no matter the age and type or degree of handicap.

The professional training of handicapped persons is organized through various programs. Handicapped persons are entitled to choose and practice their profession or occupation, to acquire and maintain a workplace, and to advance and be promoted in their professional activity.

Public authorities and institutions, and public or private legal persons which have at least 50 employees, should employ handicapped persons in at least 4 per cent of the total number of positions.\(^\text{20}\) Alternatively, employers may:

- Pay a monthly fee to the national budget in the amount of 50 per cent from the national minimum gross salary multiplied by the number of workplaces for which such employer has not employed a handicapped person; or

\(^{19}\) *Official Gazette* 1006/2006.

\(^{20}\) Law Number 448/2006, art 78.

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• Purchase products or services obtained through the activity of handicapped persons employed in the authorized protected units, on a partnership basis, to an amount equivalent to the fee due to the national budget.

Disabled persons hired for work at home benefit from the transport to and from their residence of raw materials and materials necessary to carry out their activity, as well as of the finished products, at the expense of the employer.

Handicapped employees enjoy certain derogative rights, such as a paid probation period of at least 45 work days, a paid notice of at least 30 work days given upon the termination of the employment contract by the employer for reasons not related to the employee, and the possibility to work less than 8 hours a day if recommended by the evaluation commission. Employers of handicapped persons benefit from certain fiscal facilities as well as from a state subsidy.

**Discrimination Based on Religion**

The State respects and guarantees the fundamental right to freedom of thought, consciousness, and religious belief for every person in Romania, according to the Constitution and international treaties ratified by Romania.21

Considering that most of the population is of the Orthodox religion, the law expressly provides22 for Orthodox legal holidays. The law also provides for two additional non-working days for each of the three main religious holidays of other faiths.

**Remedies**

Every employee who thinks he is a victim of discrimination by the employer may appeal under Labor Law and Government Ordinance Number 137/2000. Actions under both laws are not mutually exclusive.

If the Council is notified, liability should fall under the category of contravention. In the case of a legal action, the patrimonial liability of the employer is contractual in nature, arising from the employment contract.

Liability is established if the harmed party proves and the Council establishes the validity of the discriminating act provided for by the Ordinance. Patrimonial liability applies only if the employee proves that the conditions of civil contractual liability are met, namely:

• Illegal act committed by the employer;
• Prejudice;
• Causal relationship between the act and the prejudice; and
• Employer’s fault.

22 Labor Law, art 139.
The summons should procedurally observe the requirements of Law Number 62/2011\textsuperscript{23} and special procedures provided by the Labor Law and the Code of Civil Procedure. A claim filed with the Council should be resolved according to the provisions of the Ordinance, completed by Government Order Number 2/2001 on the legal regime of contraventions,\textsuperscript{24} and the internal procedure of the Council.

Through the petition addressed to the Council, one may request for punishment of the guilty employer and restoration of the situation prior to the discriminating act.\textsuperscript{25} In the case of a work conflict brought to court, one also may claim compensation for the material or moral prejudice caused to the employee.\textsuperscript{26}

The Council may apply a fine where applicable. The court may require the employer to pay for material and/or moral damages, the amount of which is not established by law, but on a case-by-case basis depending on the degree of prejudice caused to the discriminated employee.

**Collective Bargaining and Worker Participation in Management**

**Rights and Duties of Parties**

Under Law Number 62/2011, collective negotiation at the level of the organization is compulsory, except when the organization has less than 21 employees.

The employer should initiate negotiation. Otherwise, negotiation should take place upon the initiative of the trade union\textsuperscript{27} or employees' representatives within 10 days from the request. Parties are equal and free in the negotiation of clauses and the conclusion of collective employment contracts.

Collective employment contracts that are concluded in accordance with law will act as the law between the parties. In the negotiation and conclusion of collective employment contracts, the parties should be represented as follows:

- For employers, at the level of the organization, by their leader, established by the law, by-laws, or rules of procedure and, at the level of a group of units and activity sector, by the legally established and representative employers' associations; and
- Representative employees, at the level of the organization, by the legally established and representative trade unions or, where there is no trade union,

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\textsuperscript{23} *Official Gazette* 322/2011.
\textsuperscript{24} *Official Gazette* 410/2001.
\textsuperscript{25} Ordinance, art 20(1) and (3).
\textsuperscript{26} Ordinance, art 27.
\textsuperscript{27} This is an independent legal person, without a patrimonial objective, established for the defense and promotion of collective and individual rights and interests of a professional, economic, or social nature of its members.
\end{flushright}
by the elected representatives of the employees, while, at the level of groups of units and activity sector, by the legally established and representative trade unions.

The provisions of the collective employment contract produce effects for all employees, regardless of date of employment or affiliation to a trade union. The execution of the collective employment contract is mandatory for the parties, and breach of the obligations therein gives rise to liability.

**Employees’ Consultation and Participation in Management**

According to Law Number 62/2011, employers may invite the representative trade unions to participate in the administration council’s meeting to discuss professional, economic, and social issues. The decisions of the administration council or other similar bodies on professional, economic, and social issues should be communicated to the trade unions in a written form within two workdays from the meeting.

To protect the rights of members and to promote their professional, economic, and social issues, trade unions should receive from the employer or employers’ organizations all the information necessary for the negotiation of collective employment contracts or for the conclusion of work agreements, as well as those regarding the establishment and use of funds designed for improving work conditions and ensuring work protection, social facilities, and social security.

**Health and Safety Protection in Workplace**

**In General**


The law establishes guidelines applicable to all activity sectors (public and private) to prevent professional risks and danger of work injury and to ensure worker health and safety. It sets out the duties of the employer, the required prevention and protection services, and provisions on first aid, fire extinction, evacuation of workers, and serious and imminent danger.

The employer should appoint one or more workers in charge of activities for the prevention of professional risks within the company. The appointed workers deal mainly with health and safety tasks and should be given time to perform their duties.

The employer is liable for breach of duties, its severity depending on the importance of the unfulfilled obligation. Only in few situations is this breach a

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\(^{28}\) OJ 2006 L646.

\(^{29}\) OJ 1989 L183.
criminal deed punished by imprisonment. In most cases, the noncompliant employer is fined.

Workers’ Compensation and Survivors’ Benefits

Benefits for Disabled Workers

Under Law Number 346/2002 on the insurance for work accidents and professional illness, persons insured within the public social security system are entitled to receive the following services:

- Medical recovery and recovery of work capacity;
- Professional recovery and rehabilitation;
- Compensation for temporary work incapacity;
- Compensation for temporary transfer to another workplace and for reduction of work time;
- Compensation for damages to integrity;
- Compensation for death; and
- Reimbursement of expenses.

The base for calculating these compensations is the average of the monthly gross income of the employee for the six months prior to the occurrence of the risk. The amount of the compensation for temporary incapacity of work usually rises to 80 per cent of the base and 100 per cent for medical-surgical emergency.

Compensation during professional training or rehabilitation courses is granted on a monthly basis and rises to 70 per cent of the basic gross salary of the insured person, taking into consideration the date of the work accident or the occurrence of the professional illness.

Insured persons should be compensated during the time when they are temporarily unable to work after a work accident or professional illness established by the medical certificate issued according to law. The period for which compensation is granted is 180 days within a year, counting from the first day of medical leave.

Only in situations well justified by the possibility of the employee’s medical and professional recovery may the attending physician recommend extension of medical leave. The period of suspension of the employment contract is included in the length of service if the leave is taken for temporary lack of work capacity.

Compensation for temporary lack of work capacity in case of work accidents or professional illness is paid by the employer for the first three days of work incapacity, and, starting from the fourth day, from the contribution from insurance against work accidents and professional illness.

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30 Official Gazette 772/2009 (republished).
Benefits for Survivors

Law Number 263/2010\(^{31}\) establishes the survivors’ pension system. The right to a survivor’s pension belongs to the children and the surviving spouse, if the deceased was retired or met all the conditions for retiring.

To benefit from a survivor’s pension, children should be under the age of 16, or should carry on their education in a program organized according to law until graduation, but not exceeding the age of 26, or should be disabled, regardless of the degree of the handicap, provided that such handicap occurred during the situations described above.

The surviving spouse is entitled to a survivor’s pension for the rest of his life, upon the regulated age of retirement, if the marriage lasted for at least 15 years, as well as for the time when the surviving spouse is an invalid of the first and second degree, if the marriage lasted for at least a year.

The surviving spouse who, upon the death of the providing spouse, provides for several children under the age of 7 years, benefits from a survivor’s pension until the date when the youngest child reaches 7, during periods when such spouse does not have monthly income from a professional activity for which the insurance is mandatory or if such income is less than 35 per cent of the average gross salary per economy.

A surviving spouse who is entitled to his own pension and meets the conditions set forth by the law for receiving a survivor’s pension may choose the most favorable pension. The survivor’s pension is calculated as a function of the situation of the deceased employee. The amount of the survivor’s pension should be established by applying a percent over the average annual point achieved by the provider, depending on the number of survivors entitled, as follows:

- Sole survivor, 50 per cent;
- Two survivors, 75 per cent; and
- Three or more survivors, 100 per cent.

Dispute Resolution

Individual Employees

Articles 266 to 275 of the Labor Law regulate labor jurisdiction in conjunction with the Civil Procedure Code. In addition, Law Number 62/2011\(^{32}\) requires employers and employees to settle labor conflicts by procedures established by law.


\(^{32}\) Official Gazette 322/2011.
Labor conflicts that concern the establishment of labor conditions when negotiating collective labor contracts are conflicts on the professional, social, or economic interests of employees.

Labor conflicts that concern the exercise of rights or the performance of obligations resulting from special laws or other acts, as well as obligations resulting from collective or individual labor contracts, are conflicts regarding the rights of employees.

Law Number 62/2011\(^3\) regulates the manner in which conflicts of interests are settled. The Law limits the cases in which conflicts of interests can be triggered and the possible manner of settlement, namely conciliation, mediation, arbitration, and strike.

Conflicts of rights are settled only by the County Courts, and judges specialized in labor litigation and social insurance preside over labor cases. Law Number 62/2011 states that the domicile or workplace of the plaintiff is decisive for determining the territorial competence of the court.

In settling conflicts of rights, the law establishes limitations of time within which actions should be brought, depending on the object of the claim. Claims regarding conflicts of rights are settled under urgent procedures in which hearings should be set in intervals of 10 or less days.

### Union Members

The procedure for settling labor litigation cases is the same, regardless of whether the employee is a union member or not. Union bodies defend the rights of their members before the courts and other State institutions or authorities through their own advocates or chosen representatives.

Labor unions may carry out any action provided by the law, including actions in the name of their members with a written proxy from those involved. However, the action cannot be registered or continued if one of those involved opposes or disclaims the lawsuit.

### Termination of Employment

#### In General

Article 55 of the Labor Law expressly provides for the following modes of termination of the individual employment agreement:

- *De jure;*
- By agreement of the parties, on a date mutually agreed; and
- By unilateral decision of a party, under terms provided by law.

\(^3\) *Official Gazette* 322/2011.
De Jure Termination

*De jure* termination applies when the legal work relation cannot be continued for reasons that do not depend on either party in such agreement. Cases of *de jure* termination are listed exhaustively under Article 56 of the Labor Code, as follows:

- On the date of the employee’s or employer’s death (if natural person), or upon dissolution of the employer (if legal entity);
- On the date of the final judgment certifying the death or legal guardianship of the employee;
- On the date when the legal requirements for the employee’s old-age retirement are met or when full or partial retirement or invalidity retirement has been notified according to the law;
- Following the establishment of the absolute nullity of the individual employment contract, from the date the nullity has been established by agreement of the parties or by final judgment;
- When the demand of reinstatement in the position held by a person unlawfully or groundlessly dismissed has been admitted, from the date when the reinstatement judgment is enforceable;
- Following conviction to a prison term, from the date of the final judgment;
- From the date the competent authorities or bodies withdraw the approvals, authorizations, or attestations necessary for the exercise of the profession;
- Following the prohibition to practice a profession or function as a safety measure or complementary punishment, from the date of the final prohibition judgment;
- At the end of the individual employment contract of limited duration; and
- Following the withdrawal of the agreement of the parents or legal representatives, for employees from 15 to 16 years old.

A recently introduced\(^\text{34}\) novelty is that it is the employer who should call for a *de jure* termination of the employment agreement. Thus, the employer is bound to issue a decision, within 5 work days from the event that calls for *de jure* termination, and to communicate such decision to the employee within 5 work days from issue.

Although the framework law expressly provides only for the employer’s obligation to communicate the decision of *de jure* termination to the employee, the employer is equally bound to inform the competent authorities and bodies (ie, the territorial labor inspectorate of the county where the registered premises of the employer are located).

\(^{34}\) The modification and amendment of the Labor Law, which regulates the procedure for the establishment of *de jure* cessation of the employment agreement, was achieved by Law Number 49/2010, *Official Gazette* 195/2010.
The employer is bound to acknowledge the termination of the employment agreement only in the cases listed in the third to the last items above, while the remaining cases only require the employer to inform the competent authority that keeps records of work relationships.

**Termination by Agreement**

Since an employment contract is based on the agreement between the employer and the employee, its termination also may be agreed upon by the parties. The termination agreement should meet the general conditions provided by law, and the written form of the agreement is only necessary *ad probationem*, unless otherwise provided by law.

In this case, the employer should consider any possible request or other clear manifestation of the employee’s intention to leave the company, which intention the employer should unconditionally accept. Essentially, the identity of the party who has initiated the termination is irrelevant so long as the agreement of parties meets all the requirements of validity to produce effects.

**Unilateral Termination**

Unilateral termination by either party implies cessation of the employment agreement following resignation by the employee or dismissal by the employer.

Resignation is defined by Article 81 of the Labor Code as the unilateral act of the employee who, by a written notification, communicates to the employer the cessation of their individual employment contract at the end of the notice period. The resignation should meet the following conditions for its validity:

- Written document issued by the employee, which is to be communicated to the employer and should unequivocally state the cessation of the employment contract, with the right of the employee not to motivate his resignation; and
- The term of notice should be respected, that is, the time when the employment agreement rightfully produces effects.

However, if the employer refuses to acknowledge the resignation, the employee can prove it by any type of evidence. Further, the employer may totally or partially waive the term of notice, and the employment contract ceases upon the date of resignation. The employee also may resign without notice if the employer’s obligations under the individual employment contract have not been met.

The maximum term of notice depends on the position occupied by the employee, i.e., operating personnel or management. Thus, the parties have the right to agree upon the term of notice under the actual employment contract, as long as such term does not exceed 20 work days for operating personnel and 45 work days for management.

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The legal provisions allowing for the negotiation of the term of notice are in the employee’s favor because the term of notice for resignation will be the maximum stated in the applicable collective employment contract only if the parties have failed to state the term of notice in the individual employment contract or if the agreement of the parties cannot be retraced. The resignation does not need the employer’s approval, and the issuance of a decision of the termination is not necessary.

**Prohibitions on Termination**

Prohibitions related to dismissal may be permanent or temporary. Permanent prohibitions apply to dismissals based on sex, sexual orientation, genetic characteristics, age, national affiliation, race, color, ethnical affiliation, religion, political option, social origin, disability, family situation or responsibility, trade union affiliation or activity, and dismissals based on the lawful exercise of the right to strike and unionization.

Temporary prohibitions of dismissal apply during:

- Temporary disability, as certified by a medical certificate according to the law;
- Quarantine leave;
- Pregnancy, insofar as the employer had knowledge of it prior to issuing the dismissal decision;
- Maternity leave;
- Parental leave for children under two years of age or children up to three years of age who are disabled;
- Parental leave for caring for sick children under seven years of age or, in the case of a disabled child with a recurrent disease, up to the age of 18 years;
- Exercise of an elective office in a trade union, except where the dismissal is for the employee’s serious or repeated disciplinary offenses; and
- Leave.

An employee cannot be dismissed if the individual employment contract is rightfully suspended or is suspended upon the employee’s initiative. However, the temporary prohibition of dismissal does not apply if the dismissal is lawfully undertaken following legal reorganization, bankruptcy, or dissolution of the employer.

**Dismissal for Reasons Related to Person of Employee**

The employer may decide on dismissal for reasons that pertain to the employee in the following instances:

35 Labor Law, arts 59 and 60.
• The employee has committed a serious or repeated disciplinary offense against the labor discipline rules or the rules laid down in the employment contract, collective labor agreement, or rules of procedure, as a disciplinary sanction;
• The employee has been taken into preventive custody for more than 30 days, under the Code of Criminal Procedure;
• By decision of the competent medical examination bodies, such that a physical and/or mental inability of the employee is found which does not allow him to fulfill the duties corresponding to the position held; and
• The employee is not professionally fit to the workplace where he is employed.

Essentially, as a protection for the employee against possible abuse and as a guarantee of rights, dismissal can be carried out only through a specific procedure provided by law and only after a dismissal decision issued in writing and with set contents, which decision is to be communicated to the employee within certain time limits.

To be valid, the dismissal decision should include the de facto and de jure reasons that have led to the dismissal, as well as the time limitation and the court where the decision may be appealed.

According to Law Number 53/2003, the employee may challenge the dismissal decision before the law court that covers his place of residence or workplace, within 30 calendar days from receipt of the notification.

According to Law Number 62/2011, the unilateral measures of performance, modification, suspension, or termination of an individual labor contract can be challenged by the employee within 45 calendar days from the moment when the unilateral measure was communicated to him.

An employer may impose disciplinary dismissal of an employee who has committed a serious or repeated disciplinary offense related to the labor discipline rules, but the employer should still carry out the preliminary disciplinary inquiry.

The employee should be notified in writing as to the object, date, and time of the preliminary disciplinary hearing. Only if the duly summoned employee does not show up, for objective reasons, is the employer entitled to issue the dismissal decision without the hearing.

During the disciplinary hearing, the employee may be accompanied by a representative of the union and may produce all evidence and defense in his favor. After the hearing, the hearing committee appointed by the employer should issue a report, stating the position of the parties and proposing a disciplinary sanction.
Based on the report of the preliminary disciplinary hearing, or if the employee does not take part in the hearing, the employer should issue the dismissal decision within 30 calendar days from the date when the disciplinary events have been acknowledged, but not later than six months from the actual events.

The dismissal may be carried out when an employee has been taken into preventive custody for more than 30 days, but the employee should be missing from the company during the period stipulated by the law for the dismissal to be valid. The dismissal decision should be issued within 30 calendar days from the events causing the dismissal.

If the employee is found by decision of the competent medical examination bodies to be physically and/or mentally unable, or if he is not professionally fit to the workplace where he is employed, the employer should propose to him other existing work positions in the organization that are compatible with the work capacity established by the occupational medicine physician or with his professional capacity.

If there are no vacant positions, the employer should request the assistance of the local public employment office to reallocate the employee.

If an employee is dismissed for lack of professional capacity, the employer should carry out a prior assessment of the employee according to the procedure set in the applicable collective labor agreement or internal rules of the employer.

The assessment should focus on the activities provided for in the employee’s job description and may be carried out in the form of a written, oral, or practical examination, as well as other types of tests.

Employees dismissed for lack of physical and/or mental capacity and professional ability have the right to a notice that cannot be less than 20 work days. Exceptionally, there need be no notice for persons dismissed for lack of professional capacity who are in their probationary period.

**Dismissal for Reasons Not Related to Person of Employee**

An employee also may be dismissed for reasons not related to his person, such as the dissolution of his workplace. This type of dismissal may be individual or collective, depending on the number of employees of the same employer who are being dismissed within 30 calendar days.

In order for such dismissal to be valid, the dissolution of the workplace should be effective and should have a real and serious cause. Notwithstanding the individual or collective nature of the dismissal, the employer should issue a dismissal decision for each employee with the contents required by law.

The employer has the duty to notify the employees and the local public employment office as to the intention to perform collective redundancy. He also should initiate consultations with the trade union or representatives of the employees to find methods to avoid collective redundancies or limit the
consequences of such dismissals. The employees have the right to a notice of at least 20 workdays. The deadlines established by law for such obligations are mandatory.

An employer deciding on a collective redundancy may not employ new personnel for the workplaces of the dismissed employees for 45 calendar days from the date of their dismissal, and the dismissed employees have a priority of employment in their respective workplaces.

If the dismissal is decided for reasons not related to the employee’s person, he is entitled to receive compensation under the conditions established by the applicable collective employment contract or individual employment contract.

Dismissed employees should be compensated even more if the applicable collective employment contract (at the level of activity sector, group of organizations, or company) or the individual employment contract has been negotiated so as to provide for such compensation.

**Unlawful Dismissal**

A dismissal that does not comply with certain conditions or is contrary to the procedure or form provided is null and void. If the court finds the dismissal groundless or illegal, it should order its cancellation and demand that the employer compensate the employee in an amount equal to the indexed, increased, and updated wages and other rights the employee would have benefited from, regardless of whether compensation was requested or not by the employee in his appeal.

“Compensation” also includes the bonuses provided by the collective or individual employment contract from which the employee would have benefited. If expressly provided in the employment contract, the court also may decide on moral prejudice compensation. The amount cannot be reduced by wages paid to the employee if he has taken on another position and the legal solution is justified by the legality of plurality of offices. The court should return the parties to the state existing before dismissal only upon request of the employee.

**National Unemployment Insurance**

Under the Labor Law, employees dismissed for reasons not related to their person should benefit from active measures designed to fight unemployment and may enjoy compensations under the terms of the law and the applicable collective labor agreement.

Law Number 76/2002\(^\text{36}\) emphasizes that each person is guaranteed the right to freely choose his profession and place of work, as well as the right to unemployment insurance.

\(^{36}\) *Official Gazette* 103/2002.

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Employers should pay a monthly contribution to the insurance budget for unemployment, the amount of which applies to the calculus base, i.e., the monthly wages of the employee. The unemployed should benefit from an unemployment compensation if they comply with the following criteria:

- They have contributed to the unemployment fund for at least 12 months within the 24 months prior to the request;
- They do not have income or they have income from lawful authorized activities smaller than the social reference indicator in force;
- They do not meet the conditions of retiring under the terms of the law; and
- They are registered with the local employment agencies within the area where they live or temporarily reside, if they had the latest workplace or had income in the respective locality.

Unemployment compensation is awarded for various periods, depending on the contribution. Compensation is made by monthly payment. Persons who benefit from unemployment compensation are obliged to:

- Take part in a meeting, on a monthly basis or upon request, with the employment agency where they are registered to receive assistance in finding a workplace;
- Communicate to their agency of registration, within three days, any modification of the conditions that had led to the awarding of unemployment compensation;
- Take part in programs designed for the stimulation of occupation and professional training offered by their agency of registration;
- Actively seek a workplace, and
- Announce in writing to the local employment agency where they are registered the occurrence of temporary work incapacity within 24 hours from the moment when the sick leave certificate was issued by the doctor.

An employer’s failure to pay contributions to the insurance budget for unemployment and retention of employees’ contributions are criminal offenses.

Retirement, Social Security, Health Care, and Old-Age Pensions

In General

Social security services qualify as replacement income for the total or partial loss of the insured’s income as a consequence of old-age, disability, or death. Social security services are granted in the form of pensions and other types of services.  

37 Law Number 263/2010.
The right to social security is guaranteed by the State and is exercised through the public system of pensions and other social security rights. Social security rights due within the public system in Romania may be transferred to countries where such employees establish their residence or address, under conditions regulated by international agreements and conventions ratified by Romania, and may be received in the respective country’s currency or in another currency agreed upon.

Natural and legal persons are bound to participate in the public pension system, and social security rights are granted in correlation with the fulfillment of these obligations. Social security funds are established based on contributions from persons who participate in the public pension system. Every participant in the public pension system is entitled to equal treatment with regard to legal rights and obligations.

Social Costs

In Romania, social costs owed to the State budget for health care, health and safety protection, workers’ compensation, survivors’ benefits, and pensions are funded by a combination of employer and employee contributions. However, the employer is the one who pays them all, indicating on the payroll the contributions owed by each employee. There are two types of contributions:

- Contributions due from the employer, which include (a) social security contribution, paid as a differentiated percent depending on whether the employee performs under normal or special conditions; (b) contribution to the unemployment insurance budget; (c) contribution to the health care insurance system; (d) contribution for insurance against work accidents and professional illness, established as a variable quota, depending on the special conditions set by law;38 (between 0.15 per cent and 0.85 per cent); (e) contribution for leave and compensation; and (f) contribution to the guarantee fund for the payment of salary debts;39 and

- Contributions due from the employee, which include (a) social security contribution; (b) contribution to the unemployment insurance budget; (c) contribution to the health care insurance system; and (d) income tax.40

Social security contributions are regulated by Law Number 263/2010, while contributions to the unemployment insurance fund are provided for in Law Number 76/2002. On the other hand, contributions to the health insurance fund are set in Law Number 95/2006, as amended, while contributions for leave and compensation are regulated by Government Emergency Order Number 158/2005, as amended.

38 Law Number 571/2003.
39 The contribution due from the employer to the guarantee fund for payment of salary debts is established by Law Number 200/2006, as amended.
40 The tax on salary income is regulated by Law Number 571/2003.

(Release 1 – 2012)
Conclusion

Romanian employment law has evolved significantly in the last 20 years as a consequence of changes in the social and economic environment.

Romania is about to face major changes in employment legislation, and the government has reported the main reforms to be made in the near future. The restructuring and dismissal procedures for public sector staff are being reformed. Pension reform also is in process. In 2010, the law that governs the pension system was approved by Parliament: special pensions have been abolished, while those given abusively for disability should be recalculated.

The law that rules the unitary wage system was revised to simplify the remuneration system and remove the unjustified intermediary hierarchy and pay differences for the same job. Finally, a new Social Dialogue Law entered into force, along with changes to the Labor Law which focused primarily on an easier procedure for dismissals caused by an employee’s fault, more flexible provisions on the conclusion of individual labor agreements for a definite period, and the extension of probation periods.

Finally, Law Number 62/2011 abolished previous laws on trade unions, the settlement of work conflicts, employers’ organizations, the collective labor contract, the Social and Economic Council, and the social dialogue commissions at the central and territorial level.
Russia

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Introduction
The Government's current policy is to provide employees with lesser labor and social security guarantees without overburdening businesses and the federal budget. The key principles of the current labor and social security policy were inherited from the Soviet times. They include recognition that an employee, as a vulnerable party who has lesser economic power to assert his will compared to an employer, should be protected by the procedures and requirements of the Labor Code and the state medical, pension, and Social Security Systems against industrial accidents and professional diseases.

Although there has been a certain reduction of employees' guarantees and benefits, the current labor legislation has some positive effects for employees. The maximum working hours have been reduced from 41 to 40 hours a week and the annual vacation was increased from 15 to 28 working days.

Russia, being a federal state, establishes a framework for regulation of labor relations and employee social protection. Russia sets out the minimum rights and guarantees of employees, the procedures for conclusion, change and termination of labor agreements, liability of employers and employees, and the principles of the labor social partnership and collective bargaining. Russia, in 2006, adopted the new Labor Code, which is the cornerstone normative act binding for all employers and employees.

Russian regions and municipalities may adopt normative acts that do not fall within the federal competence and do not contradict federal legislation. That means that they may participate in labor and social security policy by increasing employee rights and guarantees at their own expense.

Legal Relationship of Employer and Employee

In General
The principal document regulating employment relations in Russia is the Russian Federation Labor Code, which provides the following definition of employment relations:
“Employment relations mean relations based on an arrangement between an individual (employee) and an employer concerning performance by the employee in person, for payment of a certain labor function (working in a job position according to a staff list, at an occupation or trade, with qualifications being indicated; a particular work assigned to the employee), the employee's compliance with the employer’s internal labor rules, provided the employer ensures the working conditions envisaged by the labor laws, by collective bargaining agreement, by the local normative acts of the employer and the employment contract.”

As a general rule, employment relations arise on the basis of a written contract on employment, but actual admittance by the employer of the employee to work, even if an employment contract has not been duly drawn up, is qualified as signing of an employment contract. Employment relations arise from election or appointment of an employee to a certain office, from employment instruction of the State Labor Service within the state quota, or from a court ruling on conclusion of an employment contract.

The Labor Code states that Russian labor laws are not applicable to military servicemen, members of boards of directors (supervisory boards) of organizations, persons working under civil law contracts, and other persons as established by federal law.

One must distinguish employment relations and civil law relations on the basis of a civil law contract, so long as Russian employment laws provide for specific obligations of the employers and protection for employees. In practice, certain employers try to evade establishment of an employment relationship by signing a civil law contract with an individual instead of an employment contract. Such approach creates a risk of a claim brought by the individual on recognition of employment.

The court decision on such claim will depend on actual terms and conditions of the parties’ relationship, which are examined by the court as to compliance with the definition of employment given above. Generally, individual entrepreneurs, individuals acting under civil law contracts as independent contractors, agents, partners, members of the board of directors, military servicemen, attorneys-at-law, and notaries are not qualified as employees.

An employment contract must be concluded in the Russian language1 and must contain obligatory terms of employment, such as date of commencement of work, description of work (job function), salary terms, and place of work. The Labor Code states that missing obligatory terms will not invalidate the employment contract. The parties to the contract (the employer and the

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1 A bilingual is allowed, but the Russian version will prevail.
employee\(^2\)) may include in the employment contract any other agreed employment terms, such as provisions as to probation, commercial secrets, and additional insurance. An employment contract normally will be concluded for an indefinite period of time. Temporary employment is allowed only in the events envisaged by the Labor Code and may not exceed five years.

**Equality of Rights and Opportunities**

One of the general principles of the Russian labor law is equality of rights and opportunities of employees; privileges, additional rights, and obligations are established with respect to certain categories of employees and are substantiated by the necessity to provide the employees with additional protection (e.g., pregnant women, employees under 18 years of age, employees combining work with education, and disabled individuals), to protect the national labor market (e.g., regulation of employment of foreign citizens), and to protect interests of the employer (e.g., additional grounds and less complicated procedures for dismissal of senior management).

Part-time employees, temporary and seasonal employees, and employees combining jobs (working for another employer) enjoy the general rights of the employees provided by the Labor Code, with certain peculiarities related basically to procedure for termination.

Normally, an employment contract may be concluded with persons who have reached the age of 16. The Labor Code provides additional protection for employees under 18 years of age, such as a lesser number of working hours, extended annual vacation leave, prohibition to work at night, statutory holidays, and weekends, and obligatory medical examinations at the expense of the employer. Employment of persons of 14 years of age and younger requires approval of parents and guardianship authorities, and is permitted only in a limited number of cases.

**Foreign Citizens**

In the Russian Federation, labor laws and regulations extend to labor relations involving foreign citizens and stateless persons, foreign legal entities and international organizations, and organizations formed or founded by foreign legal or natural persons, except as otherwise envisaged by an international treaty of the Russian Federation.

The Russian Government has the power to restrict or prohibit employment of foreigners in any sphere of economy and in any region by establishment of quotas for employment of foreigners and establishing the permitted percentage

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\(^2\) As the employer may act an individual (including individual entrepreneur, attorney-at-law, notary public) or legal entity, as the employee may act an individual (natural person) only.
of foreign employees that may be hired by an employer, depending on its business sector.

For 2010, the quota for employment of non-Russian citizens is established at 1,944,356 foreign workers. The quota is divided among districts, with 250,000 places allocated to Moscow for 2010. Non-citizens may not work in retail trade in alcoholic beverages, pharmaceutical products, in retail outlets other than shops or stores, patent attorneys, private detectives, private guards, managers of an aviation enterprise, judges, prosecutors, and municipal officers.

They also are restricted from employment in positions privy to state secrets. Employment of non-citizens is governed by the Federal Law on the Legal Status of Foreign Citizens in Russia, Number 115-FZ dd., of 25 July 2002.

It states that employment of non-citizens is conditional to obtainment by the employer of a permit to hire foreign workforce (issued within the limits of quota for a particular region) and obtainment by the foreign employee of an individual work permit.

From 1 July 2010, a simplified employment procedure for highly skilled foreign specialists (i.e., those whose salary is more than RUB 2,000,000) is in force. It exempts such specialists from quotas and provides for a less complicated procedure of obtaining work permits.

The procedure established by the said Federal Law on the Legal Status of Foreign Citizens in Russia also extends to non-citizens working on the basis of civil law contracts. Even if a foreign citizen has got a work permit, he still cannot freely move to another federal district because a foreign citizen is allowed to work only in the territory of the Russian region where his work permit has been issued. Rare exceptions granting free movement of foreign employees in Russia can be found in international agreements.

In particular, Russia and Belorussia are taking steps towards formation and implementation of the Union State. Fostering this goal, both states concluded the Agreement on Equal Rights of Citizens of 25 December 1998. The Agreement provides for free movement of Belorussian citizens into Russia, providing the latter with labor rights equal to those accorded to Russian citizens.

**Secondment and Employee Leasing**

Russia has not ratified International Labor Organization (ILO) Convention Number 181 on Private Employment Agencies and the respective Recommendations thereto, and Russian labor laws do not regulate employee leasing, as the concept of secondment and employee leasing is alien to Russian law.

Nevertheless, the Russian labor market requests such service and, in fact, staff leasing companies exist and provide staff leasing services in spite of the fact that there is no clear regulation in this respect. The federal law on staff leasing was
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drafted and discussed in 2004–2006, but it was not submitted to the Russian Federation Parliament (Duma) for approval.

Change of Ownership

Any change in ownership in the employer or of the employer’s property or assets, such as sale of shares in the employer, sale of its assets, privatization of the employer-state enterprise, reorganization of the employer in any form, and other change of ownership, will not be regarded as grounds for termination of employment or change of employment terms. However, senior management may be terminated in case of change of ownership. Thus, change in ownership in the employer generally is not applicable to commercial entities.

Nothing prohibits the seller and the purchaser of business to agree upon the terms and conditions of transfer to the purchaser of the employees involved in such business and, if the employees agree to transfer, this will entail termination of employment of the transferred employees with the seller and commencement of their employment with the purchaser.

The purchaser is not required to preserve any terms and conditions of employment applicable by the seller, and the purchaser has full legal right to offer prospective employees new employment terms. Any prospective employee may consider such offer and is not obligated to accept it; if so, such employee will remain employed by the seller on the same terms and conditions of employment, and may be further terminated on the grounds listed in the Labor Code.

Terms and Conditions of Employment

Remuneration

Remuneration for labor includes salary (monthly salary or tariff rate), obligatory compensation payments and allowances (for work under dangerous, harmful, special climatic conditions, overtime payments, and night work payments), and payments such as bonuses. There are three types of minimum salary in Russia, namely:

- The federal minimum salary, established by the federal law, which currently amounts to RUB 4,330 and which is obligatory throughout Russia;
- The minimum salary, not less than federal minimum salary, established by regional agreement on minimum salary and applicable for employees working in the particular subject area;\(^3\) and
- The minimum salary within an industry or other sphere, established by an industrial agreement or an agreement with other sphere of application between

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\(^3\) Currently, the regional minimum wage for Moscow is established by the Regional Agreement on Minimum Salary in Moscow for 2011 and is RUB 11,100.
representatives of employees and employers, and which is binding only upon
the parties to it.

Wage is payable in cash in the Russian currency and at least twice a month. The
portion of wage paid in a non-monetary form may not exceed 20 per cent of the
accrued monthly wage. The wage will be established in the individual
employment contract and will depend on the employees’ skill, complexity of the
work performed, and quantity and quality of the labor. The maximum amount of
salary is not provided (limited) by law. The rules apply to all categories of the
employees, including full and part-time employees, temporary and seasonal
workers, disabled employees, and young employees.

**Hours of Work**

The Labor Code provides for flexibility in choosing the working time regime
that would fit both the employee and the employer, including part-time work, an
open-ended (unlimited) working day, flexible working hours, and shift work.

Normal duration of working hours may not exceed 40 hours per week. Overtime
work is limited by four hours during two subsequent days and 120 hours per
year; the rules also apply to the employees working on the terms of an open-
ended (unlimited) working day. Reduced working hours are established for
special categories of employees, such as employees under 18 years of age,
disabled employees, and employees working under dangerous and/or harmful
conditions. All employers are obligated to account for the working time,
working days, and shifts of each employee to ensure adequate payment,
provision of days off, and compliance with overtime limitations and annual
vacation requirements.

Overtime work is allowed in limited number of cases provided by the Labor
Code and is subject to the employee’s written consent; it is prohibited for
pregnant women and employees aged below 18 to work overtime. The same
rules are applicable to work during days off and on public holidays. Overtime
work must be compensated as follows:

- The first two hours of work at no less than 1.5 times the normal wage; and
- For subsequent hours, not less than at double the normal wage.

Work on days off and public holidays receive at least the double rate. If an
employee wishes, instead of overtime pay and pay for work during days off and
public holidays, he may be awarded with additional days off. Employees
working on the terms of an open-ended (unlimited) working day are not entitled
to payment for overtime work but must be provided with an additional three
calendar days of annual vacations. Night time is the time from 10 p.m. to 6 a.m.;
generally, the length of night time work (shift) will be reduced by one hour
(with certain exceptions, e.g., employees hired especially for night time work),
and each hour of night work is subject to additional 20 per cent hourly rate payment. All employees must be provided:

- Breaks for rest and taking meals during the working day (shift) of at least 30 minutes;
- Daily (inter-shift) rest of at least eight hours;
- Days off (weekly continuous rest) of at least 42 hours;\(^4\)
- Public holidays; and
- Annual vacations of at least 28 calendar days per working (not calendar) year, which is extended for certain categories of employees.

Sick leave (temporary disability) must be confirmed by a medical certificate in the established form issued by a certified medical institution. The first three days of sick leave are payable by the employer, and remaining days are payable from the Social Security Fund. The amount of sick leave payment is based on average wage and depends on the length of Social Security payments. The minimum monthly sick leave payment may not be less than the federal minimum wage and is currently capped at RUB 38,730.

**Health Care**

Mandatory state medical insurance and state Social Security Systems exist in Russia, and each employer must be registered with the State Medical Insurance Fund and the Social Security Fund and make deductions with respect to each employee as per the rates established by federal law. Mandatory social security encompasses insurance against accidents at work and occupational disease, and mandatory medical insurance is a state guarantee for free medical aid.

An employer’s obligation to provide an employee with mandatory social security must be included in each employment contract. Voluntarily medical insurance is rather undeveloped but still is provided by employers as additional benefit to employees.

**Vocational Training**

An employer is not obligated to provide for vocational training of its employees but has full discretion in determination of forms and terms for training or retraining of its employees, depending on the employer’s needs and business plans.

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\(^4\) Employees working under a five-day working week must be provided with two days off per week; in a six-day working week arrangement, one day off. Sunday is the common day off.
Vocational training generally requires signing of a specific agreement or addendum to an employment contract where all necessary terms of training must be defined. Such document may provide for the employee’s obligation to work with the employer for a particular period of time and to reimburse expenses incurred by the employer in connection with training if the employee terminates employment before expiration of this period. The Labor Code provides for additional benefits for the employees who combine work with education (e.g., students), such as additional vacations to prepare for examinations.

Discrimination

The Constitution establishes equality of everyone before the law. In line with this general principle, the Labor Code provides that everyone has equal opportunities to implement their labor rights, prohibits forced labor and discrimination in the labor sphere, and provides for equality of rights and opportunities of the employees.

The Labor Code requires that no one be subject to restrictions in labor rights and liberties or gain any advantages on the basis of sex, race, skin color, nationality, language, origin, property, family, social and employment status, age, place of residence, religious beliefs, political convictions, affiliation or failure to affiliate with public associations, and other circumstances not connected with the employee’s professional qualities. This requirement also is applicable to foreign employees and employers; however, employment of foreign citizens is subject to a special regulation by other federal laws.

Thus, the employer may not establish, directly or indirectly, preferences or differences in hiring and employment terms connected with the employee’s gender, age, race or national origin, or religious beliefs; nor collect and process of personal data on the employee’s race or national origin, political convictions, religious or philosophical beliefs, or state of health (except for professions and jobs where medical examinations are mandatory for hiring and further employment) is allowed with the employee’s written consent.

The establishment in legislation of differences, exceptions, preferences, and restrictions of rights of employees arising from specific requirements for the given type of work or from the state’s special care for persons who need additional social and legal protection is not considered as labor discrimination.

As an example, women are protected through prohibition of their work in hard, harmful, and/or dangerous trade. Special attention is paid to regulation of the work of pregnant women and women with children. Pregnant women may not be requested to work beyond normal working hours, at nights, weekends, and public holidays. They may be dismissed only in case of liquidation (dissolution) of the employer.
Women with children of up to three years old and single mothers with children of up to 14 years old or disabled children of up to 18 years old must be provided additional vacation days. They may be terminated only in case of liquidation (dissolution) of the employer or having violated their labor duties. An employer's groundless refusal to hire and groundless dismissal of a pregnant woman or a woman with a child up to three years old constitutes a crime in Russia.

The Labor Code does not provide for specific discrimination protection for aged persons, but reaching the retirement age is not considered as a legal ground for an employee’s dismissal. The Labor Code lacks sexual harassment provisions. At the same time, the Criminal Code outlaw sexual harassment and imposes imprisonment of up to one year for those found guilty of such conduct.

Employment protection of invalids is ensured by the state in the form of mandatory quotas. Employers with staff of more than 100 employees must employ invalids in the amount of the mandatory quota. The mandatory quota for employment of invalids set by regional laws varies from two per cent to four per cent of the employer's average number of staff. Moscow has a two per cent mandatory quota.

Invalidity of an individual and his abilities (or limitations) to work are stated in the medical certificate and individual rehabilitation program. Terms of employment of disabled persons must comply with requirements and limitations provided. Employers whose staff exceeds 100 employees also must furnish special devices and equipment for the minimum number of workplaces for invalids, defined for each such employer by a regional executive body within the mandatory quota of positions, and customize workplaces for the needs of particular invalids to ensure performance of job functions.

In some cases, employers may be required to finance rehabilitation of invalids. The Labor Code also provides for additional protection of invalids with reduced working hours and extended annual paid vacation. Persons who consider that they were subject to discrimination in the labor sphere may apply to a court to restore their violated rights and compensate material damages and moral harm. A company's official committing discrimination is subject to disciplinary liability up to dismissal.

Russian labor laws do not contain any employer's obligation to accommodate the employee's religious beliefs. Labor discrimination constitutes an administrative offence resulting in administrative liability of a company and/or its officials, including fines and administrative suspension of business activities. Discrimination, including discrimination in the sphere of labor, constitutes a crime in Russia with imprisonment of up to five years.
Collective Bargaining and Worker Participation in Management

Labor Social Partnership

The Labor Code promotes the principle of “labor social partnership”, which implies the system of relations between employees, employers, and state or municipal bodies aimed at accommodating the labor interests of employees and employers. The labor social partnership is based on equality of the parties, freedom of choice in discussing labor issues, freedom of undertaking, and feasibility of obligations. The labor social partnership can be exercised in the form of:

- Collective bargaining;
- Worker participation in management;
- Participation of representatives of employees and employers in labor dispute resolution (see text, below); and
- Mutual negotiations on regulation of labor relations, ensuring of guarantees of the employees' labor rights, and improvement of labor law.

Collective Bargaining

In General

Collective bargaining is the procedure intended for drafting, concluding, and amending collective agreements initiated and applied by representatives of employees or employers. Collective bargaining is conducted by ad hoc or regular commissions composed of equal number of representatives of employees and employers.

At the head of the collective bargaining system is the Russian Trilateral Commission on Regulation of Social and Economic Relations. It is composed of representatives of the Government of Russia, all Russian trade unions, and all Russian associations of employers.

The scope of collective bargaining may relate to any issue of social and labor relations. The term, place, and procedure for collective bargaining are defined by the parties' representatives. In case of discrepancies, the parties should draft and sign minutes of disagreement. Discrepancies not settled by the parties are subject to further collective bargaining or the dispute resolution procedure (see text, below). The parties cannot evade collective bargaining, but they are not obliged to conclude collective agreements; nor may any party request inclusion of any provision not agreed with the other party.

Collective Labor Agreement

A collective labor agreement is a legal document regulating social and labor relations with a particular employer and concluded by representatives of employees (e.g., a trade union) and the employer. The term of a collective labor
agreement may not exceed three years and can be extended an unlimited number of times for new periods of up to three years.

Tariff Agreements

A tariff agreement is a legal document regulating general principles of social, labor, and economic relations and concluded by authorized representatives of employees and employers (e.g., an association of employers).

Tariff agreements are differentiated depending on the sphere of their application. General tariff agreements regulate relations of employees and employers in the whole of Russia. Regional (inter-regional) tariff agreements regulate relations of employees and employers in a Russian region. Territorial tariff agreements regulate relations of employees and employers in a particular municipality. Finally, industrial (inter-industrial) tariff agreements regulate relations of employees and employers in a particular industry.

Generally, a tariff agreement is not binding for the employer who is not a member of an association of employers having concluded the agreement or has not authorized the association of employers to represent its interests upon its conclusion. The term of a tariff agreement may not exceed three years and can be extended once for a new period of up to three years.

Issues

The list of particular issues that can be included into collective labor or tariff agreements is open and covers wages, conditions and procedures for wage increases, vocational training, improvement of workplace safety, additional benefits to employees, and the employees' obligation to refrain from strikes if an employer implements relevant provisions of the agreements. Collective labor agreements and industrial (tariff) agreements also may establish the employer's increased obligations as to health and safety protection.

In no event may a collective labor or tariff agreement undermine the employees' rights and guarantees granted by the Labor Code. Collective labor and tariff agreements are subject to an informative registration with the relevant State Labor Authority.

Workers Participation in Management

The ultimate role in the company’s management and decision-making belongs to an employer. The employees' rights to participate in management are basically of an accessory and consultative nature; the employees' opinion and recommendations may be taken into consideration by an employer, but they are not binding. Currently, Russian law does not obligate an employer to have employee representatives on the employer's board of directors or other management body; nor must the employer admit employee representatives to meetings of the employer's management bodies.
Employees have the right to obtain from an employer information on issues directly affecting their interests (e.g., reorganization or liquidation and sale of business or major assets), but Russian law does not define what information must be provided to employees. The Labor Code declares the right without any regulations as to its exercise. The Labor Code also authorizes employees to deliver to the employer their position on certain issues, but to no binding effect for the employer. The employer and employees are free to establish agreed forms of participation of employees in management, which may be developed in the employer’s statutory documents, internal rules, or a collective labor agreement.

Health and Safety Protection in the Workplace

Employer's Obligations as to Health and Safety

In General

The employer is responsible for establishment of safe working conditions and labor protection and is obliged to ensure at its own expense the safety of his employees, use of certified means of protection, compliance of each workplace with safety and labor protection requirements, compliance with the work and rest regime requirements, availability of certified special clothing, footwear, and other means of individual protection, trainings on safe methods and techniques of work, monitoring of compliance of working conditions with obligatory safety and labor protection requirements, attestation of workplaces, certification of the employer’s labor protection system, mandatory medical examinations of employees at the employer’s expense, preventing emergency situations, investigation and recording of accidents at work and occupational diseases, and mandatory social insurance of employees against workplace accidents and occupational diseases.

Each employer is obliged to maintain a full set of safety and labor protection regulations in his business sphere and to develop internal labor safety rules and instructions binding for employees. Work conditions at each workplace must comply with the labor safety requirements. The employer is obliged to ensure employee safety in use of equipment, buildings, and facilities, implementation of technological processes, and application of instruments, materials, and raw materials in production. The employer must make mandatory contributions to the Social Security Fund, which serves as a safety net against industrial injuries and occupational diseases.

The law requires an employer to inform employees of the conditions and safety at workplaces. The employer is obliged to educate employees with safe methods of work and first aid treatment and to determine employees' knowledge of the labor safety requirements and prohibit work of persons who have not been trained and instructed on labor safety requirements or whose knowledge of such
requirements has not been certified. Prohibition of work also applies to persons who have not undergone a mandatory medical examination.

Establishment of an Internal Body for Health and Safety Protection

An employer involved in production activity with a staff exceeding 50 employees is obliged to establish a labor protection department or the position of a labor protection expert with relevant professional training or work experience.

An employer with 50 employees or less who are involved in production activity may choose to create a labor protection department, set up the position of a labor protection expert, engage an accredited labor protection organization, or assign responsibility for labor protection to the chief executive officer or other employee in addition to the performance by them of their usual workplace duties.

In any case, an employer must appoint a person (persons), body, or specialized organization responsible for compliance with safety and labor protection rules and regulations. The above requirements apply almost to all modern companies (including companies rendering legal, marketing, audit, and other services) because they use in their business activities computers, telefaxes, printers, and other equipment and mechanisms that may harm health and safety of employees.

Employee's Rights and Obligations as to Health and Safety Protection

The employee's main rights include the right to refuse to work in case of danger to his life and health as a result of violation of the labor safety requirements and the right to request state authorities to examine labor conditions and labor safety at his workplace.

The employee's main obligations include observance of labor safety requirements and immediate notification of his superiors on situations hazardous to health and life of people, on work-related accidents, and on any employee’s health deterioration. Violation of the labor safety requirements by an employee may serve as the ground for the employer's unilateral termination of a labor agreement with the employee, if such violation results in disastrous consequences or could certainly lead to such consequences.

Employer's Liability

Violation of the labor safety rules may result in the following types of liability for an employer or its executive:

- Disciplinary liability;
- Administrative liability;
- Criminal liability; and
- Liability to compensate for damages caused to an employee's property and moral harm.
Administrative liability for violation of safety rules includes fines on an employer and its officers and suspension of the employer’s activities of up to 90 days; guilty officers also may be disqualified for up to three years.

Criminal liability applies only to the officer responsible to ensure observance of the labor safety rules (e.g., the chief executive officer or a labor protection expert). Criminal liability provides for the individual's imprisonment of up to three years, with prohibition to hold certain positions or conduct certain activities for up to three years or without such prohibition. Damages caused by the employer to the employee's property (in particular, as a result of violation of labor safety requirements) must be compensated in full. Moral harm is compensated to an employee in the amount agreed by the employee and the employer or, in case of disputes, by a court.

**Workers’ Compensation and Survivor Benefits**

**Employers’ Obligations**

Russia maintains the mandatory Social Security System against industrial accidents and occupational diseases, and this was created especially to protect injured workers\(^5\) and families of workers killed on the job. The Social Security System establishes three main employers’ obligations:

- Make mandatory social contributions to the Social Security Fund;
- Provide injured workers with certain indemnity benefits; and
- Submit declarations and reports and specifically report to the Social Security Fund regarding accidents.

Mandatory social contributions are paid by employers monthly at their own expense. Mandatory social contributions are calculated as the amount of the worker's overall remuneration for a month applied to the tariff rate. The rates are established by law annually in percentages and vary depending on the employer's professional risk grade (i.e., the level of the workers' injuries and occupational diseases in a particular sphere of economic activity). Currently, there are 32 professional risk grades. In 2010, the tariff rates vary from 0.2 per cent to 8.5 per cent.

The employers' obligation to provide injured workers with indemnity benefits is limited to a temporary disability benefit and a payment of a special vacation leave for medical treatment at sanatoriums. Other indemnity benefits are paid by the Social Security Fund directly to injured workers. Mandatory social security payments payable by the employer may be reduced by the amounts of indemnity benefits (payments) provided by an employer to injured workers.

\(^5\) This term also covers workers suffering from occupational illness.
Additional protection of injured workers and families of workers killed on the job is rendered through the mandatory pension system, i.e., through payment by the Pension Fund of a permanent invalidity pension and survivors’ pension. Collective labor agreements and industrial (tariff) agreements also may set obligations of employers to provide additional benefits for workers and their families.

**Benefits for Injured Workers**

*Professional Disability Benefits*

The worker's professional disability should not be confused with invalidity, although these concepts are close and, in some cases, may overlap. In Russia, professional disability and invalidity are determined according to different rules and lead to different consequences.

Injured workers are entitled to the following professional disability benefits:

- A temporary disability benefit;
- A one-off professional disability benefit;
- A permanent professional disability benefit;
- Medical benefits; and
- Social and occupation adaptation benefits.

A temporary disability benefit is paid to an injured worker twice a month during the whole period of his temporary disability until recovery or determination of the worker’s permanent professional disability by the State Medical and Social Expertise Agency. The monthly amount of the benefit is equal to the employee’s average monthly remuneration.

A one-off professional disability benefit is paid to an injured worker if the State Medical and Social Expertise Agency determines the worker’s permanent professional disability. The amount of the benefit is calculated as part of the maximum for this kind of benefit proportionate to the injured worker's professional disability degree. The maximum amount of a one-off professional disability benefit is set annually by law and, in 2011, is RUB 68,586.

A permanent professional disability benefit is paid to an injured worker monthly during the whole period of his permanent professional disability (i.e., consistent loss of ability to work) determined by the State Medical and Social Expertise Agency. The amount of the benefit, generally, is equal to the portion of the injured worker's average monthly remuneration proportionate to his disability degree. The pay is adjusted to inflation. The monthly permanent professional disability benefit provided to an injured worker cannot exceed the maximum set by law that, in 2011, is RUB 52,740.
Medical benefits represent payments provided to cure or relieve the worker's injury from a work-related accident or an occupational disease. Medical benefits include payment for medical treatment of an injured worker during the period from an industrial accident until his recovery or determination of his permanent disability, payment for medications, payment for a nursing home, and payment of a special vacation leave for medical treatment at a sanatorium.

Social and occupation adaptation benefits include payments for vocational training and provision of an injured worker with transportation. Eligibility for the above benefits does not depend on the injured worker's length of employment. Provision of the most of the discussed benefits is made out of funds of the Social Security Fund.

Permalink Invalidity Pension

A permanent invalidity pension is paid monthly to a person who has been recognized as an invalid by the State Medical and Social Expertise Agency, regardless of whether his invalidity is work-related or not. The pension is granted by the Pension Fund.

The invalidity cause, the length of employment, and the fact that an invalid continues working are of no impact for the invalid pension eligibility. Invalids who have not worked at all also are entitled to this pension. The pension for invalidity does not rescind a permanent professional disability benefit. Hence, a work-related invalid can receive both payments simultaneously. Generally, the pension for invalidity amount depends on:

- The base monthly amount of a permanent disability pension set by law; and
- The amount of mandatory contributions made by an employer to the Pension Fund for a worker as a beneficiary as of the day of the pension-granting to the worker.

The base monthly amount of a permanent invalidity pension varies according to the three invalidity categories, which reflect the degree of body functions' disorder and the person's vital activity limitations. The base monthly amount of a permanent invalidity pension is RUB 5,124 for Category I invalids, RUB 2,562 for Category II invalids, and RUB 1,281 for Category III invalids. The pension for invalidity is granted for the person's invalidity term. However, the right to this pension expires upon granting of an old-age pension or reaching of 55 years by women and 60 years by men if they have worked for at least five years.

Survivor Benefits

Qualifying Persons

The main qualifying persons for survivor benefits in connection with death of a worker killed on the job include:
- Persons incapable of work and being dependents;
- Children born after death;
- Spouse, parent, or other member of the family, who does not work and brings up the deceased’s children, grandchildren, brothers, and sisters being his dependants of up to 14 years old; and
- Dependents who become incapable for work within five years from the date of his death.

**Nature of Benefits**

Qualifying persons are eligible for a one-off survivor benefit and a monthly survivor benefit paid by the Social Security Fund. A one-off survivor benefit is the maximum established by federal law that, in 2011, is RUB 68,586. The amount of the benefit is paid in equal shares to qualifying persons.

A monthly survivor benefit is paid at the average monthly remuneration of a worker killed on the job. The amount of the benefit is paid in equal shares to qualifying persons. It is adjusted for inflation. The maximum amount of a monthly survivor benefit is limited by law and, in 2011, is RUB 52,740. The term of payment of a monthly survivor benefit is varied by law. In particular, the benefit is paid to children until they reach 18 years of age and to invalids during the whole term of invalidity. Eligibility for the benefits does not depend on the length of employment of a worker killed on the job.

**Survivor Pension**

A survivor pension is paid monthly to dependants incapable for work in case of the breadwinner's death, regardless of whether such death is work-related or not. The pension is granted by the Pension Fund. The pension does not rescind the survivor benefit and may be paid along with it. Dependants eligible for the pension are:

- Children, brothers, sisters, and grandchildren up to 18 years old (up to 23 years old for full-time students);
- Spouse, parent, or other member of the breadwinner's family who does not work and brings up children, grandchildren, brothers, and sisters of a breadwinner being dependents of the latter of up to 14 years old; and
- Spouse or parents if they are over 55 years old for women and 60 years old for men or invalids.

Eligibility for the pension does not depend on the breadwinner's length of employment. The pension is determined according to the formulas set by law for certain categories of dependants and the type of income of a breadwinner before death. A key element of such formulas is the base monthly amount of the survivor pension, which is set by law.
The base monthly amount of the survivor pension is RUB 2,562 for a child who has lost both parents or a single mother and RUB 1,281 for other dependants incapable of work. The pension is granted for the term during which a dependant is regarded as incapable for work (e.g., until the date when the breadwinner's children reach 18 years old) or for an unlimited term (e.g., in the case of a widow above 55 years old).

Investment (Accumulative) Part of Mandatory Pension Accruals

If a person dies prior to being granted the investment (accumulative) part of the mandatory pension accruals, the latter is paid to his family.

Employer Liability

An employer's failure to pay mandatory social contributions to the Social Insurance Fund or the Pension Fund is penalized with:

- A fine of up to 40 per cent of the unpaid contributions; and
- A late-payment interest of one-three-hundredth of the Russian Central Bank's refinancing rate (currently, 8.25 per cent) on the unpaid amount per each day of payment delay.

Employers also are subject to a late payment interest of 0.5 per cent of the unpaid amount for each day of delay in providing an injured worker with a temporary disability benefit or a payment of a special vacation leave for medical treatment at sanatoriums. An employer's failure to submit declarations and reports to the Social Insurance Fund or the Pension Fund is penalized with:

- A fine of up to 30 per cent of the amount of social contributions subject to payment under non-submitted returns; and
- A late-payment interest of up to ten per cent of the amount of social contributions subject to payment under non-submitted returns for each month of delay in their submitting.

Dispute Resolution

Individual Labor Disputes

In General

Individual labor disputes are defined as unsettled controversies on application of labor law, in terms of a collective labor agreement, an individual labor agreement (including establishment, termination, or change of individual terms of labor) between an employer and an employee (including a former employee), or between an employer and a job seeker who has been refused a job.

Any individual labor dispute may be considered by both a labor disputes' commission and a court, except for those falling into the exclusive jurisdiction
of courts. There is no requirement for pre-court dispute resolution by a labor disputes' commission.

**Labor Disputes' Commission**

A labor dispute commission is organized within an employer at the request of employees or on the employer’s initiative. It is composed of an equal number of representatives of the employer and the employees. The commission may be set up as an *ad-hoc* body or for an indefinite period of time. The commission should consider a labor dispute within 10 days from the date of the employee's application. The commission may request documents from the employer, summon witnesses, and invite experts. Its proceedings are recorded in a protocol.

An employee may resort to a labor disputes commission within three months from the day when the employee learnt or should have learnt about violation of his labor rights. An employer or an employee may challenge in a court a decision of a labor disputes' commission within ten days from the date of its receipt. In absence of challenge, the decision comes into force after expiration of the ten days and must be executed within three subsequent days.

**Courts**

Courts consider individual labor disputes if:

- An employee prefers a court to a labor disputes' commission;
- An employer, an employee, or a trade union acting in the interests of an employee challenges a decision of a labor disputes' commission;
- The prosecutor challenges a decision of a labor disputes' commission as violating labor law; or
- A case falls within the court’s exclusive jurisdiction.

Courts exercise exclusive jurisdiction over the employer’s claims for damages and employees’ claims on re-instatement with their employer regardless of the dismissal grounds, change of the grounds and date of dismissal reflected in the employee's employment history record (a so-called "labor book"), payment for the period of forced absence from work due to unlawful dismissal, transfer to another job, the employer's unlawful actions (failure to act) when processing employees’ personal data, unlawful job refusals, and alleged discrimination.

An employer may resort to a court within one year from the date of damages being found. An employee shall resort for reinstatement within one month from the date of receipt of a dismissal order or labor book with a record on termination. In other instances, action must be taken within three months from the date when the employee learnt or should have learnt about violation of his labor rights. If the limitation periods are missed due to a valid reason, they may be restored by a court.
With regard to claims on reinstatement, the burden of proof of the dismissal validity, existence of the grounds for dismissal, and compliance with the dismissal procedure established by the Labor Code lies with an employer. Russian laws do not provide for any differences or peculiarities with respect to individual labor disputes involving members of trade unions.

**Collective Labor Disputes**

*In General*

Collective labor disputes are defined as unsettled controversies between employees (trade unions or other representatives elected by employees) and employers (their representatives) concerning:

- Introduction and changing of work conditions (including salaries);
- Conclusion, change, and fulfillment of collective labor agreements or other agreements (e.g., industrial (tariff) agreements); or
- Employer's refusal to consider an opinion of trade unions or other representatives elected by employees upon adoption of the employer’s local normative acts where involvement of trade unions or other representatives elected by employees in its adoption is required by the Labor Code.

The Labor Code heavily regulates the procedures for initiation and resolution of collective labor disputes, including the parties' rights and obligations, time frames, documentation of dispute resolution, and requirements for strikes. The right to initiate collective labor disputes rests with employees, trade unions, and other representatives elected by employees. To do so, they should lodge claims with the employer, who is obliged to consider the claims and issue his decision within three working days from the date of claims' receipt. If the employer decides to refuse the employees' claims, a collective labor dispute must be resolved by:

- A conciliation commission;
- A mediator and/or a labor arbitrator; and
- A strike.

All the procedures must be applied consequently in accordance with the indicated order; the next procedure may be applied in case the previous procedures have not succeeded in dispute resolution. Neither of the parties is allowed to evade from participation in the dispute resolution procedures. The Labor Code provides for additional guarantees for employees in case of collective labor disputes. In particular, a lock-out (i.e., employees' dismissal on the ground of their participation in collective labor disputes or strikes) is prohibited.
A peculiarity of collective labor disputes is that they may involve participation of the state authority on regulation of collective labor disputes which, among other things, facilitates resolution of collective labor disputes, carries out non-mandatory registration of collective labor disputes, provides a list of labor arbitrators, and trains them. An agreement reached as a result of a collective labor dispute is binding on the parties to it.

**Conciliation Commission**

A conciliation commission is formed within three days from the date of the employer's decision to refuse employees’ claims. It is composed of an equal number of representatives of an employer and employees. A conciliation commission must resolve a dispute within five working days from its formation date.

If a conciliation commission fails to resolve a dispute, the parties may resort to a mediator or a labor arbitration.

**Mediation or Arbitration**

A mediator should be appointed by the parties within three days after a conciliation commission executes the statement of disagreements. Instead of appointing a mediator, the parties may form a labor arbitration. A labor arbitration is an *ad hoc* dispute resolution body formed by an employer, employees, and the state authority on regulation of collective labor disputes, within three days from the date of finishing of the dispute consideration by a conciliation commission or a mediator.

Formation of a labor arbitration is possible only if the parties to a collective labor dispute concluded a written agreement on mandatory enforcement of its decisions. Formation of a labor arbitration, its authorities, members, and proceedings' regulations must be reflected in a written decision signed by an employer, employees' representatives, and the state authority on regulation of collective labor disputes.

** Strikes**

 Strikes are possible in two cases, i.e., if the previous procedures have failed to resolve a dispute or if an employer has evaded participating in the previous procedures or does not implement binding agreements (decisions) concluded (issued) during a dispute.

The Labor Code regulates the procedures, rights, and obligations of employees, employers, and third persons during strikes. Strikes are qualified as unlawful if organized in violation of procedures, terms, and requirements set by the Labor Code. In addition, law provides for a list of cases when strikes are deemed unlawful by default (in aviation and railway transport, and hospitals).
Termination of Employment

Termination Regulation

The Labor Code establishes detailed rules for termination of employment and provides for an exhaustive list of grounds for termination. The general principle is that the parties are entitled neither to set additional grounds for termination nor to change grounds and procedures for termination established by the Labor Code.

Hence, a labor agreement may provide for additional grounds for employee dismissal in a very limited number of cases and for certain categories of employees, such as chief executive officer and members of the collective executive body. For these employees, the Labor Code allows immediate termination by resolution of the respective body corporate of the employer in accordance with the employer’s charter.

Violations of rules and procedures established by the Labor Code entail reinstatement of the dismissed employee, and obligation of the employer to pay for forced absence and compensate moral damage caused by unlawful termination by the relevant court. A decision on reinstatement must be executed immediately, and the reinstated employee must be admitted to work the next day after its adoption by court.

Sometimes, employers seek to overcome the rules established by the Labor Code by providing employees with additional benefits like additional compensations or increased severance pay in return for the reduced termination period or additional grounds for termination provided by the Labor Code.

In such cases, breaches of law are recognized invalid by the relevant court, whereas additional benefits will survive. Collective labor agreements and industry (tariff) agreements may provide for regulation of certain issues not detrimental to employees.

Termination Grounds

In General

The Labor Code establishes a detailed and exhaustive list of termination grounds. Broadly, they can be divided into:

- General termination grounds;
- Unilateral termination by an employee; and
- Unilateral termination by an employer.
General Termination

General termination grounds include:

- Parties' agreement on termination of a labor agreement;
- Expiration of a fixed-term labor agreement;
- Reduction or rescission by the Government of the permitted share of foreign employees whose labor can be utilized by individuals and companies in certain spheres of economy; or
- Circumstances beyond the parties' will (e.g., the employee's health disease preventing employment, emergency situation).

Unilateral Termination by Employee

An employee may unilaterally terminate a labor agreement at any time by giving two weeks’ written notice, and he has the right to withdraw the notice at any time before termination.

Unilateral Termination by Employer

An employer must strictly follow the termination procedures and grounds given in the Labor Code. In particular, termination by the employer (on the employer’s initiative, as defined in the Labor Code) may take place if:

- The employer is liquidated or conducts or staff redundancy;
- The employee is unfit for the position he occupies or the work he performs due to the state of his health (as confirmed by a physician's statement) or low qualification (as confirmed by the results of a qualification test or attestation);
- The employee repeatedly fails to perform his labor duties for no good reason; or
- The employee grossly violates his labor obligations and duties (absenteeism, alcoholic or other intoxication, disclosure of commercial or work secrets, theft at the place of work, willful destruction of another's property, as established by an effective decision of a court or competent authority, or violation of requirements for labor protection which resulted in an accident or catastrophe).

Before imposing a penalty, the employer must demand a written explanation from the employee with respect to a revealed violation. A punishment may be applied within one month from the date a violation is revealed by the employer. The employer must have all papers confirming current and previous non-performance of the duties, and the employee’s written explanations as to the reasons of non-performance or misdeed, and orders on imposition of punishment.
Termination may take place if the employee was repeatedly punished for non-performance of the labor duties in accordance with the procedure for imposition of disciplinary punishment established by the Code. The following forms of disciplinary punishments are provided by the Labor Code (other forms may not be applied), namely:

- Comment;
- Reprimand; and
- Termination.

**Restrictions on Termination**

**In General**

Except for the case of liquidation, an employer is prohibited to terminate employment on its initiative of an employee being on vacation or during the employee’s temporary disability (illness), of a pregnant woman. A woman with children of up to three years old, a single mother bringing up children of up to 14 years old (or disabled child of up to 18 years old) may be terminated for misconduct as well.

Termination by an employer of a labor agreement with minors up to 18 years old is subject to the approval of the state labor inspectorate and the commission for juvenile affairs and protection of their rights.

In case of redundancy, employees with higher qualifications and higher productivity must be granted a preferential right to retain the job. If employees have equal qualification and productivity rates, preference is given to married employees having two or more dependants, employees whose families lack other independent earning, employees who have received a professional disease while working for the employer, employees sent by the employer to training to improve their skills, and war invalids.

While the main restrictions on termination are established by the Labor Code, collective labor agreements and industry (tariff) agreements may provide additional restrictions. For example, the Industry Tariff Agreement for Machinery Industry for 2008–2010 prohibits an employer from dismissing a young specialist on the grounds of redundancy within three years from the date of conclusion of a labor agreement.

**Required Notice Periods**

**Termination Notices by Employer.** The employer is required to serve a termination notice to an employee at least:

- Three calendar days before the termination date, in the case of termination due to expiration of a fixed-term labor agreement;
Two months before the termination date, in the case of dismissal on the
ground of the employer's liquidation or redundancy (for seasonal employees,
seven calendar days); and

Three calendar days before the termination date, in the case of termination due
to the employee's failure during the probation period.

These required notice periods apply to all employees, irrespective of their job
position, including the chief executive officer. In certain cases, no required
notice periods are established by law (e.g., termination of a labor agreement on
the grounds of a single material breach by the chief executive officer of his
duties).

**Termination Notices by Employee.** An employee is required to serve a
termination notice to the employer at least:

- Two weeks before the termination date, in the case of unilateral termination
  by the employee;
- One month before the termination date, in the case of unilateral termination by
  the chief executive officer;
- Three calendar days before the termination date, in the case of unilateral
termination by the employee of a fixed-term labor agreement, for up to two
  months and by a seasonal employee; or
- Three calendar days before the termination date, in the case of unilateral
termination by the employee during probation.

**Procedures for Termination**

**General Termination Procedure**

Generally, termination of a labor agreement is documented with the employer's
dismissal order stating the termination date and ground for termination in full
compliance with the Labor Code and with reference to the applicable article of
the Labor Code, stating a particular applied ground for termination.

An employee must acknowledge the order with his signature. The employer is
obligated to make a dismissal entry in the employee's labor book in compliance
with the dismissal order and strictly adhering to the grounds of termination set
by the Labor Code, as discussed above. The employee must acknowledge with
inscription of the dismissal entry in the labor book and his signature.

On the last day of the employee's work, which also is the date of the employee’s
termination, the employer must hand the labor book to the employee, and make
all financial settlements with the employee (e.g., pay salary and monetary
compensation for unused vacation leave). At the employee's request, the
employer is obliged to provide him with duly certified copies of work-related
documents (e.g., a note on the employee's salary, employment, and dismissal
orders). The general termination procedure is applicable in all cases of termination of a labor agreement and, hence, fully applicable to the situations described in the text, below.

**Termination Procedure Initiated by Employee**

An employee must render the employer a written termination notification observing the required notice period of two weeks. The employee has the right to rescind the termination notice at any time before passing of the two weeks.

In such case, the employee generally cannot be dismissed by the employer. A labor agreement survives if it has not been duly terminated and an employee does not insist on his dismissal after expiration of the required notice period.

**Termination Procedure Initiated by Employer**

Unilateral termination of labor agreements by an employer must comply with the special requirements that vary depending on the termination grounds. Such requirements may include the employer's obligation to meet the employees’ preferential right to retain the job, notify employees, notify trade unions and the state employment center (agency) on dismissal, offer the redundant employees another vacant positions, organize attestation before dismissal, comply with the procedure for application of disciplinary punishment, including obtaining the employees' written explanations of committed violations of labor discipline and duties, issue particular documents evidencing circumstances, substantiating grounds, and formalizing procedure of the employees' dismissal (e.g., orders, evaluation, and labor investigations), request employee consent for certain actions, and pay all severance and redundancy payments.

The Labor Code provides a step-by-step redundancy procedure, violation of which results in reinstatement of the redundant employees. Redundancy may take place when necessary for the employer due to the business situation and the employer’s need. Redundancy must be started by issuance of an order on redundancy indicating the number of positions and staff to be made redundant; when establishing in person the employees to be redundant, the employer must comply with restrictions to terminate pregnant women and women with child, and identify employees with a preferential right to retain the job.

Redundancy notification must be served on each redundant employee two months in advance of the forthcoming redundancy with the employee’s signature. A dismissal due to redundancy is admissible only if the employee cannot be transferred on his written consent to another job (either a vacant position or a job meeting the qualifications of the employee or a vacant lower position or a lower-paid job). Thus, the employer is obligated to offer each redundant employee during the two-month period all the vacancies the employer has in the area of location of the employer meeting the requirements.
The trade union (if any) and local employment authority also must be notified on forthcoming redundancy and employees’ dismissal. Employment relations continue unchanged until the last day of the required notice period of two months. A labor agreement is terminated according to the general termination procedure, along with effecting of redundancy payments to the dismissed employees. Collective labor agreements and industry (tariff) agreements may set additional benefits for the employees in case of redundancy, such as increased redundancy payments, and employers’ obligations to provide an employee with free time for job search during the redundancy period.

**Severance and Redundancy Payments**

If a labor agreement is terminated, the Labor Code requires the employer to make all settlements with the employee on the last working day, including compensation for unused vacations, salary payments, severance payments, and payments provided by collective agreement or industry (tariff) agreements. The severance payment represents compensation due to the employee to compensate negative effects that may arise due to termination of a labor agreement. The severance payment is made only in cases set by law, e.g., in case of termination due to the employee's refusal to be transferred to another job that is necessary due to his health condition, in case of staff redundancy, and due to the employer's liquidation.

The amount of a severance payment varies depending on the ground of termination of a labor agreement, and category of employees. In case of redundancy or employer’s liquidation, an employee is entitled to a severance pay in the amount of the average monthly wages and will retain the average monthly earnings for a period of job search, but not more than two months from the day of the discharge, less severance pay. In exceptional cases, by a decision of the State Employment Authority, the average monthly earnings must be retained for the third month.

Severance pay in the amount of two-weeks' average earnings must be payable to an employee upon the rescission of the labor agreement in connection with the employee's refusal to be transferred to another job as might be required in accordance with a medical certificate, the employee's refusal to be transferred to a job in another area together with the employer, the employee's refusal to keep working in connection with a change in the labor contract terms, the reinstatement of another employee who did this job, or the employee’s full incapability to work due to state of health.

**National Unemployment Insurance**

**Financing the Unemployment Program**

Before 1 January 2001, unemployment measures were financed through the State Employment Fund. Originally, it was intended that both employees and
employers would participate in covering its expenditures. However, in practice, only employers were obliged to make unemployment insurance contributions to it. In case of necessity, the fund also was financed by the state, regional, or local budgets.

Since 1 January 2001, the State Employment Fund has been abolished, and social payments and active labor market measures have been financed solely by the federal budget.

**Employer Duties and Liabilities**

With the abolition of the State Employment Fund, employers are no longer subject to mandatory contributions under the Russian unemployment program. Payment for public works conducted for an employer at his own initiative may constitute the only direct cost borne by the employer for the maintenance of active labor market measures.

Most of the employers’ duties concerning unemployment measures are declaratory, pursuing a general well-being of society, e.g., duties to refrain from violations of labor agreements and to provide assistance to dismissed employees in finding a new job or conducting vocational retraining. Whether to fulfill these duties or not, must employers decide for themselves. However, there are several mandatory duties.

An employer must reserve the mandatory quota of positions for invalids. An employer must hire the mandatory quota citizens, needing special social protection, or reserve particular work for them. Mandatory quota are made by the regional and municipal executive powers. An employer must make monthly notifications to the local State Employment Authority as to vacancies and progress in filling the mandatory quota positions, and notify employment authorities on forthcoming termination of labor agreements indicating positions, profession, and wages for the dismissed employees.

**Employee Benefits**

*Monetary Benefits*

Russian citizens are entitled to the following social payments during unemployment:

- Monthly welfare payments;
- Monthly training allowance;
- Pecuniary aid; and
- Compensation of relocation expenses.

Monthly welfare payments are paid if unemployed citizens comply with requirements and terms of periodic re-registration with the relevant state
employment center. The amount of monthly welfare payments depends on the term of unemployment and the citizen's average salary.

The minimum and maximum amounts of monthly welfare payments are established annually by the Government. In 2010 and 2011, the minimum amount of welfare payment is RUB 850 rubles, and the maximum is RUB 4,900. Certain categories of unemployed citizens (e.g., orphans) are entitled to increased welfare payments. The total period of monthly welfare payments cannot exceed 24 months during 36 consecutive months.

Monthly training allowance is paid during vocational training and retraining and improvement of skills organized by the state employment centers. To qualify for these payments, unemployed citizens must regularly attend trainings and have good study results. Pecuniary aid is paid after expiration of the term for monthly welfare payments or during vocational training or retraining and improvement of skills organized by the state employment centers. Compensation for relocation expenses is paid if unemployed citizens shift to another region for a new job.

In addition, Russian citizens may receive income from public works organized by the state employment centers. Income is paid by the employer who requested public works, in accordance with a fixed-term labor agreement concluded between the employer and a Russian citizen. At the same time, monthly welfare payments continue to be paid to encourage Russian citizens participating in public works to find a new job.

Non-Monetary Benefits

In General. Unemployed Russian citizens are entitled to the standard set of active labor market measures, such as assistance in job search, occupational guidance, support (in particular, financial aid) for entrepreneurial activities, vocational training, psychological aid, programs of social adaptation in the labor market (e.g., the program "Job Seekers' Club" aimed to return confidence in one's abilities), and assistance in relocation to rural areas for work. These measures are provided or organized by the state employment centers and are free of charge.

Job Retraining and Placement Programs Mandatory for Employers. Generally, Russian law does not establish employers' obligations to organize job-retraining/placement for employees upon their dismissal or for unemployed Russian citizens. Exceptions to this rule are designed for socially vulnerable groups of employees or for specific grounds for termination of a labor agreement. In particular, the Labor Code establishes special benefits for orphans or children without parental care upon redundancy or the employer's liquidation. In such cases the employer is obliged to organize at his own expense vocational trainings (education) of the employees and their subsequent employment with that employer or other companies.
Termination of a labor agreement on certain grounds triggers the employer's obligation to offer an employee a new job before dismissal. In particular, such obligation is established for termination due to the employer's liquidation, redundancy, invalidation (expiration) of the employee's driver's license or other special rights preventing him from fulfilling his job duties, and reinstatement of the employee previously holding the position of the employee to be dismissed. Labor agreements, collective labor agreements, and industrial (tariff) agreements also may provide for the employers' obligations to organize job-retraining or placement of dismissed employees.

**Job Retraining and/or Placement Programs Mandatory for Employees or Unemployed Russian Citizens.** The dismissed employees or unemployed Russian citizens are not subject to any mandatory job-retraining and/or placement programs.

The Russian unemployment program cancels all monetary and non-monetary benefits if an unemployed Russian citizen refuses two jobs offered by the state employment center within ten days since the date of his registration with the latter.

**Retirement, Social Security and Health Care, and Old Age Pensions**

**Old Age Pensions**

There are two types of old age pensions in Russia, i.e., a retirement pension, which depends on employment history, and a social pension, which does not depend on employment history. A retirement pension is paid by the Pension Fund to Russian citizens who have reached the retirement age, which is 55 years for women and 60 years for men, and who have worked for at least five years. A distinguishing feature of the Russian state pension system is that pensioners are entitled to draw retirement pensions while they continue working.

A retirement pension is composed of two parts, i.e., the base pension and the savings pension. The base pension is designed to form the monetary basis for the employees' retirement pension. It reflects the portion of mandatory contributions made by an employer to the Pension Fund for an employee as a beneficiary increased by special coefficients set by law and depending on the pensioner's age, length of employment, conditions of work, and place of residence.

The savings pension is designed to protect a future retirement pension from inflation and to increase its amount. Generally, the savings pension reflects the portion of mandatory contributions made by an employer to the Pension Fund. However, it also may include the employee's voluntary contributions to the Pension Fund.

A social pension is paid by the Pension Fund to Russian citizens who have reached the qualifying age, which is 60 years for women and 65 years for men,
and who are not eligible for a retirement pension. This pension is suspended if the pensioner starts working. The main obligations of employers under the Russian state pension system are to:

- Register with the Pension Fund;
- Pay mandatory social contributions to the Pension Funds; and
- Submit quarter tax returns to the Territorial Department of the Pension Fund.

Employers, at their own expense, effect monthly mandatory social contributions to the Pension Fund. The amount is 26 per cent in 2011 of the monthly remuneration paid to an employee.

Employers are not subject to mandatory social contributions with respect to the employee whose annual remuneration exceeds RUB 415,000, calculated on cumulative total basis. Since 2011, mandatory social contributions made by an employer are allocated between the employee's base pension and the savings pension as follows:

- For employees born before 1967, the base pension is 26 per cent and the savings pensions is not applicable; and
- For employees born in 1967 or thereafter, the base pension is 20 per cent and the savings pension is six per cent.

**Health Care**

Russia implements a mandatory medical insurance system, which implies that all Russian citizens, regardless of their employment history (if any), are entitled to free medical treatment in state clinics and hospitals. Free medical treatment covers therapist and specialist care, dental care, maternity care, emergency treatment, and hospital care. The main obligations of employers under the mandatory medical insurance system are to:

- Register with the relevant Territorial Medical Insurance Fund;
- Pay mandatory social contributions;
- Submit quarter tax returns to the Territorial Department of the Pension Fund; and
- Conclude a mandatory medical insurance agreement with a medical insurance company.

Employers, at their own expense, effect monthly mandatory social contributions to the Medical Insurance Fund and the relevant Territorial Medical Insurance Fund. Their overall amount is 3.1 per cent (5.1 per cent from 2011) of the monthly remuneration paid to an employee. Annual remuneration per employee exceeding RUB 415,000 is exempt from mandatory medical insurance contributions. The threshold is annually indexed. The employers are free to provide additional voluntary medical insurance for their employees, as
additional benefit for them. Employees are not subject to any mandatory social medical or pension contributions, but may on their own participate in voluntary medical and pension insurance.

**Summary of Social Costs**

Russian social security is financed through the employers’ mandatory social contributions to relevant state non-budgetary funds, i.e., the Pension Fund, the Medical Insurance Fund, and the Social Security Fund. Mandatory social contributions are assessed on the amount of remuneration provided to employees and paid by employers monthly at their own expense.

The employers’ mandatory social contributions in 2010 range from 26.2 per cent to 34.5 per cent of payroll. From 2011, the employers’ social security burden will be increased to a range of 34.2 per cent to 42.5 per cent of payroll. The table below depicts the mandatory social contributions by employers.

<table>
<thead>
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<th>Mandatory State Insurance</th>
<th>2011 Tax Rate %</th>
<th>2012 Tax Rate %</th>
</tr>
</thead>
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<tr>
<td>Pension Fund</td>
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<td>26</td>
</tr>
<tr>
<td>Medical Insurance Fund</td>
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<td>5.1</td>
</tr>
<tr>
<td>Territorial Medical Insurance Fund</td>
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<td>0</td>
</tr>
<tr>
<td>Social Security Fund</td>
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<td>—</td>
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<tr>
<td></td>
<td>0.2 – 8.5</td>
<td>—</td>
</tr>
<tr>
<td><strong>Total:</strong></td>
<td><strong>34.2 – 34.5</strong></td>
<td><strong>—</strong></td>
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</tbody>
</table>
Annual employee’s remuneration exceeding RUB 415,000, calculated on cumulative total basis, is not subject to mandatory social contributions. Employees do not participate in mandatory social contributions.

**Conclusion**

Further legal developments, as seen by the Government, include:

- Improving laws to increase flexibility of the Russian labor market, including legal regulation of new forms of labor relations such as personnel lease (secondment);
- Changing professional labor standards setting requirements to employees' knowledge and skills;
- Strengthening administrative liability for violation of labor safety requirements; and
- Harmonizing Russian unemployment laws with international standards.

There also are ongoing debates within the Government on increase of the state pension age. Some officials suggest raising it from 60 to 65 years for men and from 55 to 60 years for women. Unlike the Government, businessmen favor more radical amendments to the Labor Code, such as simplification of the procedures for unilateral termination of labor agreements by employers and reduction of severance payments, extension of cases of the application of fixed-term labor agreements, increase of work time for employees, and reduction of benefits.

Businessmen also encourage adoption of employee leasing legislation, as it will create a new market in Russia. However, relevant draft laws significantly diminish employee guarantees, and there is no deep understanding of the social impact of employee leasing.
Slovak Republic

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Introduction

The current employment law in the Slovak Republic is primarily governed by Act Number 311/2001 Coll. Labor Code, as amended (“Labor Code”), which replaced the previous socialist Labor Code of 1965 and reflects the country’s European Union (EU)-integration tendency.

Although it contains many of the provisions of the Labor Code of 1965, the new Labor Code focuses on stipulations from which the parties to an employment contract mostly cannot derogate. These include the main obligations of employees and employers, and minimum social rights standards.

The Labor Code highlights the principles of freedom, democratization, and contractual principles in employment relations. It also contains provisions on the employment relationship, work time and rest periods, wage and average earnings, obstacles to work, labor protection, compensation for damage, and collective labor law relations, among others. Matters which are not especially regulated in the Labor Code are subsidiarily governed by the Civil Code.

Legal Relationship of Employer and Employee

In General

The Labor Code defines labor relations as relations in connection with the performance of dependent work by natural persons as employees for legal persons or natural persons as employers.

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1 Among the other laws governing employment in the Slovak Republic are the Constitution, Act Number 5/2004 Coll. on employment services, Act Number 2/1991 Coll. on collective bargaining, Act Number 152/1994 Coll. on the social fund, and Act Number 40/1964, as amended, or the Civil Code.

2 However, the new Labor Code has already been amended numerous times since its passage.

3 Section 1, Subsection 2 of the Labor Code defines this as work carried out in a relationship where the employer is superior and the employee is subordinate, and has
Other types of agreements on work performed outside an employment relationship are likewise regulated by the Labor Code, namely: (a) the work performance agreement regulated in Section 226 (Dohoda o vykonaní práce);\(^4\) (b) the agreement on temporary job of students regulated in Sections 227 and 228 (Dohoda o brigádnickej práci študentov);\(^5\) and (c) the agreement on work activity regulated in Section 228a (Dohoda o pracovnej činnosti).\(^6\) These agreements should be concluded in exceptional cases where a regular employment relationship is deemed inefficient.

**Parties to Employment**

The employer acts in his own name in labor relations and bears the ensuing liability. An investor’s subsidiary, a Slovak branch, or its foreign parent company also may be an employer.

A natural person becomes legally capable to enter into employment relationships as an employee upon reaching the age of 15. However, an agreement on liability for entrusted things, materials in stock, or similar values may be concluded only when the employee reaches the age of 18. The commencement of work prior to the completion of mandatory school attendance is prohibited.

Usually, sales representatives are not considered as employees, unless an employment contract pursuant to the Labor Code is explicitly concluded. Managing directors of Slovak limited-liability companies (s.r.o.) are not employees, as they have to conclude a mandatory contract governed by the Commercial Code.

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\(^4\) A work performance agreement may be concluded if the anticipated extent of work is determined by a specific result and does not exceed 350 hours in a calendar year. The agreement should be in writing to be valid. It also should include a definition of the work tasks, the agreed remuneration, the period in which the work task is to be performed, and the anticipated extent of work if the extent is not directly influenced by the definition of the work task.

\(^5\) Under an agreement on temporary job of students, only work in average not exceeding half the determined weekly working time may be performed. The agreement should be in writing to be valid, and may be for a definite or indefinite term. Unless otherwise stipulated, it may be terminated by agreement of the parties, or unilaterally upon giving a fifteen-day notice without need for a reason.

\(^6\) Work activities may be performed for up to ten hours per week on the basis of an agreement on work activities. The agreement should be in writing to be valid, and may be for a definite or indefinite term. If the method for termination of the agreement is not stipulated, it may be terminated by agreement of the parties, or unilaterally upon giving a fifteen-day notice without need for a reason.
Although managerial employees (vedúci zamestnanci) have the same responsibilities as normal employees, they are authorized at individual management levels to determine and give tasks to subordinate employees, to organize, manage, and supervise the employees’ work, and to give them binding instructions. The employment relationships of a managerial employee can be formed by appointment and by the subsequent conclusion of an employment contract.

**Types of Employment**

Employment may be permanent, fixed-term, or part-time under the Labor Code. An employment relationship lasts indefinitely, unless a fixed term has been expressly agreed in writing and the required conditions for fixed-term employment were fulfilled. A fixed-term employment contract may be for a maximum period of three years, and may be extended or renewed three times within this period.

A previous term is not taken into account if at least six months have passed without an employment relationship with the employer. Thus, if the consecutive fixed-term contract lasts longer than the allowed total period of three years, the employment relationship is regarded as one for an indefinite term.

In a part-time employment relationship, the employee will work less hours a week than the regular weekly working time. The working time of the part-time employee does not have to be scheduled for all working days. Employees with fixed-term or part-time employment contracts have the same working conditions as employees with contracts for an indefinite term.

**Commencement of the Employment Relationship**

An employment relationship commences at the time expressly stated in the employment contract. If an election or appointment is required by special regulation or by an internal regulation of the employer, the employment

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7 Labor Code, s 48, subs 1.
8 Labor Code, s 48, subs 2. The three-year period restriction will not apply in the following cases: (a) deputization of an employee; (b) performance of work where necessary to significantly increase the number of employees for a transitional period not exceeding eight months per calendar year; (c) performance of work that is linked to a cycle of seasons, which repeats every year and does not exceed eight months in each calendar year (seasonal work); (d) performance of care services under special regulation; (e) performance of work for which an education in the arts is required; (f) performance of work as a creative employee in science, research, and development; and (g) performance of work agreed in a collective agreement.
9 A renewed fixed-term employment relationship begins less than six months after the end of the previous fixed-term employment relationship between the same parties.
10 Labor Code, s 46.
relationship will be established by written employment contract after election or appointment.

Generally, a written contract is necessary for a valid employment relationship.\(^\text{11}\) However, a regular employment relationship also is formed where an employee continues to perform his work after the expiration of the agreed term, when the employer is aware that the contract has expired and that the employee continues to perform his work.\(^\text{12}\)

Another exception is provided in Sections 27 \textit{et seq} of the Labor Code on the transfer by law of employment relationships in case of a transfer of the employer’s business. The rights and duties arising from an employment relationship pass in full scope to the new employer to whom the business activities (or parts of it) or the employer’s tasks (or some of them) are transferred.

As transfer of business is mainly regarded as a merger, acquisition, demerger, spin-off, asset purchase, or continuation of business (in case of the death of an employer who is a natural person), the transferor and transferee are required to supply the employees and each other information about the transaction. The result of the transfer is the creation of a “new” employment relationship under the former conditions, which was not directly agreed between the new employer and the employee.

\textbf{Employment Contracts}

The requirement that employment contracts be in writing is not one of effectiveness, as an employment relationship may exist even if a written contract has not been signed. However, an oral contract is difficult to enforce.

The Labor Code governs the employment relationship where the employee carries out his work in or from the Slovak Republic, even if he is temporarily employed in another country, provided that an international element is present and there is no agreement on the applicable law.

Regulation (EC) 593/2008 (“Rome I”) allows the free choice of law applicable to the contract.\(^\text{13}\) However, such choice of law may not be of much use as it will not deprive the employee of the protection granted to him by Slovak provisions which cannot be derogated.\(^\text{14}\) As long as an employee is worse off because of the chosen foreign law, the more favorable Slovak law governs the employment relationship. It would thus be more practical to agree on Slovak employment law as the choice of law to avoid a different treatment without any advantage in substance.

\begin{itemize}
  \item \(^\text{11}\) Labor Code, s 42(1).
  \item \(^\text{12}\) Labor Code, s 71(2).
  \item \(^\text{13}\) Rome I, art 3(1).
  \item \(^\text{14}\) Rome I, art 8(1).
\end{itemize}
An employment contract should at least contain the (a) type of work for which the employee was accepted and its brief description; (b) place of work performance; (c) day of work take-up (commencement day); and (d) wage conditions, unless agreed in a collective agreement. The employment relationship may exist as long as the work has been assigned and performed.

An employer is entitled to rescind an employment contract if:

- The employee does not come to work on the agreed date of commencement of work, provided there is no obstacle to work;
- The employee fails to inform the employer of any obstacle to work hindering him to commence work on the agreed date of commencement of work within three business days; or
- The employee was convicted of crimes upon a final judgement after concluding the employment contract.

An employment contract may be rescinded no later than upon commencement of work by an employee. The employment contract must be rescinded in writing; otherwise, it is void.

Where a regular workplace has not been designated in the contract, the regular place of work would be regarded as such for the reimbursement of travel expenses. The employer has to give a copy of the contract to the employee. If the duties and rights of the employee are not included in the contract, the employer should notify the employee of such in writing within one month from the formation of the employment relationship.

Discrimination Issues

The Anti-Discrimination Act prohibits discrimination in employment relationships, among others, particularly with regard to access to employment and remuneration. The Labor Code prohibits discrimination for reasons of marital status, family status, color of skin, language, political or other conviction, trade union activity, national or social origin, property, lineage, or other status. An employee who feels that he has been discriminated against may go to court for legal protection and appropriate compensation.

Non-discrimination should be observed at all stages of the employment relationship, including pre-contractual relations. An employer is not allowed to request information which is not directly related to the work performance or employment relationship in job interviews. In particular, the employer may not ask questions concerning pregnancy, family background, sexual orientation,

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15 Act Number 283/2002 Coll. on reimbursement of travel expenses (as amended).
16 Labor Code, s 44(1).
17 Act Number 365/2004 Coll.
origin, confession, membership in trade union organizations or political parties, and criminal records.\[^{18}\]

**Terms and Conditions of Employment**

**Remuneration**

The employer is required to provide the employee with a wage or other remuneration for work performed.\[^{19}\] Employers and employees enjoy wide freedom in the arrangement of remuneration, so long as the wage is not lower than the minimum determined by the government.\[^{20}\] If a wage (without any premiums) does not reach the lowest level of the minimum wage, the employer is obliged to pay the difference.

The employee is generally entitled to receive payments only for the work he has actually performed. However, he may receive his average earnings even without performing work during his paid leave, on public holidays, and where there is lack of work on the part of the employer.

The wage will generally be paid at the place of work and a written pay slip will be provided,\[^{21}\] but the employer and employee may agree on other means of payment (e.g., bank transfer). Wages are due every month unless otherwise provided in the collective agreement or employment contract. As a general rule, all employees of an employer are entitled to receive equal remuneration for the same work or for work of equal value.\[^{22}\]

**Sick Pay**

If the employee is unable to work due to illness or other incapacity, the employer is required to excuse his absence.\[^{23}\] The employee should prove such obstacle to work and its duration to the employer, and such obstacle should be properly confirmed by the relevant facility.

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\[^{18}\] Labor Code, s 41.
\[^{19}\] Wage is the financial settlement or settlement of a financial value (wages in kind) provided by an employer to an employee for work. Settlement provided in relation to employment, such as wage compensation for temporary incapacity or work standby, severance allowance, discharge benefit, travel reimbursement, contributions from the social fund, revenues from capital stocks (shares) or bonds, and tax bonuses will not be considered as wage.
\[^{20}\] The government determines the minimum wage as the lowest level of a guaranteed wage. It also determines the conditions for the payment of the minimum wage to employees whose wage has not been fixed in a collective agreement. The minimum wage stands at EUR 307.70 in 2010, which is expected to amount to EUR 317 in 2011.
\[^{21}\] Labor Code, ss 129 and 130.
\[^{22}\] Labor Code, s 119a.
\[^{23}\] Labor Code, s 141 (1).
The employee is entitled to sick pay from the employer as follows:

- From the first to the third day of absence, in the amount of 25 per cent of the daily assessment base or probable daily assessment base; and
- From the fourth to the tenth day of absence, in the amount of 55 per cent of the daily assessment base or probable daily assessment base.

Sick pay from the eleventh day of absence until the day following the termination of such temporary incapacity for work (which should not be later than the end of the fifty-second week of the beginning of the absence) is paid by the State Social Security Insurance, in the amount of 55 per cent of the daily assessment base or probable daily assessment base. Sick pay also is granted for every day which would have been a working day or public holiday for the absent employee.

**Working Time and Overtime**

The length of normal weekly working hours may not exceed 40 hours, except for certain employees (e.g., long-distance truckers). The length of normal weekly working hours for employees working on a three-shift or continuous pattern is restricted to 37.5 hours. If the work is performed on a two-shift pattern, the normal weekly working hours are reduced to 38.75 hours.

If working hours are scheduled evenly to individual weeks, the length of a shift may not exceed nine hours. This may be increased to twelve hours a day in case of uneven scheduled working hours.

Under Section 87a of the Labor Code, an employer may introduce working-time banking as a method of uneven distribution of working hours after written agreement with the employee representatives. The employer may distribute working hours so that in the case of increased quantity of work an employee will work for more hours than the designated weekly working hours and in the case of reduced quantity of work the employee will work fewer hours.

The same wage is paid to the employee regardless of whether he works overtime or does not work at all. Plus hours – overtime and minus hours – when the

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24 Act Number 461/2003 Coll. on social insurance (as amended).
25 Section 85 of the Labor Code defines working time (pracovný čas) as the period when an employee is at the disposal of the employer, performs work, and discharges obligations pursuant to the employment contract.
26 Employees who are under the age of 16 should not work longer than eight hours a day. Even if they perform work in more than one employment relationship, their normal weekly working hours are restricted to 30 hours. The normal weekly working time of an employee who is over 16 but under 18 years old may not exceed 37.5 hours.
27 Labor Code, s 86(2).
employee does not work, are recorded on the account of working-time balanced every 12 months.

An employer may adopt flexible working time upon prior agreement with employees’ representatives to increase work efficiency and employee satisfaction. The employee himself will choose the start and end times of the optional working time segments determined by the employer. Flexible working time may be applied to both even and uneven distribution of working time for individual weeks.

After six hours of continuous work, an employee is entitled to a work break for at least 30 minutes. This is not regarded as work time unless the employee is entitled to have a break for safety reasons.  

Work on public holidays and on an employee’s rest days is only permitted in the instances under Section 94 of the Labor Code. Work on rest days will be ordered exceptionally and upon prior negotiation with employees’ representatives.

For work on public holidays, the employee will be paid his attained wage and granted compensatory time in the same scope of working hours. When the employee takes this compensatory time off, he will be paid in the amount of his average earnings. However, the employer and employee may agree on a premium of at least 50 per cent of the employee’s average earnings in addition to the attained wage, instead of compensatory time.

An employee is entitled to a premium of at least 20 per cent of the minimum wage for one hour of night work. An employee may be required to standby if stipulated in the employment contract. If the employee performs work during his standby, he earns his regular wage. If he is not required to work during the time of standby outside his workplace, he is entitled to a premium of at least 20 per cent of the minimum wage for one hour of such standby. If he stands by on his workplace but does not perform work, he is entitled to a proportionate part of his basic wage as compensation.

A standby during which no work is performed is not regarded as work time. The employer may order at most eight hours of work standby per week and 100 hours per calendar year. Work standby beyond these periods is allowed only upon consent of the employee.

28 Labor Code, s 91.
29 Rest days include days of continuous rest in the week and holidays. Section 94, Subsection 5 of the Labor Code expressly prohibits an employer from ordering or agreeing that an employee will work on 1 January, Easter Day, 24 December, and 25 December to sell goods to end consumers or related work, except in retail sale.
30 Labor Code, s 122.
31 Labor Code, s 123. Night work is work from 10 o’clock in the evening to five o’clock in the morning.
32 Labor Code, s 96.
Overtime work means work performed by an employee at employer’s order or with the employer’s consent exceeding the set weekly working hours. An employer may order overtime work up to 150 hours within a year. Under the mutual agreement, an employee may work extra 250 hours of overtime a year, and the managerial employees may work extra 400 hours of overtime a year. An employee is entitled to alternative time-off in lieu of overtimes worked.

Where no compensatory time off for overtime work is granted, the employee gets his wage with a premium of 25 per cent of his average earnings. Wages do not normally include compensation for overtime work unless stipulated in the employment contract. However, the collective agreement may specify a set of employees who may have potential overtime of up to 150 hours in a year included in their wage. Such employees will not be entitled to a premium for overtime work and may not have substitute time off for this period.

Measures on the collective regulation of working hours, overtime, night work, or work on rest days in relation to safety and health protection at work should be consulted in advance by the employer with the employee representatives.

Business Trips

A business trip (pracovná cesta) is a limited time period for which the employee is instructed by the employer to work away from the agreed working place. An employee may be sent on a business trip outside the municipality of his regular workplace or residence for a necessary period only upon his consent. However, his consent is not required where the business trip directly pertains to the nature of the agreed type of work or workplace, or if the possibility of being sent on a business trip is included in the employment contract.

An employee on a business trip will perform work according to the instructions of the superior employee who sent him on such trip. The employee is entitled to compensation for travel expenses such as fares, accommodation expenses, meal allowances, and other necessary expenses.

Vacation

Any employee who has worked uninterruptedly for the same employer for at least 60 days in a calendar year is entitled to an annual vacation. The length of annual leave is at least four weeks. If the employment has not lasted the whole

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33 Labor Code, s 121, Subsection 1. Section 85a is specifically applicable to employees in the health sector.

34 These are employees responsible for planning, systems, creative, methodological, or commercial activities, as well as employees who direct, organize, or coordinate complex processes or an extensive set of highly complex equipment.
year without interruption, the employer has to grant the employee a proportionate amount of vacation time.\(^{35}\)

Paid leave of at least five weeks pertains to an employee who, by the end of the calendar year, has reached 33 years of age. Paid leave of teachers, including headmasters, senior masters, and teacher assistants, will be at least eight weeks per calendar year.

Employees who carry out work that may be harmful are entitled to supplementary leave. Every employee is entitled to wage in the amount of his average earnings during the period of vacation.\(^{36}\)

The time when vacation is taken is determined by the employer according to a schedule of leave which has been agreed with the relevant employees representatives, taking into account the employee’s justified interests. The employer should notify the employee of his vacation schedule at least four weeks in the calendar year in which the employee’s entitlement to leave has arisen.

If the employer is prevented from determining the employee’s leave by urgent operational reasons or by obstacles on the employer’s part, the leave should be scheduled in a manner that it is taken by the end of the following year at the latest.

If it is not possible to grant or take the leave because of urgent reasons or an obstacle on the employer’s part, the leave may be transferred to the next year. Monetary compensation instead of leave is only possible if the employment relationship is terminated.\(^{37}\)

Maternity leave is granted in the length of 34 weeks.\(^{38}\) If more children are born, or if the mother is a solitary woman, the maternity leave amounts to 43 weeks. The same periods, but starting from the day of birth, also apply to men taking care of children. A mother or father may request for parental leave, amounting to three years which has to be granted in desired scope until the child reaches five years of age and may be split into several periods.\(^{39}\)

**Non-Competition**

An employee may perform other earning activities concurrently with employment. However, if these activities may have competitive character to the scope of business carried out by the employer, the employee should ask for the

\(^{35}\) Labor Code, s 101.

\(^{36}\) Labor Code, s 116.

\(^{37}\) Labor Code, s 113.

\(^{38}\) Labor Code, s 166.

\(^{39}\) In case of a child with serious health disability requiring exceptional care, the employer is obliged to grant parental leave upon request until the child reaches eight years of age.
employer’s written consent. The consent may be withdrawn within 10 days after asking for consent in writing.

The employer’s consent is not required in the performance of scientific, pedagogical, publicist, tutorial, lecturing, literary, and artistic activities of the employee. The Labor Code regulates non-competition clauses after termination of employment. In an employment contract, an employer and an employee may agree in writing on competition clause applicable after termination of employment only if the employee has the opportunity to acquire information and knowledge during employment, which is not publicly available, and its use could cause substantial harm to the employer (Section 83a). The clause may be agreed for up to one year, and the employee is entitled to cash compensation for compliance with the ban on gainful activities in the minimum amount of 50 per cent of his monthly wage for each month of the ban. If the employee violates the ban, he must return provided cash consideration.

## Liability

### Employees’ Liability

An employee is obliged to act in a way to avoid damage to property, unjust enrichment, or the occurrence of threat to life, health, and property. If there is a threat of damage, the employee should notify his superior. If immediate intervention is necessary to avert such threat, the employee is obliged to intervene unless he is prevented by substantive circumstances, or if he would expose himself or other employees or persons in the vicinity to a serious threat. If he ascertains that he does not have the necessary working conditions created, he should notify his superior.

An employee is generally liable to his employer for damage caused by his own fault when carrying out his work. Such liability is proportionally reduced if the damage also is caused by the employer’s breach of his duties. The burden of proof that the employee is at fault lies with the employer.

If the damage was caused by negligence, the amount of compensation for damage to be paid by the employee is limited to four times his average monthly earnings. This limit does not apply if there is specific liability for particular cases under Sections 182 and 185 of the Labor Code, or if the employee was drunk or has abused addictive substances.

In the case of intentional damage, the employee is required to pay for the loss of profit as well as the full compensation for damage if non-settlement is contrary to good morals. If the employee knowingly breaches his obligation to protect the

40 Labor Code, s 83.
41 Labor Code, s 177(1).
42 Labor Code, s 179(1).
employer’s property, or at least did not warn his superior of some imminent damage, he is obliged to settle a part of the damage so long as prevention of such damage by adequate measures was possible.

The employee is not liable for damage caused by him so long as he averted damage to the employer’s property or a hazard to life or health. The employee will not be accountable for damage arising from economic risk.43

Where there is a written agreement on liability (dohoda o hmotnej zodpovednosti), the employee is responsible for things of value (e.g., cash, stamps, goods, materials in stocks, and other items which are objects of turnover and circulation) that are entrusted to him. The employer is liable for a shortfall of such values, over which he may dispose the whole time he is accountable for them, unless he can prove that the shortfall occurred without his fault.

The employee is required to fully compensate for the damage caused to the employer if such agreement on liability has been concluded. The agreement can only be concluded with an employee who is at least 18 years old. Under certain circumstances, the employee may withdraw in writing from such an agreement.

An employee who is at least 18 years old also is liable for loss of tools, personal equipment, or other similar things the employer has entrusted him on the basis of a written receipt or confirmation. The employee is relieved of this liability if he can prove that the loss did not occur due to his fault.

**Employer’s Liability**

The Labor Code differentiates between an employer’s general liability and liability for particular cases. The basic principle of general liability is that the employer has to compensate the employee for any damage or harm to the employee which arose in the performance of his work or directly connected thereto due to the employer’s breach of duties or intentional violation of good morals.

The employer also is accountable for damage sustained by the employee due to violation of an employer’s legal obligations by employees acting in the name of the employer. The general accountability of the employer is objective, i.e. the fault of the employer is not examined. The employer’s liability also arises in the following cases:

- Damage to articles that an employee deposited at a predetermined place in the employer’s premises (or at a place where such articles are usually placed) in the discharge of work tasks or in direct relation to it. With regard to articles

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43  Labor Code, s 181.
that are not usually brought to work, the employer will only be accountable if they were taken into safekeeping, to the maximum extent of € 165.97.44

- Material damage sustained by an employee and his purposeful outlay of costs in averting damage threatening the employer, if the danger was not deliberately induced by the employee and if he acted in a manner appropriate to the circumstances. An employee who averted a danger threatening life or health also will be entitled to compensation if the employer would be accountable for such damage.45

- Damage to an employee’s health46 or if he accidentally dies in the discharge of work tasks in direct relation to it.47 An employer can be fully or partly exempt from liability if it can be shown that the reason for damage also was caused by the employee.

**Vocational Training**

The Labor Code requires the employer to take care of the employees’ vocational development. The employer may arrange for the improvement or deepening of the employees’ qualification (*prehlbovanie kvalifikácie*), or their qualification upgrading (*zvyšovanie kvalifikácie*).

Improvement of qualification leads to a deepening of the employee’s abilities in the field in which he is already working. On the other hand, qualification upgrading allows the employee to acquire qualification for a new type of work.

Attendance at an instructional training or other improvement measure is considered as regular working time, and the employer will bear the costs of the employee’s improvement of qualification. The employee may only be responsible for assisting with the costs when he requests for an improvement of qualification of a more financially demanding form.

The employer also is required to grant the employee time off with a compensatory wage, if not agreed otherwise, for the necessary time of attendance for courses or for preparation of closing examinations in the scope stipulated in Section 140, Subsections 2 and 3 of the Labor Code.

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44 Labor Code, s 193. The right to compensation for damage will expire if the employee failed to notify the employer of the damage in writing without undue delay, within 15 days from the day he became aware of the damage.

45 Labor Code, s 193.

46 A further precondition in the case of occupational disease is that the employee was working at the employer’s undertaking under conditions in which the disease arose before it was ascertained. An occupational disease may only be a disease listed in an attachment to a particular law. The employer only pays for material damage in case of an occupational disease or work accident. Any other damage occurring during the performance of working tasks or directly connected thereto will be paid by the State Social Security Insurance.

47 Labor Code, s 195.
The employer may commit to enable the employee to upgrade his qualification, while the employee may commit to remaining in the employment relationship for a determinate period upon completion of study or to repay costs associated with the course of study when he terminates the employment relationship prior to completion of study.\textsuperscript{48} Such agreement should be in writing to be valid and should contain:

- The type of qualification and way of its increase;
- The study field and school credentials;
- The period for which the employee commits himself to remaining in the employment relationship, which period should not be more than five years; and
- The type of costs and their total amount which the employee will be obliged to repay\textsuperscript{49} if he does not fulfill his commitment to remain in the employment relationship for the agreed period.

An agreement on improvement of qualification may only be concluded if the anticipated costs amount to at least € 3,319.39. An employer employing less than 20 employees may conclude such an agreement if anticipated costs are at least € 1,659.70. In such cases, improvement of qualification may not be imposed on the employee.

\section*{Change of Type of Work and Location}

The employer is generally allowed to instruct the employee to work in the workplace agreed upon in the employment contract, but the parties may agree to amend the contract to allow the employee to change his type or place of work. In other cases, the employer has the right or obligation to instruct the employee to perform different work, even if the employee does not agree.

An employee will be required to perform work of a different type or in a different place only in exceptional cases regulated by Section 55 of the Labor Code. The employer is required to transfer the employee to alternative work if:

- Upon a medical opinion, the employee’s health condition has caused the long-term loss of his ability to perform his previous work, if he can no longer perform such work as a result of occupational illness or the risk of such illness, or if he has already received the maximum permitted level of exposure in the workplace as determined by a competent public health body;
- A pregnant woman, mother of a child less than nine months of age, and nursing woman performs work which she may not be employed for, or which

\textsuperscript{48} Labor Code, s 155.
\textsuperscript{49} The maximum amount of invested costs to be settled may not exceed three-fourths of the total amount of invested costs.
according to a medical opinion jeopardizes her pregnancy or maternal function;
• According to a medical opinion or a decision of the health protection body, it is necessary in the interest of protecting other persons against contagious diseases;
• It is inevitable by virtue of a legal ruling of court or other competent body;
• By virtue of a medical opinion, an employee working at night is acknowledged unfit for night work; or
• A pregnant woman, mother of a child less than nine months of age, and nursing woman working at night requests transfer to day work.

If the objective of transfer cannot be achieved by transferring the employee within the scope of the employment contract, the employer may transfer the employee upon agreement to work of a type different than that as concluded in the contract.

An employer may, even without the consent of the employee, transfer him for a period of time to perform work different than that as agreed upon if necessary to avert extraordinary events, or to mitigate their immediate consequences.

The employer should discuss in advance with the employee the reason for and duration of the transfer. If the transfer results in an amendment to the employment contract, the employee should be provided with a written notification of the reason for and duration of the transfer, except in items (1) to (6) above.

Upon a written agreement on temporary assignment, an employer or an agency for temporary employment may temporarily assign an employee to work for another employer.50 Neither the purpose nor the period of the assignment are regulated or limited by the Labor Code.

**Termination of Employment**

**In General**

An employment relationship generally ends if it is terminated by mutual agreement or lapse of time, if one party gives a notice of termination (dismissal or resignation), or if one party terminates without notice (immediate termination) or within the trial period.51

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50 The agreement should contain the name and registered office of the using employer, date of inception of the temporary assignment, agreed duration of the temporary assignment, type of work and location of workplace, wage conditions, and conditions for unilateral termination of the performance of work before lapse of the specified duration of the temporary assignment.

51 Labor Code, s 59.
In general, any notice of termination should be in writing and should be delivered to the other party to be valid. Once a notice of termination has been served on the other party, it may only be withdrawn with such party’s consent, and both the withdrawal and the consent have to be in writing to continue the employment relationship.

The Labor Code distinguishes notices of termination given by the employer (dismissals) and by the employee (resignation). The basic notice period is one month if an employee’s employment with the employer lasted less than one year as at the date the termination notice is delivered. The notice period applicable to an employee who is given notice for organisational or medical reasons is:

- Two months, if the employee’s employment relationship with the employer lasted one to five years as at the date the termination notice is delivered; or
- Three months, if the employee’s employment relationship with the employer lasted at least five years.

The notice period of an employee, whom the termination notice is given for other reasons, is two months, if the employee’s employment with the employer lasted at least one year as at the date the termination notice is delivered. Termination without notice (immediate termination) may be given by the employer or the employee only for strictly regulated reasons.

Means of Termination

The employer and the employee may agree to terminate the employment relationship at an agreed time. Such agreement should be in writing and generally does not have to stipulate any reasons for termination, unless requested by the employee or if the employment relationship was terminated by agreement due to organizational changes.

A fixed-term employment may be terminated upon lapse of time. Where an employee keeps performing work upon expiration of the agreed period but with the knowledge of the employer, the employment relationship becomes one for an indefinite term, unless agreed otherwise.

Since the employment relationship is characterized by personal performance of work, it is terminated upon death of the employee. If the written employment contract provides for a trial period, any party may terminate the employment relationship in writing for any reason, or even without a reason, during the trial period.
period. A written notification on termination has to be delivered to the other party at least three days before the end of the employment relationship.\(^5^7\)

An employer may terminate employment in the probationary period with a pregnant woman, mother up to ninth month after birth, and nursing woman only in writing and only in exceptional cases unrelated to her pregnancy or motherhood; otherwise the termination is null and void.

**Duties before Dismissal of Trade Union Body Member**

Where a certain member of a trade union at the employer’s undertaking is concerned, the employer should ask for the prior consent of the trade union. If the union body refuses to grant approval, any subsequent termination of members of trade union bodies will be unlawful.

**Termination by the Employer**

**Notice of Termination**

The employer may only give a notice of termination to his employee for any of the reasons stated in the Labor Code. These include the following:

- The employer’s business or a part of it is closed down or relocated;
- The employee becomes redundant due to operational business reasons;
- The employee is not capable of performing the work for a longer term due to his state of health;
- The employee does not meet the conditions prescribed in statutory provisions for the performance of the agreed work;
- There are reasons for which the employer can immediately terminate the employment relationship, e.g., serious breach by the employee of his duties;
- There are less serious breaches of the duties of the employee, and the employer has warned the employee in the last six months of the possibility of a dismissal; and
- The employee does not fulfill his tasks without fault of the employer. In case of unsatisfactory work performance, the employer should have urged the employee in writing to address his deficiencies within the last two months prior to dismissal.

Generally, the notice period is one month if an employee’s employment with the employer lasted less than one year as at the date the termination notice is delivered. The notice period is two months, if the employee’s employment relationship with the employer lasted one to five years as at the date the termination notice is delivered. The notice period is three months, if the employee’s employment relationship with the employer lasted at least five years

\(^5^7\) Labor Code, s 72.
as at the date the termination notice is delivered. The reason for the termination should be clearly specified in the written notice, and a subsequent change of the stated reason is not allowed. The stated reason may influence the severance payments to be paid.

A notice of termination is prohibited during the period when the employee is unable to work due to health reasons, pregnancy, parental leave, military service, or assignment to public posts, among others. If the employee has been given notice before the start of such a protected period, the notice period is interrupted as long as the protection lasts. 58

However, there are exceptions to this protection, i.e., not all of the protected periods refer to each reason for dismissal. For instance, if the notice is given for reasons of organizational business changes, no protection is granted, while the protection against a dismissal due to immediate termination will only apply in case of pregnancy or parental leave.

A notice is not possible if two months have passed since the employer learned of the circumstances of the reason for termination. In case of breach of duties abroad, the period starts when the employee returns, but ends one year after the reason had arisen.

If the employee’s conduct becomes an object of investigation during the two-month period, the employer may give notice to such employee within two months after he has learned of the results of the investigation. If the employer intends to give notice on grounds of breach of labor discipline, he should inform the employee of the reason for such and allow him to present his side.

**Immediate Termination**

The employer may terminate an employment relationship with immediate effect, provided the actual reason is stated, where (a) the employee has been lawfully sentenced for a willful criminal offense, or (b) where the employee has seriously breached the labor discipline. However, immediate termination is not possible during the employee’s pregnancy or parental leave.

**Termination by an Employee**

The employee also may give his employer a notice of termination or an immediate termination, but the Labor Code grants him great latitude with regard to terminating his employment.

Section 67 of the Labor Code only requires that the employee’s notice of termination be served on the employer, with or without stating a reason. The employee also has to comply with the one- or two-month notice period.

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58 Labor Code, s 64(2).
The parties may agree that the employer is entitled to financial compensation amounting to one month’s average earnings of the employee if the employee does not continue to work until the end of the notice period. Such agreement should be in written form to be valid.

A resignation with immediate effect is possible if the employee’s entitled wage or compensation, travel reimbursement, payment for work standby, or alternative income has not been fully paid within 15 days after maturity. He also may demand for severance payment in such cases.

An immediate termination also is possible where the employee can no longer perform his work due to his state of health without a serious threat thereto, provided the employer has not transferred him to a suitable alternative workplace.

An immediate termination also is allowed if the employee’s life or health is directly threatened. The immediate resignation should be carried out within two months from the day the employee has learned of the reason, but within one year after the reason has arisen.

**Severance Payments**

Severance payment is possible only in some of the reasons for termination, where there is mutual agreement on the termination of employment, in termination due to organizational changes, or due to health reasons. The reasons for termination have to be stated in the agreement if the employee so wishes.

An employee who is terminated by agreement is entitled to a severance pay in the amount of at least the sum that is a multiple of his average monthly salary and a number of months of the notice period under the Labor Code, if the termination is due to any of the following reasons:

- The employer closes or relocates his business or a part of it;
- The employee becomes redundant due to operational business reasons, e.g., reorganization; or
- The employee is given notice because according to a medical report he lost capacity to perform current work for a long term.

**Legal Consequences of a Void Termination of Employment**

Where a dismissal is void, the employment relationship continues if the employee informs the employer without due delay that he insists on being further employed. In this case, the employee is entitled to his wage. The compensation equals the employee’s average earnings and has to be paid from
the day the employee insists on his further employment until the day he returns to work or when the employment is terminated in a valid manner.  

If the total period, for which the employee should be provided wage compensation, exceeds nine months, the employee is entitled to wage compensation for nine months. Where the employee does not insist on further employment though the termination is void, the employment relationship is terminated as if it had been agreed upon.

If the employee terminates his employment in an invalid manner, the employment continues if the employer requests the employee to perform his work. If the employer does not insist on such continuation, the employment relationship is terminated as if it had been agreed upon. If the employee fails to continue to work, the employer may demand reparation of the consequent damage arising thereof from the day the employer notified the employee of his insistence that the employee keep performing work.

**Juridical Remedies**

Both the employer and the employee may claim that the termination is void. The lawsuit should be filed within two months after the day the employment relationship was intended to be terminated.

In the Slovak Republic, there are no particular labor courts. The competent court of first instance is the County Court (*okresný súd*). Labor law disputes are decided by a single judge who specializes in employment law.

**Collective Dismissals**

A collective dismissal (*hromadné prepúšťanie*) occurs where an employer terminates an employment relationship over a period of 30 days due to winding-up, relocation, organizational changes, or other reasons that do not depend on the person of the employee and applicable to an employer:

- With at least 10 employees of an employer employing between 20 and 100 employees;
- With at least 10 per cent of employees from the total number of employees of the employer employing between 100 and 300 employees; and
- With at least 30 employees of an employer employing more than 300 employees.

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59 Labor Code, s 78(1).
60 Labor Code, s 79(3).
61 Labor Code, s 78(2).
62 Labor Code, s 77.
The employer is required to negotiate with the employees’ representative at least one month before the collective dismissal. If there are no employees’ representatives in the workplace, the employer should negotiate directly with the affected employees on measures to avoid the collective dismissal or to reduce its effects. The employer should provide the employees’ representatives (or the employees) with all necessary information and should inform them in writing as to:

- The reasons for collective dismissal;
- The number and structure of employees to be subject to termination;
- The overall number and structure of employees employed;
- The period over which collective dismissal will be effected; and
- The criteria for the selection of employees to be subject to termination.

The employer should concurrently deliver a transcript of such written information to the relevant Labor Office. The employer may realize the collective dismissal at least one month from the delivery of the written information to the Labor Office and the employees’ representatives (or employees).

Collective Labor Law

In General

The term “collective labor law” has a long tradition in the Slovak Republic, although it had a different meaning before 1989. Even today, its influence is not as considerable as in the old EU members. Only a few industrial sectors are familiar with collective bargaining agreements, strikes are not very common, and the public is generally not very interested in bargaining issues.

The origin of any collective labor provision is the constitutionally guaranteed freedom of association of trade union organizations. Details are governed by the Labor Code and the Collective Bargaining Act.63

Collective labor law regulates relations between the entities representing the employees and the employers or their organizations, aiming at the improvement of working and wage conditions of employees.

Trade Union Organizations

In the Slovak Republic, trade union organizations are unincorporated associations,64 and the employer is required to allow their operation at the

64 The establishment of trade union organizations is governed by Act Number 83/1990 Coll. on association of citizens (as amended).
workplace. The main role of trade union organizations is to conclude collective agreements with the employer containing terms that are more favorable than the minimum provided by the Labor Code.

An employment agreement is thus invalid in areas where the rights of the employee are governed to a lesser extent than in a collective agreement. Trade union organizations have the following major rights:

- Co-decision rights, such that certain legal actions of the employer may be taken only after the consent of the trade union organization;
- The right to negotiate all proposed decisions of the employer that might have an impact on the working conditions of the employees;
- The right to information on essential issues concerning development of the employer’s activities and achieved economic results; and
- The right to control the observance of labor legislation and obligations resulting from collective agreements.

Failure to consult the competent body of the trade union organization does not affect the validity of the relevant measure, but a fine may be issued on the employer.65

**Work Trustee and Working Council**

A work trustee and a working council may represent the employees’ interests, irrespective of the operation of a trade union organization with the employer. A working council may act at a workplace that employs at least 50 employees, while a work trustee may operate at a workplace that employs less than 50 but more than three employees. The rights and duties of a work trustee is the same as that of a working council.66

The working council is entitled to act in the form of an agreement or of granting previous consent only where the working conditions or conditions of employment are not arranged by collective agreement. It also disposes of information and control rights. The employer is required to allow elections of the members of the working council if requested in writing by at least ten per cent of the employees.

Under Section 233a of the Labor Code, the works council or employee trustee may conclude with an employer agreement, similar to the collective agreement, regulating working conditions, including wage conditions and employment conditions to the extent they can be agreed in the collective agreement. Such agreement may be concluded only if no trade union is active with the employer.

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65 A comprehensive collection of offenses is enumerated in the Labor Inspection Act Number 125/2006 Coll. (as amended).
66 Labor Code, s 233.
Collective Bargaining

The Collective Bargaining Act regulates collective bargaining between the competent trade union bodies and the employers. The aim of collective bargaining is the conclusion of a collective agreement.

Collective agreements govern individual and collective relationships between the employers and the employees as well as their rights and obligations. Claims arising from collective agreements for individual employees will be applied and satisfied as other claims of employees arising from employment.

A collective agreement will govern working conditions, conditions of employment, and labor relations in a more favorable way than the Labor Code or other labor regulation, provided such is not expressly prohibited. The Collective Bargaining Act distinguishes between two types of collective agreements:

- Collective agreement relating to one employer (podniková kolektívna zmluva), concluded between the competent trade union and the employer; and
- Collective agreement of a higher degree (kolektívna zmluva vyššieho stupňa) concluded between a trade union organization and the employers’ association of all companies in the relevant field of business.67

Negotiations on a new collective bargaining agreement should start at least 60 days before the termination of the prior agreement. Disputes arising under collective bargaining agreements should be settled by a mediator or, failing that, by an arbitrator.

Where there are several competent trade union organizations that cannot agree on a common procedure, the employer is entitled to conclude the collective agreement with one or more trade union organizations with the largest number of members among the employees.

 Strikes and Stoppages

The right to strike is regarded as one of the basic principles of economic freedom. The Bill of Rights guarantees this right in principle68 and delegates further regulations to ordinary laws.

The right to strike and the possibility of ordering work stoppage are governed by the Collective Bargaining Act. Strike is defined as partial or complete stoppage

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67 These also can be concluded (a) for more employers between the relevant higher trade union body and an organization or organizations of employers, (b) between the relevant higher trade union body and the State, or (c) for more employers between the relevant higher trade union body, representatives delegated by the government, and representatives of employers.

68 Article 27, Paragraph 4 of the Bill of Rights denies the right to strike to judges, prosecutors, and members of security and military forces.
of work by the employees, while a work stoppage is defined as partial or full cessation of work by the employer.

A strike can be declared and commenced upon decision of a competent trade union organization body, provided that a simple majority of the employees that participated in the voting agreed to it. Employees may go on strike if all attempts by a mediator to settle a dispute arising out of a collective bargaining fail.

Exceptionally, strikes are allowed to attain amendments to a collective bargaining agreement where the agreement is expressly subject to change. In such cases, the employer is not entitled to compensation for damages and lost profits.

The competent trade union organization body is obliged to announce the start of the strike three days in advance, as well as the reasons and aims of the walkout and the list of spokespersons that represent the participants of the strike.

The employer, the employers’ association, or a prosecutor may request the competent Regional Court (krajský súd) to declare the strike unlawful. The employer is entitled to compensation where the strike is declared unlawful.

On the other hand, the instrument of stoppage may be used by an employer as ultima ratio. In accordance with the regulations concerning a strike, the employer is allowed to lock out his employees only if a collective bargaining agreement has not been agreed after failure of mediation, provided the disputing parties have not called the arbitration tribunal.

The concerned trade union organization or a prosecutor may take legal action at the County Court to declare the stoppage unlawful.

Where the employee cannot perform his work because of a lockout, his absence is treated as if there is a lack of work from the employer. Thus, the employee is entitled to remuneration in the amount of his average earnings. However, if the stoppage is lawful, he is merely compensated in the amount of half of his average earnings.
South Africa

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South Africa

Introduction

In General

South Africa is a jurisdiction in which the Constitution is the highest law of the land, while its legal system consists of the common law and legislative intervention by the government. Due to the long history of governmental regulation of employment, a dual legal system has developed such that the contract of employment is regulated by common law, while collective bargaining, certain minimum wage and hour laws, protection against unfair dismissal, and other employment law aspects are regulated by legislation.

Black workers were previously excluded from the ambit and protection of employment legislation, but South Africa now has some of the most democratic, far-reaching, and sophisticated employment legislation in the world.

Historical Development of Labor Legislation

Following the violent suppression of the white mine workers’ strike on the Rand in 1922, South Africa introduced its first piece of comprehensive labor legislation, i.e., the Industrial Conciliation Act Number 11 of 1924 (“Industrial Conciliation Act”).

The Industrial Conciliation Act provided for the registration of employers’ organizations and trade unions, and created a framework for collective bargaining together with a system for dispute settlement and the regulation of strikes and lockouts.

It also provided for the establishment of industrial councils and ad hoc conciliation boards where there was no industrial council. Agreements concluded therein could be made legally binding through publication in a government gazette.

 Strikes and lockouts were prohibited during the lifetime of any agreement concluded at an industrial council or conciliation board. Where there was no agreement, strikes and lockouts were prohibited until the issue in dispute has been submitted for settlement to the relevant industrial council or conciliation board.
Unfortunately, the Industrial Conciliation Act excluded black male workers from its ambit. This prompted its amendment in 1930, and was entirely replaced by the Consolidated Industrial Conciliation Act Number 36 of 1937, which provided for an inspector from the Department of Labor to represent black workers at industrial council meetings. However, the introduction of the Industrial Conciliation Act Number 28 of 1956 ("1956 Industrial Conciliation Act") perpetuated the racial division of workers by prohibiting the registration of new unions having both white and “colored” members, among others.

**Wiehahn Reforms**

The Wiehahn Commission of Inquiry was established following large-scale industrial action by black workers, and recommended fundamental reforms to the industrial relations system. The most important of these was the inclusion of black workers under industrial legislation, and allowing them to join registered trade unions and be directly represented in industrial councils or conciliation boards.

The Wiehahn Commission of Inquiry also proposed the introduction of an industrial court with the power to determine unfair labor practices, and the establishment of the National Manpower Commission to continually survey and analyze the labor market and to make recommendations to the Minister of Labor on issues affecting labor policy.

These recommendations were enacted through a series of amendments to the 1956 Industrial Conciliation Act, which was renamed the Labor Relations Act Number 28 of 1956. All of these reforms happened against the background of strong political resistance against the apartheid government. Because black union members were disenfranchised, the unions were often center stage in the political struggle against apartheid.

**Labor Relations Act Number 66 of 1995**

Widespread industrial unrest and political protest led to an agreement between organized business and the two major trade union federations (i.e., the Congress of South African Trade Unions (COSATU) and the National Congress of Trade Unions) for the restructuring of the National Manpower Commission to a bargaining forum with the power to negotiate labor market policy.

Another agreement was forged between COSATU and the major business organizations to establish the National Economic Forum, which was geared towards the negotiation of policy regarding economic growth, social equity, and democratic participation in decision-making.

The lifting of the ban on the African National Congress (ANC) and the release of political prisoners, including Nelson Mandela, culminated in the first democratic elections in April 1994. The ANC won by a landslide, and because of COSATU’s electoral alliance with the ANC and the South African
Communist Party, it was able to exert influence on the government to immediately effect major reforms to labor legislation.

This resulted in a merger between the National Manpower Commission and the National Economic Forum in February 1995, resulting in the National Economic, Development, and Labor Council (NEDLAC). The subsequent negotiations between organized business, labor, and government and a campaign of rolling mass action by trade union federations resulted in the Labor Relations Act Number 66 of 1995 (the “Labor Relations Act”).

The Labor Relations Act gives extensive organizational rights to trade unions and introduces the concept of workplace forums, which compels consultative and joint decision-making between workers and management under certain conditions. However, very few workplace forums have been established, largely because unions have regarded them as a threat to their power in the workplace.

The Labor Relations Act firmly promotes centralized bargaining through Bargaining Councils (or a statutory council where there is none). It grants employees the right to strike so long as they comply with a given procedure. The failure to hold a ballot no longer affects the legality of the strike. Extensive rights in relation to secondary strikes and picketing also are granted to workers.

The Labor Relations Act also discards the industrial court and its jurisdiction on unfair labor practice, and provides for new bodies such as the Commission for Conciliation, Mediation, and Arbitration (CCMA), the national Labor Court, and the Labor Appeal Court. Nevertheless, it codifies many of the principles that were developed by the industrial court in respect of unfair dismissal.

Additional guidelines have been provided in the form of codes of good practice, while issues of discrimination are now dealt with in the subsequently enacted Employment Equity Act Number 55 of 1998 (EEA). The scope of the Labor Relations Act also has been extended to include workers in virtually all areas of economic activity.

Legal Relationship of Employer and Employee

In General

An employment relationship will exist where the common law requirements of a contract of employment are present or where the wider statutory definition of employment is met. The prerequisites for a valid contract of employment in common law are:

- Two legal persons who are parties to the contract, i.e., employer (natural or corporate person) and employee (natural person);
- The contract is entered into willingly by both parties;
- The employee agrees to perform specified or implied personal services for the employer;
• The employer has the right to supervise and control the rendering of the services by the employee; and
• A fixed or ascertainable consideration or rate of wages payable to the employee.

A common law contract of employment is completed by mere consent of the parties as soon as they have agreed on the essential terms, and no formalities are required. It may be implied, express, oral, or written, and may be indefinite or for a fixed term. If the duration is not specified, the custom or law of the community for the particular occupation will generally apply.

Employment also may arise where the statutory definition of employment is met. Most of the key pieces of employment legislation refer to employment as a relationship where any person (except an independent contractor) works for another or for the State, and receives or is entitled to receive any remuneration.

Employment also involves any other person who assists in carrying on or conducting the business of an employer in any manner. The statutory employment relationship may be implied, express, oral, or written.

The Labor Relations Act and the Basic Conditions of Employment Act Number 75 of 1997 (BCEA) provide that any person who works for or renders services to any other person is presumed, until the contrary is proved, to be an employee regardless of the form of the contract, if any of the following factors is present:

• The manner in which the person works is subject to the control or direction of another;
• His hours of work are subject to the control or direction of another;
• In respect of a person who works for an organization, he is a member of that organization;
• He has worked for the other person for an average of at least forty hours per month over the last three months;
• He is economically dependent on the other person for whom he works or renders services;
• He is provided with tools of trade or work equipment by the other; or
• He only works for or renders services to one person.

However, these presumptions do not apply to persons who earn more than an amount periodically determined by the Minister of Labor, which is presently ZAR 149,736 per annum. Most employment relationships will fall under the statutory definitions of employment and will thus be subject to the rights and obligations introduced by statutes.

The Labor Relations Act and the BCEA apply to all employees and employers as statutorily defined, except for members of the National Intelligence Agency, the South African Secret Service, the South African National Academy of
Intelligence, unpaid volunteers working for a charitable organization, and directors and staff of the Electronic Communications Security (Pty) Ltd. Except as regards severance pay, the BCEA does not apply to persons employed on vessels at sea.

Employment legislation can be divided into minimum standards legislation and labor relations legislation. Minimum employment standards and employment conditions for most employees are regulated by the BCEA.

The Minister of Labor also can make sectoral determinations establishing basic conditions of employment for employees in a sector and area. The Labor Relations Act, through the conclusion of Bargaining Council Agreements under the auspices of Bargaining Councils, also plays a role in regulating minimum employment standards within the industries for which such Bargaining Councils have been established. However, as the statutory treatment of employment rights and duties is inevitably incomplete, the common law continues to operate to supply residual terms to the relationship.

Exclusions

Agents, partners, and independent contractors fall outside the common law notion of employment, while the statutory definitions expressly exclude independent contractors.

Although there is no statutory definition of an independent contractor, the general approach of the courts has been to apply a “dominant impression” test or a “reality” test, i.e., whether the dominant impression or reality of the relationship is one of employment or as between a client and an independent contractor. The NEDLAC also has issued a code of good practice that provides additional guidelines. The primary factors that distinguish an independent contractor from an employee are:

- Content of the contract;
- Supervision and control of the person;
- Control over the person’s hours of work;
- Provision of tools of the trade to enable work;
- Economic dependence on the company or working for more than one person; and
- Payment for making productive capacity available to the employer or payment for the product or output of labor.

Capacity of the Parties

The capacity of the parties to enter into an employment contract is largely determined by the same considerations that apply to contracts in general.

Thus, contracts entered into by a minor under the age of seven are void, while contracts concluded by a minor between the ages of seven and twenty-one are
voidable by his guardian. Children under fifteen years of age or who are of schooling age are specifically protected under the BCEA.

Special Categories of Employees

Child Labor

The Constitution gives a child the right to be protected from exploitative labor practices and not to be required or permitted to perform work or provide services that: (a) are inappropriate for a person of his age; or (b) place his well-being, education, physical or mental health, or spiritual, moral, or social development at risk.

The BCEA prohibits the employment of children under the age of fifteen. No person may employ a child who is under the minimum school leaving age in terms of any law, whether fifteen or older.¹

Trainees

The BCEA applies to persons undergoing vocational training except where the provisions of any other law regulate any term or condition of their employment.

The Skills Development Act Number 97 of 1998 (“Skills Development Act”) also regulates learnership agreements concluded between learners (trainees), an employer, and a training provider.

Voluntary Workers

The BCEA does not apply to unpaid voluntary workers who are working for an organization serving a charitable purpose.

Temporary and Part-Time Employees

In general, temporary and part-time employees enjoy the protections afforded to employees under the Labor Relations Act. However, if the temporary employee is terminated at the expiration of his fixed term of employment and he did not have a reasonable expectation of its renewal on the same or similar terms, the termination will not amount to a dismissal and will thus not have to be justified by the employer.

Temporary and part-time employees also enjoy some protection under the BCEA. The provisions of the BCEA on leave and termination of employment only exclude employees who work less than twenty-four hours a month, while those dealing with the regulation of working time only exclude senior managerial employees, sales staff who travel to the premises of customers and

¹ The South African Schools Act presently requires every parent to ensure that every learner for whom he is responsible should attend a school until the last school day of the year in which the learner reaches the age of fifteen or the ninth grade, whichever comes first.
who regulate their own hours of work, employees who work less than twenty-four hours a month, and those who earn more than the earnings threshold periodically set by the Minister of Labor.

Foreign Workers

Foreign companies that operate inside South Africa are bound by its labor legislation. Any foreigner who is not a permanent resident and who wishes to render services in South Africa should obtain a work permit, otherwise his employer could be imposed criminal and civil sanctions.

While there is no regulatory restriction on the number of foreign workers that an employer may employ in South Africa nor on the number of categories under which work permits may be applied for, the work permit process prescribed by legislation guards against the employment of foreign workers in positions that can be filled by locals.

There is no general legislative cap on the period for which a foreign worker may be aggregately employed, but the Immigration Act provides for maximum periods for which certain categories of work permits may be granted. For instance, a visitor’s visa with consent to work may be issued for a maximum of ninety days, renewable for another ninety-day period. A quota work permit is usually first issued as a three-month work seeker’s permit, which may be extended for up to five years once employment is secured. It also may be renewed if the qualification remains an identified scarce skill.

A general work permit is usually granted for a maximum of five years and may be renewed. Intra-company transfer work permits may be issued for a maximum of two years and cannot be renewed. A corporate permit can be open-ended, allowing a company to employ a number of foreign workers in specific predetermined positions over a period of time, but the corporate employee’s permit is generally limited to three or five years.

Transfer of Business

Under Section 197 of the Labor Relations Act, if the whole or a part of any business, trade, undertaking, or service is transferred as a going concern by one employer to another, the new employer is automatically substituted in the place of the old employer in respect of all contracts of employment existing immediately before the date of transfer.

All the rights and obligations between the old employer and an employee at the time of transfer continue in force. The transfer does not interrupt an employee’s continuity of employment, and his contract of employment continues with the new employer as if with the old employer.

The new employer can employ the transferred employees on terms and conditions that are on the whole not less favorable than those on which they were employed, unless any of their conditions of employment are determined by
a collective agreement. Collective agreements and arbitration awards to which
the old employer was a party or by which he was bound also bind the new
employer. The old and new employers should agree on the value of certain
entitlements for transferring employees (e.g., accrued leave and severance pay)
and which of them is liable for such. Such agreement should be disclosed to the
transferring employees.

Unless the old employer is able to show that he complied with his obligations,
he will be liable for the entitlements payable to transferred employees who are
retrenched or who lose their employment through the insolvency of the new
employer within twelve months of the transfer. An employee may be transferred
to a pension, provident, retirement, or similar fund other than that to which he
belonged prior to the transfer, provided that certain criteria in the Pension Funds
Act Number 24 of 1956 are satisfied.

If the old employer is insolvent, or if an arrangement or compromise is entered
into to avoid winding up or sequestration for reasons of insolvency, the new
employer is automatically substituted in the place of the old employer in all
contracts of employment in existence immediately before the old employer’s
provisional winding up or sequestration.

Terms and Conditions of Employment

Remuneration

Remuneration is widely defined as any payment in money or in kind or both,
made or owing to an employee in return for working for the employer.

If remuneration is to be paid in money, it should be paid in local currency and
should be paid daily, weekly, fortnightly, or monthly. The mode of payment
should be in cash, by check, or by direct deposit into a bank account designated
by the employee.

Cash or checks should be handed to employees at the workplace, unless
otherwise agreed, during working hours or within fifteen minutes of the
commencement or conclusion of their working hours, and should be placed in a
sealed envelope.

There is no general minimum wage that applies to employees. However,
minimum wages have been set for certain sectors and industries through sectoral
determinations issued by the Minister of Labor or by Bargaining Council
collective agreements.

Hours of Work and Rest Periods

The BCEA prescribes a forty-five hour workweek with a nine-hour daily
maximum for employees who work five days or fewer per week (and eight
hours daily for employees who work more than five days a week).
These periods may be reduced to forty hours per week and eight hours a day through collective bargaining and the publication of sectoral determinations. The BCEA limits overtime to ten hours a week. Employers are generally prohibited from requiring or permitting employees to work more than twelve hours on any day. Payment of overtime should be at 1.5 the employee’s normal wage rate, but overtime may be compensated by paid time off by agreement.

Collective agreements may allow normal working hours and overtime to be averaged over a cycle of up to four months. Ordinary contracts with employees also may allow the compression of the workweek, so long as the employee does not work more than twelve hours per day, forty-five hours per week, and more than ten hours overtime per week on more than five days a week.

Employees should be given adequate meal intervals, which are regulated by collective and individual agreements. They also should have a daily rest period of twelve hours and a weekly rest period of 36 continuous hours (which should include a Sunday). These rest periods may be varied by agreement, but only to a limited extent.

**Sunday Work and Night Work**

Sunday work should be remunerated at double rates, unless the employee ordinarily works on a Sunday, in which case payment is at time-and-a-half. Sunday pay may be exchanged by agreement for additional paid time off.

Night work constitutes work performed after six o’clock in the evening and before six o’clock in the morning the next day. An employer can only require or permit night work upon agreement with the employee and if an allowance is paid, or if the employee’s working hours are reduced and transportation is available between his place of residence and the workplace at the commencement and conclusion of his shift.

An employer who requires employees to work on a regular basis after eleven o’clock in the evening and before six o’clock in the morning the next day also should inform such employees in writing of the health and safety hazards associated with the work and of their right to undergo a medical examination in relation thereto at the employer’s cost. The employer should provide for such medical examinations before the employee starts work or within a reasonable time thereafter and at appropriate subsequent intervals. An employer also should transfer an employee to suitable day work within a reasonable time if he suffers from a health condition associated with night work and if it is practicable to do so.

**Leaves**

The minimum annual vacation leave under the BCEA is three weeks. By agreement, annual leave can be accrued by an employee at a rate of one day for every seventeen days on which he worked or was entitled to be paid, or one hour for every seventeen hours.
An employee is entitled to take his leave on consecutive days or occasionally at times agreed with the employer. Payment as an alternative to taking leave is not permitted, but an employee is entitled to be paid for leave accrued but not taken upon termination of employment.  

The BCEA allows for some flexibility in an employee’s sick leave entitlement by reducing sick leave payments if the number of paid sick leave days is commensurately increased and as long as the pay entitlement is at least seventy-five per cent of the employee’s ordinary wages.

Employers may require proof of incapacity for absences of longer than two consecutive days or on more than two occasions during an eight-week period. Female employees are allowed four months’ unpaid maternity leave during which their employment is secured.

Employees who have been employed for more than four months and who work at least four days a week also are entitled to three days’ paid family responsibility leave per annum. Such leave can be taken when the employee’s child is born or is sick, or in the event of death of his spouse or life partner, parent, adoptive parent, grandparent, child, adopted child, grandchild, or sibling.

Employers may require reasonable proof of the event for which family responsibility leave is required before paying, and any unused family responsibility leave entitlement lapses at the end of the annual leave cycle.

**Health Care Coverage and Vocational Training**

Although there is no general obligatory health care coverage for employees, most medium-sized and large employers voluntarily participate in private medical insurance schemes that provide a range of medical benefit plans (with varying costs) for employees (and often their dependents).

Employers sometimes contribute a percentage of the premium payable for the employee’s membership in such a medical scheme, or the full cost is incorporated in the employee’s total remuneration package.

Bargaining Councils (or statutory councils where there is none) may establish and administer pension, provident, medical aid, sick pay, holiday, unemployment, and training schemes or funds or any other fund for the benefit of one or more parties to the Bargaining Councils or their members.

There is a legislative framework in place under the Skills Development Act that is aimed at developing the skills of the workforce, increasing the levels of investment in training and education, and to improve employment prospects for persons previously disadvantaged by unfair discrimination. What is essentially

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2 A current issue in South African employment law is whether the parties may agree that accrued leave will be forfeited if not taken by the employee.

3 This is equal to the number of days the employee would have worked during a period of six weeks.
involved is the payment of a skills development levy by all employers, currently one per cent of the aggregate monthly remuneration payable to the workforce, which is then used to fund training and skills development. Employers may be reimbursed for such payments if they submit action skills development plans.

**Discrimination**

**In General**

Section 9 of the Constitution confers on every person the rights of equality and to equal protection and benefit before the law. Unfair discrimination of any sort, whether direct or indirect, including discrimination on the grounds of race, gender, pregnancy, marital status, ethnic or social origin, color, sexual orientation, age, disability, religion, belief, culture, or language, is prohibited.

All labor-related legislation is subject to scrutiny by the Constitutional Court. A dismissal is automatically unfair if it is based on any of the grounds referred to in the Constitution, except if it is based on the inherent requirement of the particular job.

An unfair dismissal automatically allows the aggrieved party to claim reinstatement or compensation, with a maximum award equivalent to twenty-four months’ salary or double the maximum that can be awarded in an ordinary unfair dismissal case. Matters as regards discrimination are dealt with by the Labor Court, rather than by way of arbitration under the CCMA.

The EEA aims to achieve equity in the workplace by promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination, and by implementing affirmative measures designed to redress disadvantages in employment experienced by designated groups.4

In recent years, the Department of Labor has become active in enforcing compliance with the EEA. The Director General has conducted reviews of many employers to assess compliance and has issued directives to such employers. Employers who failed to respond satisfactorily have been taken to court.

**Gender**

The Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace5 encourages employers to adopt sexual harassment policies and to communicate these to all employees. It suggests the following minimum provisions that should be included in a sexual harassment policy:

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4 “Designated groups” pertain to people of color, women, and people with disabilities. Testing by an employer to determine an employee’s (or an applicant’s) HIV status is specifically prohibited under the EEA, unless such testing has been determined as justifiable by the Labor Court.

- Sexual harassment is a form of unfair discrimination on the basis of sex, gender, and/or sexual orientation that infringes the rights of the complainant and constitutes a barrier to equity in the workplace;
- Sexual harassment in the workplace will not be permitted or condoned;
- Complainants in sexual harassment matters have the right to follow the procedures in the policy, and appropriate action should be taken by the employer; and
- It will be a disciplinary offense to victimize or retaliate against an employee who lodges a sexual harassment complaint in good faith.

The procedures to be followed by a complainant and an employer upon the occurrence of sexual harassment should be outlined in the policy.

Under the BCEA, an employee is entitled to at least four consecutive months of maternity leave, which may be commenced at any time from four weeks before the expected date of birth or on a date certified by a medical practitioner or midwife that such leave is necessary for the employee’s health or that of her unborn child.

No employee may work for six weeks after the birth of her child unless a medical practitioner or midwife certifies that she is fit to do so. An employee who has a miscarriage during the third trimester of pregnancy or bears a stillborn child is entitled to maternity leave for six weeks after the miscarriage or stillbirth whether or not she had commenced maternity leave at the time of the miscarriage or stillbirth.

Although the statutory maternity leave is unpaid, many employers provide maternity benefits in the internal company policies. Employees also may claim some maternity benefits from the Unemployment Insurance Fund pursuant to the Unemployment Insurance Act Number 63 of 2001 (the “Unemployment Insurance Act”). Payment of maternity benefits by the employer does not adversely affect the employee’s right to unemployment benefits under the Unemployment Insurance Act. The BCEA prohibits an employer from requiring or permitting a pregnant employee or an employee who is nursing her child to perform work that is hazardous to her health or the health of her child.

During an employee’s pregnancy and for six months after the birth of her child, the employer should offer her suitable alternative employment on terms and conditions that are no less favorable than her ordinary terms and conditions of employment if she is required to perform night work or her work poses a danger to her health or safety or that of her child, and if it is practicable for the employer to do so.
Age

A dismissal will be fair if the reason for such dismissal was based on the inherent requirements of the job and if the employee has reached the normal or agreed retirement age for persons employed in that capacity.

Many employers include clauses in employment contracts setting the agreed retirement age and providing that the contract will automatically come to an end when the person reaches such age.

Physical or Mental Handicap

People with disabilities refer to those who have a long-term or recurring physical or mental impairment that substantially limits their prospects of entry into or advancement in employment.


Race or National Origin

Discrimination on the basis of race or national origin is prohibited under the EEA. Such a dismissal would be automatically unfair under Section 187 of the Labor Relations Act.

Religion

Discrimination on the basis of religion is prohibited under the EEA. Such a dismissal would be automatically unfair under Section 187 of the Labor Relations Act. However, the issue most frequently surfaces in the context of religious freedom in the workplace and the extent to which the employer may or may not curtail such.⁷

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⁷ In the 2006 case of Dlamini vs. Green Four Security ((2006) 27 ILJ 2098 (LC)), a number of security guards were dismissed for failing to adhere to the company policy to be clean-shaven. They were members of the Baptized Nazareth Group and alleged that their religion did not permit them to shave or trim their beards. The Labor Court held that they had to prove that shaving their beards was prohibited as an essential tenet of their faith. The company applied its policy consistently to all employees, and there was no proof of discrimination on account of religious beliefs. On the other hand, the Constitutional Court’s judgment in MEC for Education: KwaZulu-Natal and Others vs. Pillay ((2008) 1 SA 474 (CC)) contains a detailed discussion on the extent of the protection afforded to cultural and religious rights in the public school setting “and possibly beyond”. Given the broad and principled nature of the Constitutional Court’s
Employers may have to err on the side of accommodation and promotion of diversity when making a call on whether or not to allow religious or cultural expression in the workplace. Exceptional circumstances may allow for more emphasis on the workplace rule but the employer would have to justify his position.

**Collective Bargaining**

**In General**

The Labor Relations Act was specifically drafted to give effect to the right to strike and the recourse to lockout that were enshrined in Section 27 of the interim Constitution. The final Constitution was subsequently adopted after its publication, and the Bill of Rights (Section 23) therein did not contain the employer’s recourse to lockout.

Still, the Constitutional Court has held that lockout is implicit in the right to engage in collective bargaining. Nevertheless, employers now exclusively rely on their statutory rights as prescribed by the Labor Relations Act.

The legal duty to bargain previously arising out of the definition of unfair labor practice has effectively been abolished in the Labor Relations Act, which provides new institutions to encourage cooperation between unions and employers (such as workplace forums) and restructures existing ones (such as industrial councils) to make the collective bargaining process less adversarial and more cooperative.

The removal of the legal duty to bargain also has effectively removed any legal protection that small unions with representation falling short of majority previously may have enjoyed. The increased scope of application of the Labor Relations Act has resulted in the protection of previously unprotected categories of employees such as domestic workers. It also has unified the protection of categories of employees who were previously protected under separate pieces of legislation (e.g., workers and public servants).

**Organizational Rights**

The Labor Relations Act provides extensive statutory organizational rights for sufficiently representative registered trade unions, such as:

8 The term “sufficiently representative” is not defined in the Labor Relations Act, but the Labor Court has generally accepted that unions which represent a third or even a quarter of the workforce of an employer will qualify for the statutory organizational rights, subject to the express objective of the Labor Relations Act to minimize the proliferation of trade union representation in a single workplace.
• Access to the workplace for recruiting or communicating with members, holding meetings outside working hours, or conducting elections and ballots, subject only to conditions as to time and place that are reasonable and necessary to safeguard life and property or to prevent undue disruption of work;

• Deduction and receipt of union membership subscriptions; and

• Reasonable leave, including possible paid leave for union officers.

Where one or more unions have the majority of employees in the workplace as their members, they become entitled to additional organizational rights. They are entitled to specified numbers of union representatives (shop stewards) in the workplace, which numbers are established through a set formula.

These representatives are entitled to assist employees in grievance and disciplinary hearings, to monitor the employer’s compliance with employment laws and collective agreements, to report workplace contraventions to the union and responsible authorities, and to perform any other function agreed between the union and the employer.

They also are entitled to reasonable paid time off for the performance of their functions or for relevant training. In addition, they are entitled to disclosure of information. An employer who bargains or consults with the union should disclose all relevant information that will allow the union to effectively engage in consultation or collective bargaining.

The employer also should disclose relevant information that will allow the shop stewards to perform their functions effectively, but there are certain restrictions on these wide-ranging disclosure obligations. For instance, the union has no right to disclosure of information in case of employees who are engaged in domestic work in their employer’s homes.

The union should give notice to the employer when it seeks to exercise one or more of the organizational rights. The employer should meet the union within thirty days and endeavor to conclude a collective agreement as to the manner in which the union will exercise such rights, failing which the matter will be conciliated and, if necessary, arbitrated by the CCMA.

Where the dispute pertains to whether the union is sufficiently representative, the CCMA should seek to minimize the proliferation of union representation in a single workplace and the administrative and financial burden of requiring the employer to grant organizational rights to more than one union.

The extensive nature of organizational rights, taken together with the union’s right to strike for full recognition, will mean that the increasing role of representative and majority unions will become firmly entrenched.
Bargaining Forums

Centralized bargaining, as opposed to plant-level bargaining, has earned favor with unions as it is the best means of establishing industry-wide minimum terms and conditions of employment, it allows for the efficient use of skilled union employers negotiators, and it develops social benefit funds that are more effective.

However, some unions and employers argue that plant-level bargaining is preferable because centralized bargaining makes it difficult for small employers to be competitive, denies access to bargaining forums for localized unions, and lacks flexibility to accommodate regional and enterprise differences.

The debate continues, but it is the declared aim of the Labor Relations Act to encourage collective bargaining at the sectoral (or industry) level. It provides a range of incentives for participation in Bargaining Councils and permits the establishment by the Minister of Labor of statutory councils that can regulate certain aspects of employment in a sector without the cooperation of employers active therein.

The Bargaining Council is the primary collective bargaining institution under the Labor Relations Act, and, although it has been restyled, its primary functions remains to be the negotiation of collective agreements to regulate sectors of employment and to settle disputes arising in the sector. However, collective bargaining continues at plant level through domestic collective agreements or workplace forums.

Bargaining councils can only be formed voluntarily and by cooperation between one or more trade unions and one or more employer’s associations and, where no industrial council previously existed, parties to a proposed new Bargaining Council should adopt a constitution and apply for registration as such.

The area and sector of the Bargaining Council will be determined by the NEDLAC. The large unions that make up the membership of the COSATU generally favor broad jurisdictional scopes for Bargaining Councils, while employers are usually concerned about excessive labor market regulation.

The Minister of Labor ultimately has the final say, and he is enjoined to decide on the scope of a Bargaining Council that promotes orderly collective bargaining while balancing economic development, social justice, labor peace, and the democratization of the workplace.

Collective Agreements

The intended end result of collective bargaining and a Bargaining Council’s primary product is a collective agreement, which should be a written agreement

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9 Currently, individual employers can only be a party to a Bargaining Council via membership in an employers’ association, except that the State can be a party to the Bargaining Council.
concerning terms and conditions of employment or any other matter of mutual interest concluded by one or more trade unions, on one hand, and one or more employers or employers’ organizations, on the other hand. A collective agreement binds not only the parties to the agreement, but also:

- The members of each party to the agreement;
- Each member of the trade union and the employer organization that are parties to the agreement, if the agreement regulates terms and conditions of employment or the conduct of employees and employers in relation to each other; and
- Employees who are not members of trade unions who are parties to the agreement, if the employees are identified in the agreement, if the agreement expressly binds the employees, and if majority of the employees in the workplace are members of the trade unions.

A collective agreement also will vary, by operation of law where applicable, any individual contract of employment between an employee and an employer who are bound by the collective agreement. It also will bind for its whole duration all persons who were members of a party to the agreement at the time it became binding or who become members while it is still in force, irrespective of whether that person continues to be a member for the duration of the agreement.

A collective agreement concluded within a Bargaining Council binds only the parties to the Bargaining Council who are parties to the collective agreement. An employer association which is party to the Bargaining Council but was not prepared to sign the collective agreement will not be bound to the agreement simply because it is a party to the council.

However, such association may be bound if there is a provision in the constitution of the Bargaining Council that decisions of the council taken by, for example, a majority vote, are binding on all parties to the council, and the council decides to adopt the agreement as binding.

In the past, industrial council agreements could be extended by the Minister of Labor to employers who were not parties thereto but who fell within the industrial council’s registered scope of jurisdiction. A Bargaining Council under the Labor Relations Act can do the same by asking the Minister of Labor in writing.

The Minister of Labor may extend the agreement within sixty days if: (a) the collective agreement identifies the non-parties to whom its provisions are to be extended; (b) the trade unions whose members constitute the majority of the trade union parties to the council vote in favor of the extension; and (c) the employers’ organizations whose members employ the majority of the employees employed by members of employers’ organizations that are party to the council vote in favor of the extension.
The Minister of Labor also may not extend the agreement unless (a) the collective agreement establishes or appoints an independent body to grant exemption to non-parties who apply and to determine the terms of the exemption, and (b) the terms of the agreement do not discriminate against non-parties.

Nevertheless, the Minister of Labor may still extend the collective agreement if the parties to the council are only sufficiently representative, and the failure to extend may undermine collective bargaining at the sectoral level.

The Labor Relations Act effectively empowers parties with less than thirty per cent representation to regulate whole industries, areas, or sectors in that only a majority vote within a Bargaining Council is required. This means that a majority of the industry can regulate the remainder of the industry.

This constitutes a compelling incentive for employers and unions to centralize their bargaining arrangements so that they will at least have a say in what terms and conditions of employment apply in their workplaces. However, it is no longer a criminal offense to breach a provision of a collective agreement that has been extended.

**Statutory Councils**

The establishment of statutory councils arose out of a concern that some employers might still seek to avoid centralized bargaining and unions might not be strong enough to force them into a central forum. A union (or employers’ organization) that has at least thirty per cent support within a sector can apply to the Minister of Labor for the establishment of a statutory council if the employers in the industry refuse to participate in the establishment of a Bargaining Council.

The Minister of Labor may then appoint representatives on behalf of the employers and the statutory council, which will enjoy powers relating to dispute resolution, education, and training initiatives, and the establishment of social benefit schemes to which the employers in the industry could be made subject by the extension of the collective agreement concluded therein. An agreement concluded in a statutory council that is unrepresentative may be extended by the Minister of Labor.

**Closed Shop and Agency Shop**

The Labor Relations Act specifically allows employers and registered trade unions to enter into closed shop or agency shop agreements. A representative trade union (or trade unions) and an employer or employer’s organization can

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10 However, the criteria that will be applied by the independent body should be determined by the parties through a collective agreement, and such criteria should be fair and should promote the primary objects of the Labor Relations Act.
enter into a closed shop agreement, requiring all covered employees to be members of the trade union(s).

An agency shop agreement is similarly possible. It does not require membership to the union, but the employer will deduct an agreed agency fee for the union’s benefit from the wages of employees who are not union members.

A closed shop agreement will only be binding if a ballot of the covered employees is held, and two-thirds of employees who vote do so in favor of the closed shop. It also is possible to have a countrywide closed shop on the basis of an agreement in principle at industry level between employers’ organizations and trade unions, and then a ballot at each workplace in the industry. The closed shop will only operate at workplaces where the ballot was successful.

A closed shop may not require prospective employees to be members of a trade union before employment commences. In addition, the amount deducted in terms of a closed shop may not be used by the trade union for political purposes or any other purpose that does not advance the socioeconomic interests of employees.

The trade union also may not use a closed shop agreement as a tool to determine who is and who is not employed by the employer. A union may only refuse membership or expel employees from its ranks in compliance with its own constitution and if there is a fair reason for such.

Undermining the union’s collective exercise of its rights (e.g., divulging to the employer the union’s tactics in wage negotiations) will constitute a fair reason for an employee’s expulsion or refusal of membership. The dismissal of employees who refuse to join the trade union or are fairly expelled from the union’s membership will not be unfair.

An agency shop agreement will only be binding if it provides that (a) employees are not compelled to become members of the trade union, and (b) the agency fee is not greater than the union’s dues and is paid into a separate account administered by the union for advancing the socioeconomic interests of employees and not for political purposes.

**Industrial Action**

*In General*

Industrial action is recognized as having a legitimate role in collective bargaining, but only as a measure that should be resorted to once conciliation and negotiation have proved fruitless. The right to strike is expressly recognized in the Labor Relations Act, but its exercise is subject to prescribed procedures and limitations. The procedures which workers should follow before being able to engage in a protected strike have been substantially simplified, but the disputes in respect of which they can strike have been limited to those which are not capable of third-party adjudication.
Disputes of right\textsuperscript{11} and matters which are the subject of an existing collective agreement or wage-regulating measure cannot be the subject of protected industrial action. Thus, employees and unions can only strike over disputes of interest.

Where a collective agreement prohibits strikes or lockouts in respect of specified issues in dispute, unions and employers bound by such agreements may not strike or lockout under those circumstances. Individual employees cannot agree not to strike over certain issues and employers will not be able to rely on their employees’ contracting out of their right to strike.

Parties who are bound by an agreement (not necessarily a collective agreement) requiring the issue in dispute to be referred to arbitration may not resort to industrial action. They also cannot take strike or lockout action if the dispute is a “rights dispute”. However, trade unions may strike to enforce the exercise of certain organizational rights despite the fact that such disputes also can be arbitrated in terms of the Labor Relations Act. Trade unions that do so are prohibited from having the matter arbitrated for twelve months.

If there is a binding arbitration award, collective agreement, or ministerial or wage determination which regulates the issue in dispute, employees and employers may not resort to industrial action over such issue.

Industrial action also is prohibited in relation to disputes of right and disputes of interest if any of the parties is engaged in an essential or maintenance service. An essential service is one which, if interrupted, would endanger the life, personal safety, or health of the whole or part of the population. It includes the parliamentary service, police service, and others that may be determined by an essential services committee.

The essential services committee can declare a service to be a maintenance service if its interruption would have the effect of material physical destruction to any working area, plant, or machinery of an employer. For example, businesses which operate kilns that require many months to heat up if allowed to cool, or mining slopes which close up if not maintained daily, would likely qualify as maintenance services.

An employer who has the whole or part of his business declared as a maintenance service, and whose other employees engage in protected strike action, is prohibited from employing replacement labor for the duration of the strike.

\textsuperscript{11} This pertains to disputes in respect of which the Labor Relations Act provides a remedy in the form of adjudication by the CCMA, an accredited Bargaining Council or private agencies, or the Labor Court.
Protected Strikes and Protected Lockouts

Parties are required to follow the pre-strike or pre-lockout procedures under the Labor Relations Act, unless different procedures are prescribed by a collective agreement binding upon such parties. The statutory procedure is as follows:

- The issue in dispute should first be referred to a Bargaining Council with jurisdiction (or to the CCMA if none exists), which has thirty days to resolve the dispute.
- After the lapse of thirty days or the failure of statutory endeavors to resolve the dispute, whichever occurs first, the Bargaining Council or CCMA should issue a certificate. The workers and trade union should then give forty-eight hours’ notice to the employer and, where applicable, to the relevant employers’ organization and Bargaining Council of the commencement of their strike.
- Where the issue in dispute relates to an alleged refusal to bargain, an advisory (non-binding) arbitration award should first be obtained from the CCMA before notice of the strike or lockout can be given.

Employees’ and employers’ organizations are relieved of any obligation to hold a ballot for their industrial action to be protected, even when balloting is required by the union’s or employers’ organization’s constitutions.

An employer or employee also is not required to comply with the statutory procedure where the dispute has been dealt with (a) in terms of the constitution of the Bargaining Council to which he is a party, (b) in terms of the procedures in a collective agreement, or (c) where the employees wish to strike in response to a lockout which has not complied with the Labor Relations Act.

If the subject matter of the dispute concerns an employer’s unilateral change of the terms and conditions of service, the employee or union referring the dispute to a Bargaining Council or the CCMA may require the employer to desist from implementing the change or to restore the status quo (where the change has already been made) for the period of the conciliation procedures. If the employer fails to do so within forty-eight hours of the notice, the employees involved may strike without further notice.

Protections for Industrial Action Compliant with the Labor Relations Act

Employees engaging in industrial action that is compliant with the requirements of the Labor Relations Act are protected against dismissal, i.e., making the dismissal automatically unfair. However, this does not prevent an employer from dismissing employees who are guilty of serious misconduct during a strike or where the employer’s operational requirements justify dismissal during the strike.

12 If the employer is the State, seven days’ notice is required.
Participants in procedural industrial action also are immune from civil or delictual claims which they would otherwise be exposed to as a result of their actions. Procedural industrial action will not constitute a breach of contract or a delict unless the acts in contemplation or furtherance of a strike or lockout also constitute criminal offenses. In such a case, the protection afforded against civil liability is forfeited.

Where industrial action is embarked upon without the participants having first complied with the provisions of the Labor Relations Act, such action will be unprotected and the following consequences may result:

- The Labor Court may be approached by the other party for an order proscribing the industrial action;
- A party suffering loss as a result of the unprotected industrial action may approach the Labor Court for an award of just and equitable compensation;\(^{13}\)
- Participating employees may be dismissed subject to fairness. In determining the substantive fairness of the dismissals, regard should be paid to the seriousness of the contravention of the Labor Relations Act, the attempts made to comply with its provisions, and whether or not the strike was in response to unjustified conduct by the employer.

Prior to dismissing employees in these circumstances, the employer should issue an ultimatum which should clearly state what is demanded of such employees, when and where they are required to comply, and the consequence of noncompliance. The ultimatum also should give the strikers sufficient time within which to reflect on their actions and to respond thereto, either by compliance or rejection. The employer is expected to call on the union whose members are striking to intervene. The striking workers also should be given an opportunity to be heard before dismissal.

**Secondary Strikes**

A secondary strike is now expressly acknowledged as a legitimate form of industrial action in South African labor law. Where employees strike in support of a primary strike, they effectively take part in a secondary strike. For a secondary strike to enjoy the same protections afforded ordinary procedural strikes, the following requirements should be met:

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\(^{13}\) The Labor Court will consider the offending party’s attempts to comply with the Labor Relations Act, whether or not the action was premeditated or in response to unjustified conduct by the other party, whether there was compliance with any order prohibiting the industrial action, the interests of orderly collective bargaining, the duration of the industrial action, and the financial positions of the parties.
• The primary strike should be protected;
• Seven days’ notice of the secondary strike should be given to the secondary employer; and
• The nature and extent of the secondary strike should be reasonable in relation to its possible direct or indirect effect on the business of the primary employer.

**Picketing**

Picketing also is recognized as a legitimate form of industrial action. All that is required to picket with protection is for a registered trade union to authorize its members and supporters to peacefully demonstrate in support of any protected strike or in opposition to any lockout.

With the permission of the employer (which should not be unreasonably withheld), the picket may be on his premises. The parties also may approach the CCMA with a view to establishing picketing rules which, failing agreement between the parties, will be determined by the CCMA.

**Protest Action**

The Labor Relations Act allows trade unions to take protest action where it does not qualify as a strike, such as in the following circumstances:

• Where it has been called by a registered trade union or union federation; or
• Where notice has been given to the NEDLAC of the reason for and nature of the proposed action, and the NEDLAC has considered the matter and has been given at least fourteen days’ notice of the intention to commence with the action.

The Labor Court may be approached to prohibit an unprocedural protest action or issue a declaratory order regarding its proprietary and proportionality. If employees participate in the protest action in defiance of a Labor Court order, they lose their protection against dismissal.

**Workplace Forums**

*In General*

The design of workplace forums is intended to facilitate a shift from adversarial collective bargaining on all matters to joint problem solving and participation on certain issues. The idea is that wages and other distributive issues should continue to be dealt with by collective bargaining, while matters such as strategic business decisions and production-related matters (e.g., introduction of new technology, health, and safety) should be subject to consultation between employers and workplace forums on a participative basis.
However, workplace forums have been treated with a degree of circumspection by established trade unions, who are concerned that workplace forums undermine their support base on the factory floor. The negotiated solution which has been included in the Labor Relations Act to accommodate this concern is that the establishment of workplace forums can now only be triggered by a representative union, i.e., a union with majority representation in a particular workplace.

*Establishment of Workplace Forums*

In addition to the requirement that a workplace forum can only be established at the request of a representative trade union, the workplace also should have more than 100 employees before a workplace forum can be set up. For purposes of the provisions of law regarding workplace forums, senior managerial employees\(^\text{14}\) are excluded from the definition of employees.

The representative union simply applies to the CCMA for the establishment of a workplace forum. After determining that requirements have been complied with, the CCMA will appoint one of its commissioners to assist the parties in establishing a workplace forum.

The commissioner will attempt to facilitate the conclusion of a collective agreement between the parties to regulate the operation of the workplace forum. In the absence of agreement, the workplace forum can be constituted by the commissioner even against the employer’s will. The commissioner also can determine the provisions of the workplace forum’s constitution and arrange for the election of its first members if the parties cannot agree in this regard.

A trade union-based workplace forum also may be established. Where a union is recognized by an employer as the collective bargaining agent, it can apply for the establishment of a workplace forum and choose the members thereof from the ranks of its shop stewards without going through an election process.

Ordinarily, members of the workplace forum have to be elected by the general body of employees in the workplace, and the distribution of seats in the workplace forum would be in accordance with a formula which reflects the occupational structure of the workplace. Workplace forums will vary in size from five members for small workplaces to twenty members for large workplaces\(^\text{15}\).

\(^{14}\) These are employees with authority to hire and fire, determine policy, or represent the employer against the employees in the workplace where situations of possible conflict exist.

\(^{15}\) If a workplace has over 1000 employees, a full-time member whose salary is paid by the employer may be appointed to the workplace forum.
Functioning of Workplace Forums

The functioning of workplace forums which are established by collective agreements will be regulated by the terms of such agreements or by the Labor Relations Act in the absence thereof. The Labor Relations Act requires the workplace forum to hold regular meetings as itself and with the employer, and periodic meetings with all the employees in the workplace. These meetings should be held during working hours without loss of pay to participating employees.

At meetings with the employees, the employer is required to present a report of the business’ financial and employment situation, its performance since the last report, and its projected performance for the short-term and long-term.

The employer also should provide the workplace forum with adequate facilities to be able to perform its functions. A workplace forum also can call on the assistance of experts in the performance of its functions. Such experts can attend and address meetings of the workplace forum and are entitled to any information to which the workplace forum would be entitled.

Specific Matters for Consultation

The employer should consult with the workplace forum to reach a consensus before any proposal in relation to certain issues can be implemented. The employer should give the workplace forum an opportunity to make representations and advance alternative proposals during these consultations. If the employer does not agree with any of these representations or proposals, he should state his reasons for disagreeing. Unless the specific matters for consultation are regulated by a collective agreement, an employer should consult with the workplace forum on the following issues:

- Restructuring of the workplace, including the introduction of new technology and work methods;
- Changes in the organization of work;
- Partial or total plant closures;
- Mergers or transfers of ownership;
- Dismissal of employees based on operational requirements;
- Exemption from any agreement or law;
- Job grading;
- Criteria for merit increases and discretionary bonuses;
- Education and training;
- Product development planning; and
- Export promotion.

This list may be extended by agreement, upon direction from a Bargaining Council, or by law. If measures in relation to these items are already in place,
they will not be subject to consultation unless changes thereto are proposed by the employer. Nevertheless, the workplace forum can request a review of (a) criteria for merit increases or discretionary bonuses, (b) disciplinary codes and procedures, and (c) rules for proper regulation of the workplace, other than work-related rules.

Joint Decision-Making

Certain issues also are required to be matters for joint decision-making by the employer and the workplace forum. In this case, the employer is prohibited from implementing his proposal in relation to specific issues without the workplace forum’s prior agreement. Unless matters for joint decision-making are regulated by collective agreement, proposals on the following are required to be subject to joint decision-making:

- Disciplinary codes and procedures;
- Rules relating to the proper regulation of the workplace insofar as they apply to conduct not related to the work performance of employees;
- Rules designed to protect and advance persons disadvantaged by unfair discrimination (affirmative action programs); and
- Changes by the employer or his appointed representatives on trusts or boards of employer-controlled schemes to the rules regulating social benefit schemes.

This list may be extended or reduced by collective agreement, or it may be extended by law. If the employer and workplace forum fail to reach a consensus, the pertinent matter is referred to the CCMA for conciliation and, if necessary, arbitration.

Disclosure of Information

Employers are required to disclose to the workplace forum all relevant information that will allow it to effectively engage in consultation and joint decision-making, with limited exceptions. The workplace forum is entitled to inspect or be furnished with copies of documentary information which is the subject of the duty to disclose.

Disputes with regard to disclosure of information are referred to the CCMA. It can order the full disclosure of the information or disclosure on terms designed to limit any harm which may be caused thereby. In the event of a breach of confidentiality by the workplace forum, the CCMA also has the power to withdraw its right to information for a specified period.

Health and Safety Protection in the Workplace

In General

Under common law, the employer has a general duty to provide healthy and safe working conditions for his employees. On the other hand, the Constitution
provides that every person has the right to an environment which is not detrimental to his health or well being. The basic rights created by the common law and the Constitution are enhanced by the Occupation Health and Safety Act (OHSA) and relevant regulations.

An employer operating in the mining industry is covered by the Mine Health and Safety Act Number 29 of 1996, which requires employers and employees to identify hazards and minimize, control, and eliminate risks pertaining to health and safety at mines. Otherwise, the OHSA applies to most employers and employees, including agricultural workers, domestic workers, State employees, and students, but it does not cover labor brokers and employees who fall under the Merchant Shipping Act Number 57 of 1951. The provisions of the OHSA cannot be bypassed by agreement.

General duties are imposed on employers to provide and maintain, as far as is reasonably practicable, a working environment that is healthy and safe. The broad duties imposed by the OHSA are refined by regulations and safety standards framed for different sectors.\(^{16}\)

**Cooperation and Self-Regulation**

Every employer who employs more than twenty employees at a workplace should appoint health and safety representatives in writing within four months of commencing business. All activities in connection with the designation, function, and training of these representatives should be performed during ordinary working hours. The health and safety representatives are tasked to:

- Review the effectiveness of health and safety measures;
- Identify potential hazards and major incidents;
- Examine the causes of incidents at the workplace in collaboration with the employer;
- Investigate complaints by employees and make representations to the employer on matters concerning health and safety;
- Inspect the workplace, articles, substance, plant, machinery, or health and safety equipment after reasonable notice to the employer of such intention,

\(^{16}\) The specific regulations that are currently in force are the Environmental Regulations for Workplaces; Driven Machinery Regulations; General Machinery Regulations; Electrical Machinery Regulations; Regulations concerning the Certificate of Competency; Electrical Installation Regulations; Lift, Escalator, and Passenger Conveyor Regulations; Regulations for the Integration of the OHSA; Regulations for Hazardous Chemical Substances; Vessels under Pressure Regulations; Major Hazard Installation Regulations; Regulations for Hazardous Biological Agents; Diving Regulations; Asbestos Regulations; Lead Regulations; Explosives Regulations; Noise-Induced Hearing Loss Regulations; Construction Regulations; and Facilities Regulations.
and to participate in consultations with inspectors during inspections and in receiving information from inspectors; and

- Attend meetings of the health and safety committee.

Health and safety committees should be established in each workplace where two or more health and safety representatives have been designated. These committees are tasked to: (a) make representations to the employer or the inspector regarding health and safety, and perform any prescribed function; and (b) keep records of such recommendations and reports made to inspectors. Health and safety committees are required to meet on a regular basis, but it remains the employer’s duty to ensure that a health and safety committee complies with the provisions of the OHSA.

**Independent Policing**

The function of independent policing is performed by the Department of Labor, whose inspectorate is endowed with special powers. An inspector may prohibit an employer from doing anything where health or safety is threatened, or he may prohibit exposure of an employee to any substance or condition likely to threaten health or safety.

He also may prohibit the use of plant or machinery if considered unsafe, or he may specify the steps to be taken to remedy a situation as well as a time frame within which such steps should be taken. Specific incidents should be reported to an inspector by the health and safety representatives or by the employer or user of the particular machinery, especially where the health and safety of any person was endangered.

An inspector should be notified immediately where a person dies, and the site at which the death occurred should not be disturbed, provided that action may be taken to prevent further incidents that may result in damage or loss of life.

Preliminary informal inquiries are held upon the occurrence of incidents, and formal inquiries may be held thereafter if directed by an inspector. Witnesses may be subpoenaed and the law governing criminal proceedings in the magistrate’s courts apply. Inspectors also may conduct investigations on a random basis, although these usually occur in practice when complaints are lodged.

Most breaches of the OHSA are punishable with a fine of up to ZAR 50,000 or ZAR 100,000 (depending on the type of offense), imprisonment of up to one year or two years, or both. This penalty applies to employers and employees alike.

An employer also is liable for the acts and omissions of his mandataries (e.g., agents, contractors, or subcontractors), unless arrangements and procedures have been agreed and set in place to ensure their compliance with the OHSA.
Workers' Compensation and Survivors' Benefits

The Compensation for Occupational Injuries and Diseases Act Number 130 of 1993 (COIDA) regulates compensation for employees who have been incapacitated through injury arising from the performance of their work.

It replaces the pursuit of a claim under common law against the employer where fault, reasonable foreseeability, and causation would have to be proved and where the employee would have to fund expensive litigation. The COIDA does not require that negligence be proved.

All employers are required to contribute levies to a statutory fund ("compensation fund") from which compensation is paid to injured workers. The trade-off is that the COIDA prevents the employee from claiming damages from the employer arising from an injury or disease suffered by him during employment. Where an employee meets with an accident or contracts an occupational disease which is due to the negligence of his employer or another employee, he may apply for increased compensation under the COIDA.

The provisions of the COIDA benefit all employees, regardless of what they may be earning, and includes casual employees, seasonal workers, and directors with employment contracts. Provision also is made for compensation for dependents.

Compensation is made from the compensation fund. The levies payable by the employer are determined by a formula that includes an assessment tariff determined in accordance with the risks associated with different types of work. Assessment tariffs are reviewed on a yearly basis.

There are a number of predetermined subclasses of work, each with its own assessment tariff. The subclass of work applicable to an employer will depend on the nature of his business. There also are differences within subclasses of work, depending on the accident costs of an employer. If the employer’s accident costs are high, the assessment tariff may be increased.

Any employee or dependent of an employee who contracts a listed disease, is injured, or dies as a result of an accident at work is entitled to claim compensation from the compensation fund. Dependents who are sufficiently close relatives and actually derive support from the employee also are entitled to bring a claim.

If the employee was involved in an accident while being driven from work at the employer’s expense, he can make a claim against the compensation fund. No payments will be made if the employee is temporarily disabled for three days or less.

The amount of compensation to which an employee is entitled depends on his remuneration at the time, and the nature and degree of his disability. The disability may be temporary or permanent, and temporary disability may be total or partial. Permanent disability also may be categorized in terms of degrees,
with reference to a schedule of the COIDA. Compensation expires when temporary disability passes but may be resumed if disability recurs.

Where death occurs, the amount of compensation is largely dependent on the number of surviving qualifying dependents. The compensation may be paid in the form of a pension, as a lump sum, or may be paid out in installments.

Employers are required to register with the commissioner managing the compensation fund and to furnish him with necessary information regarding the business and the employees. They also should furnish and maintain the prescribed equipment and services for first aid and to make the necessary arrangements for conveyance to a hospital or medical practitioner for medical attention. The costs incurred in respect of such conveyance and the medical expenses may be reclaimed from the commissioner at a later stage.

The employer should notify the commissioner of an accident within seven days after receiving notice of such accident, and should submit any claims for compensation in terms of the COIDA within twelve months from the date of the accident or death, otherwise the right to benefits lapses.

**Dispute Resolution**

The statutory dispute resolution forum under the Labor Relations Act is the State-funded CCMA which has both a dispute settlement and adjudicative function. However, private agreements aimed at dispute resolution, where parties would make use of accredited agencies or obtain accreditation for their private panel of mediators or arbitrators, also are encouraged by law.

If the parties fall under a Bargaining Council, they will be required to use the dispute resolution facilities which that council has in place. In the absence of private agreements or Bargaining Councils, the CCMA will be responsible for the resolution of disputes through conciliation, mediation, and (where applicable) arbitration. The CCMA has arbitration functions in specified instances, and these awards are final, subject only to the review of the Labor Court.

The Labor Court has Supreme Court status and national jurisdiction. It is constituted by a judge, and adjudicates on specific disputes. The Labor Appeal Court, which also is clothed with Supreme Court status, hears appeals from the Labor Court. It is constituted by three justices, and its decision may be appealed to the Supreme Court of Appeal (via a petition process), or to the Constitutional Court if the matter raises constitutional issues.

The Labor Relations Act distinguishes between justiciable and non-justiciable disputes. Justiciable disputes are the so-called “disputes of right” that should be arbitrated by the CCMA, a Bargaining Council, or be adjudicated upon by the Labor Court. Non-justiciable disputes comprise “interest disputes” that are not subject to adjudication, but only conciliation.
Employees generally have the right to strike over disputes of interest once conciliation procedures have been exhausted. Where there is a provision for private procedures and dispute resolution, such procedures should be followed.

The amendments to the Labor Relations Act which came into operation on 1 August 2002 introduced a hybrid situation for disputes over the substantive fairness of dismissals by reason of the employer’s operational requirements.

Ordinarily, such disputes would be classified as rights disputes over which employees would not have the right to strike. Now, employees may choose to claim relief through adjudication by the Labor Court or to strike over the fairness of their dismissal.

Dismissal disputes should be referred to the CCMA or the appropriate Bargaining Council having jurisdiction within thirty days of the dispute arising. Unfair labor practice disputes should be referred within ninety days of the act or omission which allegedly constitutes the unfair labor practice.

These forums should attempt to resolve the dispute within thirty days of referral. Should the CCMA or the Bargaining Council fail to resolve a justiciable dispute, such are determined by way of arbitration or are adjudicated upon by the Labor Court. The Labor Court has jurisdiction over disputes concerning:

- The application or exercise of the right to freedom of association;
- The refusal to admit a party to a Bargaining Council;
- Strikes, lockouts, breaches of picketing rules, and protest action;
- Automatically unfair dismissals;
- Dismissal on the grounds of operational requirements and strike dismissals;
- Discrimination under the EEA;
- Any matter concerning a contract of employment (concurrently with the civil courts); and
- Matters in terms of the BCEA (except certain offenses), including reviewing the performance of any function provided for in the BCEA.

The following are some of the disputes specifically reserved for arbitration:

- Disputes over organizational rights;
- The interpretation and application of collective agreements;
- Interest issues in essential services;
- Matters subject to joint decision-making and the disclosure of information in the context of workplace forums;
- Dismissals for misconduct or incapacity;
- The nonpayment of severance pay;
- Promotion, demotion, training, or the provision of benefits under the definition of unfair labor practice.
• Suspension or other disciplinary action short of dismissal under the definition of unfair labor practice; and
• The failure or refusal to reinstate or re-employ under the definition of unfair labor practice.

Parties may be represented in the Labor Court and Labor Appeal Court by admitted attorneys and advocates, a director or employee of the party, a member or officer of the party’s trade union or employer’s organization, or a designated agent or official of a council.

The same generally applies in the CCMA except that legal representation is not allowed in any conciliation proceeding, in arbitration proceedings following a dismissal for incapacity or misconduct, or in a dispute involving probation, except if permitted upon application in special circumstances.

Termination of Employment

In General

All employees have the right not to be unfairly dismissed. Unfair dismissals may be categorized as automatically unfair dismissals and dismissals which an employer cannot justify on the basis of the employee’s conduct, capacity, or the operational requirements of the business.

The employer also should effect a dismissal in accordance with a fair procedure. The Labor Relations Act includes a Code of Good Practice which sets out guidelines on substantive and procedural fairness in dismissal. 17 A dismissal is automatically unfair if:

• It contravenes an employee’s right to freedom of association;
• It is by reason of an employee’s participation in protected strike action;
• It is by reason of an employee’s refusal to do protected strikers’ work;
• It is effected to compel an employee to accept a demand relating to employment (lockout dismissal);
• It constitutes victimization for exercising any rights under the Labor Relations Act or for participating in any proceedings thereunder;

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17 “Dismissal” is defined by the Labor Relations Act beyond the ordinary reading of the term to include: (a) a failure to renew a fixed-term contract when there was a reasonable expectation of renewal; (b) a failure to allow an employee to resume work after maternity leave; (c) selective re-employment following a collective dismissal; (d) a situation where an employee terminates the contract because an employer has made continued employment intolerable (constructive dismissal); and (e) a situation where an employee terminates a contract after the transfer of the business of a going concern and the new employer has provided the employee with less favorable conditions or circumstances at work.
• It is by reason of an employee’s pregnancy or any reason related to the pregnancy;
• It constitutes discrimination on one of the listed grounds or some arbitrary ground;
• It is effected because of a transfer or reason related to the transfer of a business (or part thereof) as a going concern; or
• The dismissal was effected in contravention of the Protected Disclosures Act of 2000.

**Required Notice Periods**

The BCEA provides for the following minimum notice periods:

• One week for employees employed for six months or less;
• Two weeks for employees employed for more than six months but not more than one year;
• Four weeks for employees employed for one year or more; and
• Four weeks for farm workers and domestic workers employed for more than six months.

These minimum notice periods may not be shortened, even by collective agreement, but parties may agree to longer notice periods provided that no agreement may require an employee to give notice longer than that to be given by the employer. Notice should generally be in writing and employers can pay employees in lieu of notice. However, if an employee resides in premises supplied by the employer and the latter gives short notice or pays in lieu of notice, the employer is required to provide the employee with accommodation for one month or until the contract could have been lawfully terminated, whichever is longer.

**Procedures for Termination**

In misconduct dismissals, an employer should normally conduct an investigation (which need not be a formal inquiry) to determine whether there are grounds for dismissal. He should notify the employee of the allegations using a form and language that the employee can reasonably understand.

The employee should be given the opportunity to state his case, and should be given reasonable time to prepare a response. He also is entitled to the assistance of a trade union representative or fellow employee. After the inquiry, the employer should communicate the decision taken and preferably furnish the employee with written notice of such decision.

Discipline against a trade union representative (shop steward) should not be instituted without informing and consulting with the trade union. If an employee is dismissed, he should be given the reason for his dismissal and reminded of his
rights to refer the matter to a Bargaining Councilor, the CCMA, or to any
dispute resolution procedure established in a collective agreement.

If an employer cannot reasonably be expected to comply with these guidelines in
exceptional circumstances, he may dispense with pre-dismissal procedures.
However, the courts do not readily accept that it was not possible to hold a
hearing of some sort. In the case of dismissal for poor work performance, there
should be an investigation to establish the reason for unsatisfactory performance
and the employer should consider other ways, short of dismissal, to remedy the
matter.

An employee should not be dismissed for unsatisfactory performance before the
employer has given him appropriate evaluation, instruction, training, guidance,
or counseling, and only if he continues to perform unsatisfactorily after a
reasonable period of time for improvement. In the process, the employee has the
right to be heard and to be assisted by a trade union representative or a fellow
employee.

In the case of incapacity on the grounds of ill-health or injury, the employer
should investigate the extent of the incapacity or injury and all possible
alternatives short of dismissal, including the possibility of securing alternative
employment or adapting the duties or work circumstances of the employee to
accommodate his disability.

The employee also should be given the opportunity to state a case in response
and to be assisted by a trade union representative or a fellow employee.
Counseling or rehabilitation may be appropriate in certain kinds of incapacity,
such as alcoholism or drug abuse.

The 2002 amendments to the Labor Relations Act introduced pre-dismissal
arbitration as an alternative to internal pre-dismissal procedures as regards
dismissal for misconduct or incapacity. However, pre-dismissal arbitration can
only take place with the consent of the employee. The decision of the arbitrator
or commissioner is then final and binding on the parties, subject only to a review
process.

Where an employer contemplates dismissing an employee for participation in an
unlawful strike, he should contact a trade union official at the earliest
opportunity to discuss the course of action intended. He also should issue a clear
ultimatum that should state what is required of the employees and what sanction
will be imposed if they do not comply.

Extensive consultation by an employer is needed where dismissals on the
grounds of operational requirements are contemplated. Consultation is required
with the workplace forum, any registered trade union whose members are likely
to be affected by the proposed dismissals, the employees likely to be affected, or
representatives nominated by them for that purpose.

The consulting parties should attempt to reach consensus on appropriate
measures to avoid dismissals, to minimize the number of dismissals, to change
the timing of the dismissals, to mitigate the adverse effects of the dismissals, the method for selecting employees to be dismissed, and severance pay for dismissed employees. Relevant information should be disclosed to the other consulting party in writing.\textsuperscript{18}

The 2002 amendments to the Labor Relations Act distinguished between retrenchment exercises on the basis of the size of the employer and the scale of the exercise contemplated. If a big employer (i.e., employing more than fifty employees) contemplates a large-scale retrenchment exercise, a different process of consultation and facilitation with minimum time periods is required. If the employer falls under a Bargaining Council, the Bargaining Council Agreement should be checked for any special provisions relating to retrenchment which has to be complied with.

\textbf{Duties and Liabilities of the Employer}

Section 41 of the BCEA requires an employer to pay a retrenched employee severance pay in an amount equivalent to one week’s remuneration for each completed year of continuous service with the employer, unless the employer has been exempted from this obligation or the employee has unreasonably refused to accept an offer of alternative employment.

Severance pay should be calculated according to the employee’s remuneration at the time he is retrenched. This is the minimum payment required and does not negate any entitlement the employee may have to seek additional severance pay.

In this instance, remuneration means any payment in money or in kind made or owing to the employee in return for his working for the employer. Where the employee is paid commission or his remuneration fluctuates, severance pay is calculated on the basis of his wage during the previous thirteen weeks.

In determining the length of an employee’s employment with an employer for any provision in the BCEA, previous employment with the same employer should be taken into account if the break between the periods of employment is less than one year. Further, any previous payment made to an employee in respect of such previous service also should be taken into account.

Amendments to the BCEA in 2002 allow employees who lose employment as a result of the insolvency of the employer to claim severance pay on the same basis as employees dismissed for operational reasons. The claim is against the estate of the insolvent employer.

\textsuperscript{18} If the relevance of the information is disputed by the employer, then he bears the onus of showing that the information requested is not relevant.

\textsuperscript{19} Calculated with reference to the number of employees the employer proposes to dismiss in the current exercise and taking into account the retrenchments in the preceding 12 months.
The employer is required to pay any paid time off owing to the employee in respect of overtime, Sunday work, or annual leave. All employees, except those who work less than twenty-four hours in a month for an employer, are entitled to a certificate of service upon termination. The certificate should only reflect the reason for the termination if requested by the employee.

**Unemployment Insurance**

Unemployment insurance is regulated by the Unemployment Insurance Act and the Unemployment Insurance Contributions Act. The employer and the employee should each make monthly contributions to the Unemployment Insurance Fund (UIF) of one per cent of the remuneration paid to the employee during any month. Contributions are not required for employees who enter South Africa for the purpose of carrying out a contract of service and who are required to leave upon termination thereof (i.e., expatriates).

The employer should pay the total contribution of two per cent to the UIF. This total contribution is capped at remuneration not exceeding an amount stipulated by the Minister of Finance, which is currently ZAR 12,478 per month.

The UIF provides unemployment benefits to individuals who are temporarily unemployed or who left the workforce because of a fixed-term contract coming to an end, dismissal by the employer, or insolvency or death of the employer, provided the unemployed person reports to the claims officer and does not refuse to undergo training and vocational counseling under an approved scheme.

**Mandatory Job Retraining and/or Placement Programs**

Job retraining or placement programs are not mandatory upon termination of employment, but one of the issues stipulated for consultation in the event of an operational requirements dismissal is the possibility of future re-employment of employees who are dismissed.

Training programs by employers are encouraged under the Skills Development Act, which establishes an institutional and financial framework for ensuring the quality of education and training in the workplace.

Funding is obtained pursuant to the Skills Development Levies Act Number 9 of 1999 in the form of a levy on payroll. The levy is payable by all employers at a rate of one per cent of the aggregate monthly remuneration paid by or payable to them. An employer whose total remuneration for all his employees over the next twelve months does not exceed ZAR 500,000 is exempt from paying the levy.

Sector Education and Training Authorities (SETAs) have been established for various national economic sectors to develop and implement a sector skills plan, to monitor education and training in the sector, to promote learnerships and

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20 Unemployment Insurance Contributions Act Number 4 of 2002.
register learnership agreements, and to collect and disburse the skills
development levies in its sector, among others.

Any person who has developed a skills program may apply to a SETA with
jurisdiction for a grant or to the Director-General for a subsidy. To qualify for
such a grant or subsidy, a skills program should be occupationally based and,
when completed, should constitute a credit towards a qualification registered
pursuant to the National Qualifications Framework.

**Retirement**

South Africa currently provides very little social security or medical assistance
programs for the aged. These matters are currently not dealt with by the
government, except as to State employees. While government hospitals are
heavily subsidized, there is generally very little in the way of free medical
services for the aged.

However, a compulsory national retirement saving scheme may be introduced in
the future that will entail obligatory contributions from employers and
employees. The exact nature and terms of the scheme are not yet determined.

Persons who are over sixty years of age qualify for small social grants and other
supplementary grants from the government under the Social Assistance Act
Number 13 of 2004, provided they are resident citizens of South Africa.
However, these grants are not related to or dependent upon the particular
person’s previous employment or employer, and are based solely on his age and
financial need at the time.

Pension and provident and medical aid funds are usually privately managed and
contributions are usually linked to employment. While these funds vary in size
and benefits, they usually operate on the basis that the employer and the
employee each contribute fifty per cent. Total contributions usually amount to
approximately fifteen percent of income.

In many instances, employer contributions to medical aid schemes cease upon
retirement and workers should then carry the full burden of the contribution.
There is some form of pension or provident fund and medical aid scheme or sick
fund in most industries where a Bargaining Council is in existence. In certain
instances, Bargaining Councils have funded and set up basic healthcare clinics
for the benefit of workers and their dependents.

**Conclusion**

Employment law in South Africa is characterized by a high degree of legislative
intervention. The major post-1994 legislative enactments were the Labor
Relations Act, the BCEA and the EEA, which have been amended and refined in
subsequent years.
New and comprehensive legislation regulating data protection is due to be introduced in the near future. The Protection of Personal Information Bill of 2009 is in the process of being considered by Parliament. It is designed to regulate the protection of personal information in the public and private sectors, and will provide rights and obligations in relation to the handling of information about employees.

The matter of labor brokers is under debate, and employers who make regular and extensive use of labor brokers should start considering contingency plans for how they will meet their staffing requirements in the event that the use of labor brokers is banned or increased regulation results in the impracticality of their continued use.

It also is important to stay abreast of what the courts say about the application of legislative provisions to different factual circumstances as court precedent carries a lot of weight and provides additional guidance to employers and employees.
Spain

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Spain

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Introduction

Regulatory Sources
Among the most relevant regulatory provisions for labor law are:

• The Constitution of 1978;
• International laws and treaties;
• National legislation, in particular the Workers’ Statute, passed by Royal Legislative Decree Number in 1995; and
• Case law.

Conventional Sources

In General
A “conventional nature” refers to agreements of two types, i.e., collective and individual.

Collective Agreement
Collective agreements are those that have been subscribed to by employers and employees and which are applicable to a broad sector. The main example of this would be Collective Bargaining Agreements (both at a national or provincial level and on a smaller scope, such as those applicable to a company or work center).

Collective bargaining agreements must respect the minimum rights established by law which is why they generally improve labor conditions to levels above and beyond the minimum ones set forth by law.

Individual
The paradigm of the parties’ will is the labor contract. Both the company’s will and worker’s will to establish a labor relationship and the specific terms and conditions are established in the agreement. Generally, in labor law, the parties’ will is limited, as they must fulfill the minimum requirements established by the regulatory sources and the Collective Bargaining Agreements.
Other Sources

The term “legal principles” includes not only so-called general legal principles, which are applicable in all areas of law, but also principles specific to labor regulations (such as the pro operario principle, or the principle of unavailable rights).

The customs and usage of labor law refer to the customs within the area of the company itself and which must be respected by the parties.

Legal Relationship between Employer and Employee

Employment Contract

The Parties

Article 1 of the Workers’ Statute defines an employee in the following terms:

“Workers who voluntarily give their services in exchange for salary and within the organization and management of another person, physical or legal, named employer or businessman”.

Only a physical person can be an employee; a legal person, or group without a personality, can never be an employee. In fact, the personal character is of such relevance that the substitution of the employee himself is not allowed (contrary to what can happen with the employer as this can be changed, such as in the case of a corporate succession).

The rendering of services by an employee must be voluntary, i.e., with the consent and acceptance of the employee. Services rendered in virtue of a labor relationship must be paid. Without payment there is no labor relationship. Working for someone constitutes one of the most characteristic marks of an employment relationship. Basically, working for someone has two perspectives, i.e., being excluded from the profits (the ownership of the profits of the employees’ work belongs to the employer and not the employee) and not assuming the risks of the activity (which are borne by the employer).

The employee is submitted to the organizational and disciplinary powers of the employee. Apart from the above definition of an employee, the law establishes a series of exclusions of relations that, in the Workers’ Statute, are not labor relationships. Thus, the figure of the employee is delimited by a double perspective; on the one hand, it establishes the characteristic marks of the employee himself and, on the other hand, certain relationships are excluded. These legal exclusions are the following:

- The service relationship of a civil servant;
- The personal obligatory service;
• The activity which is purely and simply limited to the mere performance of the position of the Member of the Board or member of the administrative bodies in the companies, provided that the activity in the company only entails carrying out duties inherent to that position;
• Work carried out as a matter of friendship, benevolence, or good neighborliness;
• Family jobs, unless those that carry them out can prove they are salaried;¹
• The activity of people who intervene in mercantile operations on behalf of one or more employers, provided they are personally obliged to answer to the successful conclusion of the operation assuming the risk and fortune of it; and
• The activity of people who render their services to the transport service in virtue of administrative authorizations which they have carried out by means of the corresponding price, with commercial vehicles for public service who are the owners or who directly have a vehicle at their disposal, even when the services are carried out continuously for the same company, also are understood to be excluded from the labor scope.

The Workers’ Statute defines the employer in the following terms:

“For the purposes of this Law, the employer shall be an individual, legal entity, or group that receives the services rendered by the persons mentioned in the paragraph above [employees], as well as the services rendered by people contracted to provide work for other companies through legally constituted temporary employment agencies.”²

Bearing in mind the abovementioned definition, one can conclude that the employer is not only the owner of the business, but also is the one who has the capacity to control the services to be rendered in the company, irrespective of the legal authority pursuant to which he is able to do so. The Supreme Court’s case law has declared that the employer is the one that has the infrastructure and organizational autonomy and supervises and controls the rendering of services of the employees. Bearing in mind the above, one must use the concept of employer in the broad sense, which includes a legal person (a company) as well as a group of companies, a community of assets and a physical person.

Capacity of Parties

The Employee. In labor law, the capacity of the employee to sign an employment contract is determined by the civil legislation, with some specialties

¹ For these purposes, the Workers’ Statute considers family to be the spouse, descendants, ascendants, and other blood relations or affinity, up to second grade inclusive and, if appropriate, by adoption provided they live with the employer.
² Workers’ Statute, art 1.2
established by the labor regulations. In general terms, those that have the capacity to sign a contract from the perspective of labor law are:

- Those who have the capacity to act in accordance with the Civil Code; and
- Minors under the age of eighteen and over sixteen years of age, who are independent or who act with the consent of their parents or tutors or with authorization of the person or institution responsible for them.

Should the capacity requirements not be met, the employment contract could be declared null and void, in accordance with the Civil Code.

**The Employer.** The employer is an individual or entity to which he can be legally conferred with the reception of the services rendered by the employee, at a certain moment. From the previous definition of employer it can be deduced that, unlike with the employee, any individual or entity has the capacity to be an employer. Therefore, for example, entities without a legal personality (such as communities of assets) and a number of companies (in the cases of groups of companies) can be employers.

**Special Employment Relationships.** Apart from defining what a labor relationship is and excluding certain relationships from the scope of employment law, the Workers’ Statute establishes a third list of employment relationships, but which are of a special nature and are subject to the following specific regulations:

Top executives are not included in the Workers’ Statute.³ This relationship is regulated by Royal Decree Number 1382/1985 of 1 August 1985, by virtue of which top executives are considered to be those persons that exercise powers inherent to the legal ownership of the company and regarding the general objectives of the company, with autonomy and full responsibility, only limited by the criteria and direct instructions given by the person or superior governing and administrating bodies of the company which respectively occupy that ownership.

Persons in domestic services are governed by Royal Decree Number 1424/1985 of 1 August 1985. The object of this special employment relationship is for contracts for domestic services or activities carried out at home, as well as for the care of family members or people who live at home, and all nursery, gardening, or driving of vehicles when they are carried out as a part of the total domestic task.

Persons sentenced to prison in penitentiary institutions are regulated by Royal Decree Number 782/2001 of 6 July 2001, applicable to the inmates who develop a labor activity in the workshops of penitentiary centers, as well as those who carry out working sentences in favor of the community.

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³ Workers’ Statute, art 1.3.c).
Professional sportsmen, whose special relationship is regulated by Royal Decree Number 1006/1985 of 26 June 1985, are considered to be those who regularly and voluntarily devote a sporting practice for, and in, the organizational and managing scope of a club or sport entity, in exchange for a remuneration.

Performers in public shows are governed by Royal Decree Number 1435/1985 of 1 August 1985, which establishes regulations applicable to those who voluntarily devote an artistic practice for, and in, the organizational and managing scope of public shows’ organizers or employers, in exchange for remuneration.

Persons participating in commercial transactions on behalf of one or more enterprises without assuming their risk and fortune are regulated by Royal Decree Number 1438/1985 of 1 August 1985, applicable to those relationships by virtue of which one physical person, acting as a representative, mediator, or any other denomination which identifies him in a labor scope, is obliged with one or more employers, in exchange for remuneration, to personally promote or arrange mercantile transactions on their behalf, without assuming their risk and fortune.

Disabled employees who render their services at special employment centers are governed by Royal Decree Number 1368/1985 of 17 July 1985, applicable to those employees who have a recognized disability equivalent to or higher than thirty-three per cent and render their services at special employment centers.

Port dockers who render services through state companies or the persons carrying out the same duties as at ports managed by the Autonomous Communities are governed by Law Number 33/2010 of 5 August 2010.

Lawyers who render their services for, and within, the organizational and managing scope of a firm are regulated by Royal Decree Number 1331/2006 of 17 November 2006.

Medical residents in health sciences are governed by Royal Decree Number 1146/2006 of 6 October 2006 and Royal Decree Number 183/2008 of 8 February 2008. Religion teachers are subject to Royal Decree Number 696/2007 of 1 June 2007.

**Formalities of the Employment Contract**

The Workers’ Statute establishes freedom in the form of hiring employees, which can be undertaken either in writing or orally, having the same effect in both cases. Nevertheless, in practice, the hiring of employees is preferred in writing in order to accurately establish the conditions under which the hiring is carried out. Either of the parties could request that the contract be in written form, at any time during the employment relationship.

However, there must be a written contract when so required by a legal provision and, in all events, in the case of trainee contracts, formation contracts, relief and
fixed-discontinuous contracts, those entered into for the performance of a certain assignment or service, part-time and domestic employment contracts, as well as those entered into by employees hired in Spain to work abroad for Spanish companies.

Similarly, temporary contracts due to production circumstances with duration of over four weeks shall also be in written form. Should there be failure to observe this requirement, the contract will be deemed to be a full-time contract for an indefinite duration, barring evidence to the contrary.

From a practical point of view, it is recommended to write out an employment contract, not only to determine the conditions accurately, but also to avoid the application of the presumption of the existence of a labor relationship. In accordance with the Workers’ Statute, a labor relationship will be presumed existent provided that someone renders services for an employer and within the scope of an organization and management of another and receives payment for said service. The main consequences of this presumption can be summarized in as follows:

- Even though the contract has not been expressed either verbally or in writing, it exists;4
- The burden of the proof would be of the party defending who must prove there is no employment relationship; and
- In cases of reasonable doubt as to the correct qualification of the contract, the presumption would be applicable, and the labor regulation would apply.

Types of Employment Contracts

In General. An employment agreement may be arranged for an indefinite or a certain period of time. Spanish labor law provides the general rule that labor employment contracts are entered into for an indefinite period.

The first practical consequence of presuming employment contracts to be indefinite is that, unless it can be clearly proven that an employment contract was temporary, the Labor Courts will hold that the contract was for an indefinite term.

Temporary Contracts. Spanish law establishes several types of temporary contracts. These contracts are regulated in the Workers’ Statute5 and by means of a Royal Decree Number of 18 December 1998, concerning temporary employment contracts.

Contracts for a certain job or service with independence from the normal activity of the company are regarded to be temporary contracts. The duration of this

4 This confirms the informal character of the employment contract, and the existence of the possibility of entering oral employment contracts.
5 Workers’ Statute, art 15.
contract will, in principle, be uncertain and refer to the time considered necessary to carry out the work or service. However, its duration cannot exceed three years, extendible for a further twelve months by the Collective Bargaining Agreement. In cases of exceeded said limits of duration, the employment relationship will become indefinite.

Additionally, it is compulsory to clearly specify the work or service for which these contracts are executed. When the temporary contract terminates (i.e., when the job or service has finished), the company should pay the employee a severance compensation equivalent to:

- Eight days of salary per year of service for those temporary contracts subscribed before 31 December 2011;
- Nine days of salary per year of service for those temporary contracts subscribed as from 1 January 2012;
- Ten days of salary per year of service for those temporary contracts subscribed as from 1 January 2013;
- Eleven days of salary per year of service for those temporary contracts subscribed as from 1 January 2014; and
- Twelve days of salary per year of service for those temporary contracts subscribed as from 1 January 2015.

A second category includes contracts based on temporary production circumstances, excessive accumulation of work, and demand in seasonal peaks. Contracts for casual work may be entered into for a maximum of six months out of twelve, and they must expressly state the grounds for a limited duration and the agreed duration (the maximum duration of the contract can be extended up to twelve months, within a period of eighteen months, by means of the Collective Bargaining Agreement). These contracts should be formalized in writing.

The Labor Courts tend to consider that entering into several casual employment contracts with the same worker, although for a different work or service, circumvents the law. In these cases, the worker becomes a permanent member of the organization’s work force and may be terminated only by dismissal, with all procedural requirements.

In addition, when the temporary relationship terminates because the duration agreed in the contract has been reached, the company should pay the employee a severance compensation equivalent to eight to twelve days of salary per year of service depending on the date when the contract is subscribed (according to the proportional scale mentioned above).

Substitution employment contracts (known as “interim contracts”) are intended to replace workers who are entitled to a job reservation, by virtue of regulation, bargaining agreement, or private agreement, or to temporarily fill vacancies during a selection or promotion process for permanent employment. The
duration of the contract is the same as the duration of the absence of the replaced worker whose job has been reserved, or for the duration of the selection, which cannot be longer than three months in the latter case. It is compulsory to identify the employee who has been substituted and the reasons for the substitution.

Law Number 12/2001 introduced a new category for temporary employment contracts, the so-called insertion contract. This type of contract is arranged by the Public Administration with an unemployed person, and its object consists of the execution of a job or service of general or social interest.

Contracts for a particular work or service and substitution employment contracts should be formalized in writing, and contracts based on temporary production circumstances should also be formalized in writing when the duration is more than four weeks. Written contracts must be registered with the Employment Office within ten days of the date of execution. If the contracts are not formalized in writing, they will be considered indefinite unless the temporary nature of the contract is proven.

If a temporary contract is executed by circumventing the law, the worker will be considered a member of the staff for an indefinite term. Additionally, if the duration of the mentioned temporary employment contracts exceed twenty-four months out of thirty, with or without interruption, and the employee occupies the same or a different position for the same company or for another company of the group, by means of two or more temporary contracts or by means of a Temporary Employment Agency, the employment relationship also will become indefinite.

Likewise, according to a modification of recent law in the cases where the employment relationship has become indefinite due to the causes established above, the employer is obliged to give the employee a document informing the affected employee that he is a member of the staff for an indefinite term.

Practical Training and Job Qualification Contracts. Royal Decree Number 488 of 27 March 1998 establishes the conditions for practical training contracts and job qualification contracts. The maximum period for these contracts is two years, and the minimum period is six months.

Practical training contracts permit companies to make use of the services of school and university graduates who wish to receive practical experience in their respective fields of study during the next five years after the termination of their corresponding studies.

The salary for workers subject to practical training contracts may be reduced in a portion that ranges from sixty to seventy-five percent of the ordinary salary established by the Collective Bargaining Agreement for workers with similar tasks.

Job qualification contracts (also called “apprenticeship contracts”) permit the company to hire employees between sixteen and twenty-one years of age for the
purpose of learning a trade while performing services and being compensated for them. The remuneration must be the one set in the applicable Collective Bargaining Agreement, and it cannot be under the minimum salary which the government establishes every year for all professional categories.

**Part-Time Employment Contracts.** In accordance with Article 12 of the Workers’ Statute, modified by Royal Decree-Law Number 15/1998 of 27 November 1998 (as amended by Law Number 12/2001), part-time employment contracts are those by virtue of which the employee undertakes to provide his services for a determined number of hours per day, per week, per month, or per year, which are less than those of the scheduled working time of a comparable full-time employee.

For this purpose, “comparable full-time employee” will mean a full-time employee of the same company and work center, who is linked to the company with the same kind of employment contract and carries out an identical or similar job. If there is no “comparable full time employee”, full scheduled working time foreseen in the relevant Collective Bargaining Agreement (or, if there is no relevant collective bargaining agreement, the maximum legal scheduled working time will be deemed to be the full scheduled working time).

**Relief Contracts.** Relief contracts (*contratos de relevo*) are entered into for filling the part of the scheduled working time left by an employee (“the first employee”) of the company who reduces his working time between twenty-five and seventy-five percent with a new employee (eighty-five per cent if the relief employee is hired by means of a full-time indefinite contract).

The reduction of the scheduled working time can take place when “the first employee” fulfils all of the legal requirements to ask for retirement, except for age, and signs with the company a part-time contract. The duration of the “relief contract” is the period of time left until “the first employee” reaches the age of retirement.

**Special Clauses**

**Probationary Period.** It is possible to agree a probationary period in the employment contract, by virtue of which the employer and the employee are obliged to carry out the experiences which constitute the object of the proof, and during which both parties will be able to terminate the contract without the need to respect any prior notice or payment of a compensation of any kind (unless otherwise agreed).

The probationary period, which must be agreed in writing, will be bound by the duration limits which might be established in the Collective Bargaining Agreement for the employer, if any. If the Collective Bargaining Agreement does not establish anything with regards to the duration of the probationary
period, this cannot exceed six months for qualified technicians, or two months for all other employees.

If the probationary period passes without any of the parties terminating the contract, the latter will come into full effect, and the time already rendered will count as the employee’s seniority in the company.

**Exclusivity.** In general terms, Spanish legislation permits an employee to hold more than one job, and because of that, the same employee could simultaneously render services for different employers. Notwithstanding, this freedom has two limits, namely:

- A legal limit (the Workers’ Statute establishes that the employee cannot carry out employment services for different employers when it is considered to be unfair competition)⁶ and
- A conventional limit (the exclusivity agreement), which must be remunerated, taking into account that it is a restriction of the employee’s right to hold more than one job.⁷

**Permanence.** In those cases in which the employer pays for and provides the employee with a professional specialization, either with the purpose of launching certain projects or carrying out specific jobs, the permanence of the employee to remain rendering services for the same employer could be agreed by the parties for a determined period of time (which cannot have a duration of more than two years).

This agreement must always be formalized in writing and, if the employee does not comply with it (because he leaves the job before the agreed period), the employer would be entitled to a compensation for damages.

**Non-Competition.** Under Spanish law, it is possible to establish between the parties a post-contractual non-competition obligation. This obligation, which cannot surpass a two-year period, will only be valid if the following circumstances concur:

- The company has an effective commercial or industrial interest in such matter; and
- The employee receives an adequate, economic compensation from the company.

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⁶ The legal limit corresponds to the requirements of good faith and legal security and will prevent the employee from rendering services for competitor companies.

⁷ In this case, the employee could terminate the exclusivity agreement at any time, respecting 30 days’ prior notice to the employer, and recover his freedom to work in another job. If this occurs, the employee would lose the economic compensation or other rights related to his full dedication.
The payment of the compensation may be made either during the validity of the contract (i.e., before its termination) or after its termination. The payment usually consists of a percentage of the employee’s salary and, although the law does not specify the amount of “adequate compensation”, it would be approximately fifty to sixty per cent of the employee’s annual, fixed, gross salary.

The enforceability of such a clause (provided that all requirements are met) would not prevent the employee from rendering services for a competitor company. Thus, the Labor Court would not be entitled to forbid the employee to render services for the competitor. The consequence of this non-competition pact being breached is that the company would be entitled to claim compensation damages from the employee.

It is common practice in Spain to introduce a penalty clause for the employee’s breach, normally on the basis of the whole amount that the employee would have been entitled to receive during the non-competition pact, irrespective of the moment the breach takes place. However, the parties could agree on a higher compensation for the case of the employee’s breach. In any case, if there is a judicial conflict where the company claims a compensation for damages from the employee as a consequence of the breaching of the non-competition clause, the Labor Court would be entitled to moderate and reduce this penalty clause.

Finally, in accordance with Spanish law, the non-competition clause agreed between the parties would be valid even when the termination of employment is not justified, unless otherwise established in the contract. Therefore, if nothing specific has been foreseen in the contract in this respect, the non-competition clause would apply whatever the reason for termination (such as fair dismissal, unfair dismissal, voluntary resignation, and retirement). If the company wants to exclude from the scope of the non-competition clause any of these termination causes, the exclusions should be clearly specified in the contract.

Modifications to the Employment Contract

Substantial Modifications of Working Conditions

In General. The Workers’ Statute generally establishes that the employer may carry out substantial modifications to the working conditions only when economic, technical, organizational, or production reasons exist and can be proven. Likewise, in order to carry out such modifications, the company must fulfill certain formal requirements. In addition, the adoption of such measures must contribute to prevent a negative development of the company or to improve the company’s situation or perspectives through a more adequate organization of its resources in order to favor the company’s competitive position or to obtain a better response to the market demands.

The procedural issues applicable for carrying out the so-called “substantial modifications” differ depending on whether the modification is individual or
collective. There is an individual substantial modification of labor conditions, when the modification affects those labor conditions enjoyed by the employees under an individual concession (i.e., the employment contract).

On the contrary, a collective substantial modification of labor conditions should exist when the modification affects those conditions recognized to the employees by virtue of a collective agreement or to those conditions enjoyed by the employees by virtue of an employer’s unilateral decision with collective repercussions (with effects applicable to all, or most of, the employees). In virtue of the above, the individual or collective nature of the substantial modification does not depend on the number of employees affected but on the individual or collective origin of the condition to be modified.

**Individual Modifications.** The Workers’ Statute establishes that the employer must notify the employee and, if applicable, the employees’ legal representatives (works council or employees’ delegate) in the workplace, of the decision to amend the conditions at least thirty days before the date in which the modification will take occur.

With respect to the contents of the notification mentioned above, the letter must express the economic, technical, organizational, or production reasons that cause the adoption of such measures that the company is thinking of implementing. These reasons cannot consist of a simple, general statement as the company will have to be able to prove them, if necessary. With respect to the position of the employee, there are three options. The employee can accept the modification. If the employee does not accept the modification, he could ask the Labor Court to terminate the employment contract.

If the modification implies a change in the employee’s working time, timetable, or shift working regime, he would be entitled to ask for the termination of his employment contract and would be entitled to a compensation equivalent to twenty days of salary per year of service, with a maximum cap of nine months.

Moreover, if the company’s decision affects the employee’s professional training or dignity, and should the Labor Court deem the existence of the circumstances invoked by the employee, the employment contract will be terminated and the employee would be entitled to receive from the company a compensation amounting to forty-five days of salary per year of service up to forty-two months of salary.

If the employee does not terminate the employment contract, but he does not accept the modification adopted by the employer, he will be entitled to claim against the employer’s decision before the Labor Court, which will deem the modification to be fair or unfair. If there are no economic, technical, organizational, or production reasons to justify such amendment and/or they cannot be proven, the Labor Court will declare the right of the employee to maintain the same conditions that he/she had before the company’s decision.
Collective Modifications. The Workers’ Statute establishes that, prior to the adoption of the modification, there must be a round of talks between the employer and the employees’ legal representatives for a maximum period of 15 days. If there are no legal representatives in the company, the employer must maintain the round of talks with the employees directly. In this case (no legal representatives), the employees could opt to confer their representation to a commission composed of three employees of the company.

During such round of talks, the participants must discuss the justification of the modifications proposed by the employer and the possibility of reducing or avoiding its consequences and the measures addressed for that purpose.

On the other hand, during the round of talks, the parties must negotiate in accordance with the *bona fides* rule in order to reach an agreement and this agreement shall be adopted by the employer and the majority of the employees’ representatives.

After the round of talks, the employer must notify the employees of the decision concerning the modification, which will be in force after the 15-day period has elapsed. With respect to the position of the affected employees with regard to the employer’s decision, they will have the following options:

- Exercise the individual actions analyzed in the section corresponding to the individual modification above, and
- Without prejudice to the exercise of the individual actions, the employees may promote a collective conflict before the Labor Court. The promotion of the collective conflict will stop the procedure of the individual judicial actions until the former is finished.

Functional Mobility

**In General.** Functional mobility consists of the faculty of the employer to modify the functions of his employees within the company, and, although he is always subject to the demands of the principles of non-discrimination and contractual good faith, the Constitutional Court demands that there are strict, necessary reasons for the affectation of the employees’ fundamental rights.

As general limits of the functional mobility, which in any case must be respected, it is necessary to bear in mind that the latter cannot reduce the employee’s dignity, nor harm the formation and professional promotion of the employee.

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8 The existence of an agreement between the employer and the employees’ representatives during the round of talks does not cancel the possibility of an employee asking for the termination of the employment contract if he does not agree with the modification.
**Ordinary Mobility.** Ordinary mobility, or within the group (also called “horizontal or internal mobility”), occurs within the professional group or within equivalent professional categories. In general terms, ordinary mobility is found inside the employer’s scope of management power, and it is not, therefore, bound by causal requirements or temporary limits, provided that the limits required by academic or professional titles needed to carry out the service are respected.

**Extra-Group Mobility.** Extra-group mobility (also “vertical or external mobility”) is that which takes place within different professional categories. In this case, the functional mobility within the company is bound by various requirements and temporary limits. In particular:

- It will be necessary for technical or organizational causes to occur;
- The mobility can only be “for the necessary time”; and
- The employee must receive the remuneration corresponding to the functions he effectively carries out, except in the case that the new functions are inferior, in which case, his original remuneration will be maintained.

**Descending Mobility.** In the cases of descending mobility (i.e., in those cases in which the new functions are inferior to the previous ones), the employer must send a communication to the employees’ representatives. If a more intense functional mobility takes place or one different from the two mentioned above, as a consequence of organizational, economic, technical, or production causes, and emerges in a substantial modification of the contract, it will be necessary to:

- Reach an individual agreement between the parties; and
- Follow the provisions of Article 41 of the Workers’ Statute (substantial changes to the working conditions), in case no agreement with the employee is reached.

As for the formalization of the functional mobility, although the Workers’ Statute does not expressly establish it, it is advisable to carry out the notification in writing. The employer’s decision has direct executive effects, without prejudice to which, in relation to the employer’s decision, the employee can:

- Accept the functional changes;
- Challenge the employer’s decision, for example, if he understands that there are no justified causes which motivate the change of duties; and
- Terminate the employment contract.

The employee also can opt for the termination of the employment contract if it is a case of a substantial modification of the working conditions. In this case, if the

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9 In this case, the employee will apply to the Labor Courts for the employer’s decision to be declared null and void and to be replaced in his previous duties.
modification supposed a detriment to the employee’s professional dignity, the latter will be entitled to receive a compensation equivalent to that for unfair dismissal (forty-five days of salary per year of service, prorating in months the periods of time of less than a year, and with a maximum of forty-two monthly installments).

In addition, if, as a consequence of the functional mobility, the employee carries out duties greater than those of his original professional group, during a period of more than six months in one year, or eight months during two years, the employee can claim for promotion or, in any case, cover a vacancy corresponding to the duties he carries out according to the company’s applicable rules on promotion, apart from the corresponding salary differences.

**Geographic Mobility.** It also is possible to change the place in which the services are rendered. To this effect, the employer would be obliged to initiate a transfer procedure under Article 40 of the Workers’ Statute.

Under Article 40, the transfer of the employees’ workplace which would imply changes to the employees’ place of residence must be based on economic, technical, productive, or organizational reasons or on contracts referring to the company’s activity. The procedure to be carried out may be different depending of the nature of the transfer, i.e., if the transfer is individual or collective.

The transfer would be deemed to be a collective transfer when the transfer involves the whole work center (provided that the work center has more than five employees), or if the transfer does not involve the whole work center but implies at least the transfer of ten employees (in those companies which employ less than 100 employees), or ten per cent of the employees (in those companies which employ a number of employees between 100 and 300), or thirty employees (in those companies which employ more than 300 employees).

In the case of an individual transfer, the employer must notify it to the relevant employees (and to the employees’ legal representatives), explaining the objective reasons for the transfer (based on economic, technical, productive, or organizational grounds), and granting a thirty-day prior notice. The employees are in any case entitled to receive a compensation for the transfer.

The amount of the compensation is usually established in the relevant Collective Bargaining Agreement applicable to the company. If nothing is established in the Collective Bargaining Agreement, the compensation should at least include the expenses that employees would have to face as a consequence of the transfer (e.g., moving expenses and travel expenses).

In the case of a collective transfer, a negotiation process between the employer and the employees’ legal representatives must take place. If there are no legal representatives in the company, the employer must maintain the round of talks with the employees directly. In this case (no legal representatives), the
employees can opt to confer their representation to a commission composed by three employees of the company.

This negotiation process may be held for a maximum of fifteen days, and both the beginning of the negotiation and its results must be notified to the Employment Authorities. At the end of the negotiation period (whether it has ended with or without an agreement with the employees), the employer would notify the employees of its final decision concerning the transfer. This notification must comply with the abovementioned requirements established for individual transfers (i.e., an explanation of the reasons, prior notice of thirty days, and compensations to be paid due to the transfer). Once the decision of the transfer has been notified to the employees (both in the case of individual or collective transfers), the employee would have three options, namely:

- Accept the transfer receiving the relevant compensation corresponding to the expenses derived from it;
- Terminate the employment contract, being entitled to receive an indemnity equal to twenty days of salary per year of seniority, up to a maximum of twelve months of salary;¹⁰ and
- If the employee does not terminate the employment contract but does not accept the transfer, the employee would be entitled to claim against the employer’s decision before the Labor Court, which may declare the transfer fair or unfair.¹¹

In the case of a collective transfer, employees would be entitled to file this claim against the company on a collective basis (the so-called collective conflict), asking for the transfer to be declared unfair, and, consequently, asking for the right to be reinstated to the original workplace.

If the claim (both in the case of individual or collective claims) is accepted by the Labor Court, and the employer does not reinstate the employees to the original workplace (i.e., because the original workplace does not exist at that time), employees would be entitled to ask for the termination of employment, being entitled to receive the legal compensation foreseen for the case of unfair dismissal (forty-five days of salary per year of seniority, up to a maximum of forty-two months of salary), and with the possibility (depending on the circumstances of each case, and taking into account possible damages incurred by the employee) to receive an additional compensation of fifteen days of salary per year of seniority and up to a maximum of twelve months of salary.

¹⁰ This individual entitlement to terminate the employment contract also can be terminated even if the above-mentioned round of talks has ended with an agreement with the employees’ legal representatives.

¹¹ If the Labor Court declares the transfer unfair, the judgment will declare the employee’s right to be reinstated to the original workplace.
Foreign Employees

Foreign employees who are not citizens of a Member State of the European Union (EU) should have the corresponding work and residence permits in order to render services for a company in Spain. In order to request this work and residence permit it can be established that, in general terms, the Employment Authorities would need to check the current employment situation in Spain and, if there are unemployed persons registered with the Employment Offices which, according to their professional records, suit the position requested by the company, such administration would probably deny the work permit and residence permit application.

In addition, in order to request the work and residence permits, the company which wants to hire the foreign employee would have to hire him in Spain (not in the country where the company is based or where the foreign employee was rendering services). Likewise, a foreign employee cannot commence rendering services for the company in Spain until he has obtained the permits.

In the case of EU employees, in principle, they would only need to ask for a Resident’s Certificate (which also contains the Foreign Identification Code) at the Spanish Police Offices. However, it is not necessary for EU employees to obtain the Certificate in order to start rendering services for the company in Spain.

Corporate Succession

Under Spanish law, employees will only be automatically transferred from one company to another company when such transfer occurs in the framework of corporate successions, transfer of work centers, or autonomous productive units, as defined in Article 44 of the Workers’ Statute.

In this sense, pursuant to Article 44, a succession of companies may not terminate on its own the employment relationships; the new employer will be subrogated in the employment and Social Security rights and obligations of the former, including the commitments with regard to pensions in the conditions foreseen in its specific regulation and, in general, the many obligations in terms of complementary social protection that the assigning had acquired.

A corporate succession exists when the transfer affects an economic unit which keeps its identity, the unit being understood to be a whole of organized means with the purpose of carrying out an essential or accessory economic activity.

If the assets transferred do not constitute an independent business unit, the automatic transfer of employees foreseen under Article 44 will not be applicable and, therefore, no employees will be transferred along with said assets. In this sense, from a labor point of view, it is important to take into account what requirements are necessary for a business to be considered an autonomous activity, these being:
• Autonomy — The productive unit or line of business transferred must operate autonomously (i.e., it constitutes an economic unit itself); and

• Transfer of assets — Together with the activity and the related contracts, it is necessary to transfer the assets affected by such transfer.

As stated above, if the requirements are met, the transfer of such line of business will imply the automatic transfer of those employees who work exclusively for such business. Only those employees with ordinary employment contracts (either temporary or with indefinite employees) in force at the time of the transaction will be transferred, but the transfer will not affect top management employees whose contracts are based on Royal Decree Number 1382/1985 and who are entitled to terminate their employment contracts.

Concerning the regime of liabilities of the companies (transferor and transferee), labor law establishes that, in transfers that take place by *inter vivos* acts, the transferor and the transferee will be jointly and severally liable for three years for employment obligations that arise prior to the transfer and that had not been fulfilled.

Additionally, the transferor and the transferee also will be jointly and severally liable for obligations that arise after the transfer, if the cession is declared to be constitutive of a criminal offence. Under the frame of a corporate succession, the transferor and the transferee will have to inform the legal representatives of their respective employees, affected by the change of ownership, of the following points:

• The anticipated date of the transfer;

• The reasons for the transfer;

• The legal, economic, and social consequences of the transfer of employees; and

• The foreseen fundamental changes in the employment contracts applied to workers.

The transferor must provide the information mentioned above sufficiently in advance, before carrying out the transfer, and the transferee will be bound to grant this information sufficiently in advance and, in any case, to the employees if their employment and working conditions are affected by the transfer.

The transferor or the transferee who intends to adopt, due to the transfer, working measures in relation to the workers will be obliged to initiate a consultation period with the workers’ legal representatives on the measures foreseen and their consequences for the workers. Such consultation period will have to take place sufficiently in advance, before the application of the measures.
During the consultation period, the parties will have to negotiate in good faith, trying to come to an agreement. When the measures foreseen consist of collective movements or substantial modifications of the collective working conditions, the consultation period procedure to which the last paragraph refers to will be required to adjust to what is established in Articles 40.2 and 41.4 of the Workers’ Statute.

**Terms and Conditions of Employment**

**Remuneration**

*In General*

Salary is considered to be the remuneration for workers, whether in money or in kind, and received in exchange for their services. There are different types of salaries: those paid per unit of time, those paid per unit of work, and mixed types.

There are several elements which make up the salary, the so-called base salary and salary supplements. The former is understood to be that amount paid for fixed work per unit of time, whereas the latter includes various remunerations added to the base, according to certain personal or other circumstances related to the job or for the quality or quantity of work.

While it is possible to seize salaries in Spain, the minimum salary enjoys a privilege of absolute exemption from seizure. Salaries in excess of the minimum enjoy a relative exemption. The law establishes what portion of salaries may be seized, depending on their quantity and drawing a distinction between debts of maintenance and other types of debts.

Furthermore, the Workers’ Statute confers that the condition of a “super-privileged” creditor in providing for wage credits for the last thirty working days, in an amount not exceeding double the “Inter-Professional Minimum Salary”, will prevail over any other credit, although secured by pledge or mortgage. Wage credits also will prevail over any other credit as well as the objects manufactured by the employees, as long as they belong to the employer.

All other wage credits will be deemed to be especially privileged credits and will prevail over any other credit, except those secured by pledge or mortgage. On the other hand, Law Number 22/2003 of 9 July on Bankruptcy and Insolvency, which entered into force on 1 September 2004, contains a specific regulation regarding the classification of credits. Thus, the following are considered credits against the assets of bankruptcy, namely:

- Credits for salaries corresponding to the last thirty days of work prior to the declaration of the bankruptcy or insolvency, up to a maximum of double the minimum inter-professional salary; and
• Credits corresponding to the compensation owed in case of termination of employment contracts agreed by the Mercantile Judge (as the Law on Bankruptcy and Insolvency grants jurisdiction in certain employment and Social Security matters to the new Mercantile Courts).

There is a Salary Guarantee Fund, which is a special insurance entity which covers certain risks relating to employee’s salaries. It is financed by contributions from employers. The government annually sets the inter-professional minimum salary, based on average productivity, the general economic situation, and the Consumer Price Index.

Hours of Work, Holidays, and Leave

Hours of Work. The Workers’ Statute provides for minimum rights which can be expanded by Collective Bargaining Agreements. The duration of the working hours may be established by collective agreements or by the employment contract, although working hours may not exceed forty per week. The law recognizes a minimum time off of one-and-a-half days per week.

Holidays. Prescribed vacation is thirty calendar days per year, and bank holidays are annually established by the Government. Bank holidays depend on the place or the Autonomous Region. The minimum conditions for working hours generally include a maximum working week of forty hours or five and a half days, and a requirement that overtime may not be more than eighty hours a year. The minimum overtime paid may be no less than the value of the regular working hour. Overtime must be paid for, or offset with rest periods, as agreed in each individual employment contract or in the Collective Bargaining Agreements.

Leave. As an example of paid leave, an employee would be entitled to fifteen days for marriage, two to four days for serious illness or death of a close relative, as needed for public service, sixteen weeks for maternity leave (either parent of a child less than nine months old also has the right to a one-hour break or a half-hour reduction of the working day), and two days (four days if traveling is required) for paternity leave.

A mother is entitled to 16 weeks of remunerated maternity leave, which can be extended by two additional weeks in cases of a disabled child or multiple births, in which case this extension should be understood for each child after the second one. Otherwise, a father is entitled to thirteen weeks of remunerated paternity leave, which can be extended by two additional days in cases of a disabled child or multiple births. If both the father and the mother work, it would be possible for the father to enjoy part of the period of leave simultaneously or successively with the mother. In this case, the mother must enjoy the six weeks immediately after the birth, and the sum of the period of leave enjoyed by the parents
simultaneously cannot exceed the maximum legal period (sixteen weeks) of maternity leave.

Spanish law also provides a period of leave in the event of the adoption of a child which will be in the same terms as explained above if the child adopted is six years old or younger, or when the child adopted is over six years of age but is handicapped or has difficulties adapting to his new surroundings. The period of leave will commence on the date of the corresponding administrative, or judicial, resolution declaring the adoption in force. In the event of an international adoption, the parents may enjoy the period of leave four weeks before the adoption resolution.

Unpaid leave of absence is provided for up to three years to one parent, per child born, and four months to five years for employees who have more than one year’s service. Either parent of a child less than eight years old has the right to between one-half and one-third of the reduction in her working hours (with the corresponding proportional reduction in wages). There also are mandatory leaves, such as if the employee chooses to devote more than twenty percent of such employee’s working time within a three month period to public office or public service.

** Discrimination  

Article 14 of the Constitution establishes the fundamental right of equality in the following terms:

“Spaniards are equal under Law, and no discrimination can prevail for any reason of birth, race, sex, religion, opinion, or any other condition or circumstance whether personal or social.”

In accordance with the Article and the Workers’ Statute, any legal provision, Collective Bargaining Agreement clause, individual agreement, employer’s decisions, and terminations which could be considered discriminatory on grounds of sex, civil status, age, race, social condition, religion, political ideas, belonging (or not) to a trade union, or because of language would be declared null and void and without any effect, irrespective of its scope (i.e., working schedule and remuneration). The same would be applicable to those decisions which are apparently fair but indirectly affect a certain sex and are considered discriminatory, such as behavior indirectly connected to the sex of the person, for example, pregnancy, maternity leave, or breastfeeding, because the company could be fined up to € 187,515. There is an obligation to create an equality plan in the following companies:

- Those companies that employ more than 250 employees;
- Those companies obliged by the applicable Collective Bargaining Agreement; and
Those companies obliged to substitute certain fines imposed by the Employment Authorities.

Collective Bargaining Agreement and Workers’ Participation in Management

Collective Bargaining Agreement

Under Spanish employment regulations, the Collective Bargaining Agreement contains important rules that complete the general employment regulation and generally improve the employment conditions.

Accordingly, the Workers’ Statute states that the Collective Bargaining Agreement is the most important expression of employers’ and employees’ right to negotiate the particular employment conditions of a company or an economy sector. However, Collective Bargaining Agreements must be respected by the employers and will have the same force as the law between the companies and employees affected by them.

Consequently, the employment conditions applied by the company to its employees can never be less favorable than those established in the Spanish Workers' Statute and those established in the applicable Collective Bargaining Agreement. Accordingly, even if the company improves some of its employees’ employment conditions (i.e., salary), this could never imply that other employment conditions are less favorable than those established in the applicable Collective Bargaining Agreement.

Additionally, Collective Bargaining Agreements can have a national or regional scope, and Collective Bargaining Agreements for companies are allowed. Except in the case of Collective Bargaining Agreements directly negotiated by the company and the legal representatives of the employees, it is not necessary to sign a Collective Bargaining Agreement to be bound by it and, once they are published in the corresponding Official Bulletin, they are legally binding.

Worker Participation in Management

In General

In general terms, the worker’s representation is exercised by spokespersons and decision-making bodies, on behalf of all members of the work force in a company or work center. The Worker’s Statute establishes that, notwithstanding any other forms of participation, employees have the right to participate in the company through the representative bodies or persons identified in the Workers’ Statute.

These include employees’ delegates (delegados de personal), who represent employees in companies or work centers with less than fifty workers, or works
councils (comités de empresa) established in each work center that has 50 or more regular employees.

**Employees’ Delegate.**

The employees’ delegates are representatives of the employees in order to deal with the employer and management. They have the same functions as the works council (see text, below). Employees’ delegates are elected in every company or workplace with more than ten and less than fifty employees. One employees’ delegate is elected for up to thirty employees; three are elected for thirty-one to forty-nine employees.

Employees’ delegates also may be elected in companies with more than six and less than ten employees, if the majority of the personnel desires to have such a representation. Candidates are to be nominated by the Trade Unions or directly by the employees and those elected serve for a four-year term. Such employee representatives are subject to the same regulatory scheme as are the members of works councils in regard to terms of office, powers, duties, and job guarantees.

**Works Councils**

In those companies with a payroll of 50 employees or more, the legal representation of the employees’ interest before the employer and management is carried out by a works council. The works council is formed by members elected for four-year terms. The number of members for each works council ranges between five members for work centers with 50 to 100 employees and 75 members for companies with more than 100 employees. Candidates for the works council are nominated by the trade unions or directly by the employees. The rights and powers granted by law to works councils include:

- The right to information;
- The right to issue reports of a non-binding nature, prior to the employer making a final decision on various matters, such as the restructuring of personnel, modification in working conditions, company professional training programs, and merger, acquisition, or modification of the legal status of the company;
- The right to supervise and control compliance with regulations concerning labor matters, Social Security, and safety and health;
- The standing to bring administrative or juridical actions in all matters relative to their powers;
- The right to participate and cooperate with the employer in the operation of social welfare activities undertaken by the company on behalf of employees or their families;
- The right to cooperate with the management of the company in the implementation of measures to maintain and increase productivity; and
• The power to negotiate regarding the Collective Bargaining Agreement for the company and agreements with the employer on collective modification of working conditions, suspension or termination of employment contracts for technological or economic reasons, and determination of vacations for employees.

Members of the works council have certain privileges with regard to sanctions and dismissals, and they are allowed a certain number of hours per month to carry out their responsibilities as employees’ representatives.

Note the incorporation of Directive 94/45/EC into Spanish law by the Law of 24 April 1997, dealing with the information and consultation rights of employees of companies and groups of companies within the EU. In accordance with the Law of 24 April 1997, the constitution of a European Works Council or the establishment of the information and consultation procedure provided by law is compulsory.

Trade Unions

Under Spanish law, employees have individual and collective rights to join the trade union of their choice, form trade unions, select internal representatives, and enjoy the freedom of labor action. The Organic Law of Union Freedom of 1985 recognizes the right of employees affiliated with unions to form union sections within the company, pursuant to the provisions of the union by-laws.

Representatives of union sections formed by unions represented in works councils are union delegates. These are elected in companies employing more than 250 workers. In the event that the union delegates do not form part of works councils, they are given the same guarantees as members of works councils. An employer who does not provide the information required by law to labor union representatives, or otherwise does not comply with the requirements under law relating to labor union representatives, may be fined.

Health and Safety Protection in the Workplace

In General

The employment, health, and safety legislation in force is mainly contained in Law Number 31/1995, which regulates the labor risk prevention, and the Regulations implementing the Law, mainly Royal Decree Number 39/1997. An important change took place in Spain concerning labor risks prevention in 2003, when Law Number 31/1995 was amended.

In addition, the legislation in prevention of labor risk matters is especially copious and specific. Therefore, for example, there are specific regulations of a general nature (such as Royal Decree Number 486/1997 for places of work, Royal Decree Number 485/1997 for signposting of places of work, Royal
Decree Number 487/1997 for handling of cargo, and Royal Decree Number 773/1997 for means of individual protection), regulations for determined sectors of activities (such as Royal Decree Number 1627/1997 for temporary and mobile building activities, and Royal Decree Number 1216/1997 for fishing boats), and regulations for certain risks (such as Royal Decree Number 1316/1989 for Protection against Noise and Royal Decree Number 665/1997 for cancerous agents).

Form of Preventive Organization

In general terms, the organization of the necessary resources for the development and coverage of prevention activities (safety, hygiene, ergonomics, and medicine) will be carried out by the employer in accordance with one of the following:

- Personally assuming the activity;\(^{12}\)
- Appointing one or several employees duly formed in prevention of labor risks, to be in charge of the prevention activity in the company; and
- Contracting with an external prevention service.\(^{13}\)

There are several cases in which the employer cannot turn to one of the above forms and must constitute its own prevention service. For example, this is what happens with companies of more than 500 employees, or those with more than 250 employees that develop an activity which is considered dangerous by law.

Risk Evaluation

According to law, the first main requirement established for prevention of labor risks’ matters is that related to the compulsory elaboration of an initial risks evaluation report, through which each position must be analyzed to determine the type of risks to which each employee is exposed, as well the corresponding preventive measures proposed.

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\(^{12}\) The personal assumption on behalf of the company would be possible, provided that certain requirements are met and specifically (a) that it is a company with less than six employees, (b) that the activity is not expressly considered by law to be dangerous, (c) that the employer normally develops his professional activity in the work center and (d) that the employer has adequate formation in preventive matters. In no case can the employer assume the specialty of controlling the employees’ health.

\(^{13}\) When the company does not opt for one of the abovementioned forms, at least partially, or if it were not the most appropriate, and provided that there is no legal obligation to constitute their own prevention service, the employer could resort to one or several external prevention services, which are duly credited entities that can assume the prevention activity of third companies.
This evaluation of risks would have to be reviewed periodically, as established by a specific law, and, for example, in those cases when an accident has taken place, or when a disabled person is going to cover a position.

**Preventive Planning**

In those cases in which, from the results of the initial risks evaluation, as well as from the results of its updates and reviews, it appears that there are situations which imply a danger for the employees, the employer is obliged to carry out those possible activities in order to reduce and control the risks.

In addition, these activities have to include a preventive plan, establishing the dates in which the activities will have to be done, the person responsible for the activity to be carried out, and the necessary resources (both human and material).

In accordance with Spanish law, it is compulsory for companies to integrate health and safety regulations in the general management system of the company by means of a prevention plan, which shall affect all the activities and hierarchical levels of the company, including the organizational structure, responsibilities, functions, procedures and resources to fulfill the health and safety regulations.

**Health Control**

Both the Workers’ Statute and specific regulations in prevention of labor risk establish the obligation of the employer to guarantee the employees a periodic check-up of their health.

The medical check-up must be carried out by means of check-ups adapted to the employee’s labor risks and always respecting the intimacy and dignity of the employee’s person, as well as the confidentiality of all information related to the state of his health.

**Training and Information**

In fulfillment of the duty to protect the employees from all risks that derive from their employment, the employer must guarantee that his employees receive all the necessary information related to the risks for their safety and health, and the prevention measures adopted by the company to avoid injury.

Additionally, each employee should receive sufficient and adequate theoretical and practical in formation prevention material, specifically centered on the job position or function of each employee.

This formation should be carried out, not only at the commencement of the employee’s hiring, but also when there are changes in the functions developed, or new technologies or changes in working teams are produced. The formation
can be given by the company by means of their own resources or by arranging it with external services, and with no cost whatsoever for the employees.

Emergency Plan

Under Spanish law, it is compulsory for employers to analyze all the possible emergency situations and adopt all necessary measures concerning fire, first aid, and evacuation.

Likewise, the employer is obliged to appoint the personnel to take care of the adoption of the referred-to measures, as well as to train and inform the personnel. All the above should be reflected in an emergency plan, which must include all the information referred to.

Coordination of Activities

The regulations for prevention of labor risk establish certain obligations regarding the coordination of employers and activities in those cases in which the employees of two or more companies develop their activities in one work center, with the aim to avoid risks derived from the concurrence of activities in the same place.

In these cases, the concurring companies must establish the means of coordination which are necessary for the protection and prevention of labor risks, as well as the information on the same issues, to their respective employees.

The importance of this obligation to coordinate the activities has implied its development by means of Royal Decree Number 171/2004 of 30 January 2004, regarding coordination of company activities, which establishes a list of obligations for all the parties that render services in the same work center, whether on a regular basis or sporadically for a determined project.

Workers’ Compensation and Survivors’ Benefits

Individuals with Special Needs

Those companies with a staff of 50 or more employees will be obliged to contract the services of two per cent of disabled employees. This percentage will be annually controlled by the Employment Office.

Survivors’ Benefits

Under Spanish employment law, the company would not be obliged to pay any kind of compensation to the families of an employee killed on the job, unless otherwise is agreed in the employment contract or in the applicable Collective Bargaining Agreement.
Dispute Resolution

The grievance and disciplinary procedure are regulated basically by the general rules established in the Workers’ Statute and the specific rules that the Collective Bargaining Agreements may establish.

The employees’ legal representatives (personnel delegates or members of the company’s employees’ committee) have the guarantee of not being sanctioned or dismissed by the employer because of the fulfillment of their duties as representatives during their term (four years), as well as within the year following its termination. The dismissal of an employees’ legal representative due to the mentioned reason (fulfillment of his duties as representative) would be declared null and void, and the employer would be obliged to readmit him/her in his/her former position.

In addition, should the dismissal of an employees’ legal representative be declared unfair, he would be entitled to receive the corresponding dismissal compensation, or be reinstated in his/her position, at his/her choice (normally this option belongs to the employer).

Regarding the procedure to be respected in the case of an employees’ legal representative being sanctioned for committing a serious or very serious infraction, the opening of a disciplinary procedure (expediente contradictorio) is compulsory and consists of the affected employee, and all other members of the representative body to which he belongs, having a previous meeting in which he can form allegations for his defense before he is finally sanctioned or dismissed. The disciplinary procedure also should be respected in the case of a union member being sanctioned for committing a serious or very serious infraction.

Termination of Employment

In General

Spanish law establishes a system with considerable guarantees for employees. The most relevant point is the reasons for dismissal, i.e., for an employer to be able to dismiss an employee he must be able to prove the existence of a serious breach of the employment contract by the employee or the existence of serious economic, technical, organizational, or productive reasons because, if it does not do so, there would be a high risk of the dismissal being declared unfair by the Labor Court.

In this regard, the restrictions on termination, the existence of notice period, the legal procedure to be followed, and the severance compensation to be paid to the employee, if any, will depend on the type of dismissal carried out by the employer.
Likewise, Spanish law is very protective with maternity situations. Thereby, a dismissal when the employee is in a situation of pregnancy, motherhood, or while the employee is carrying out any of the statutory rights concerning maternity, would be declared null and void, except if the dismissal is due to gross misconduct or breach of the employment contract by the employee (e.g., unjustified absence, lack of punctuality, or disobedience), and the company would be obliged to readmit the employee and pay the salaries accrued from the effective dismissal termination date until the readmission becomes effective. Additionally, the company could be obliged to pay a compensation for damages due to breaching of the employee’s fundamental rights if the employee claims for it and the Labor Court declares the employee’s right to receive it.

Disciplinary Dismissal

The disciplinary dismissal is one which takes place due to a gross misconduct or breach of the employment contract by the employee (e.g., unjustified absence, unpunctuality, or disobedience). This kind of dismissal implies the immediate termination of the employment relationship, and there is no need to give the employee any kind of prior notice period (unless otherwise agreed in the contract or in the relevant Collective Bargaining Agreement).

In principle, the act of disciplinary dismissal requires a formal notification to the employee in a writing which explains the reasons for the dismissal, stating the facts leading to it, and the date upon which it will become effective. Nevertheless, in general, and except in some special cases (such as pregnancy, maternity leave, an employee who has filed a judicial claim against the company or has requested a right to which he is entitled), the dismissal is possible at any time without cause, provided that the company decides to recognize the unfairness of the dismissal (should the company recognize that the termination is not based on legal causes) and assuming the consequences of such recognition (namely the payment of a dismissal compensation up to 45 days of salary per year of service with a maximum of 42 installments).

In such case, it would be sufficient to produce a brief dismissal letter stating a disciplinary reason to terminate the contract (i.e., the efficiency of the employee is not good enough). In case of a disciplinary dismissal, the employee who has been dismissed would have two options, namely:

- Accept the reasons invoked in the dismissal letter and not file a claim against the company; or
- Refuse to accept the reasons invoked in the dismissal letter, and within the following twenty business days, file a claim against the company for unfair dismissal (or void dismissal).

Should the employee take the second option, once the dismissal letter has been given to the employee, he would be obliged, before filing a judicial claim, to first file what is called a conciliation claim, which consists of a writ addressed to
the Mediation, Arbitration, and Conciliation Service, where the employee applies for a conciliation hearing with the company in order to avoid a judicial claim. Should this claim finally end in a judicial claim, the following resolutions may be issued by the Labor Court:

- The dismissal is declared fair;¹⁴
- The dismissal is declared unfair if the Labor Court concludes that the infringements invoked by the company are not duly proven or they are not sufficient to dismiss an employee;¹⁵ or
- The dismissal is declared void.¹⁶

Individual Dismissal for Redundancy

In the case of an individual dismissal for redundancy, the Workers’ Statute sets out the following requirements:

- The employer must provide written notice to the employee stating the cause for dismissal;
- The employer must simultaneously put at the disposal of the employee the dismissal letter and compensation of 20 days’ salary per year of seniority, up to a maximum of 12 months’ salary;

¹⁴ In such case, the company would not be obliged to pay the employee any compensation.

¹⁵ In such case, the company would be obliged, at its choice (except in the cases of employees’ legal representatives, as we have already stated), to readmit the employee or to pay him a dismissal compensation, which in the case of unfair dismissal, and unless otherwise agreed, is forty-five days of salary per year of service, with a maximum of forty-two installments, and the so-called “procedural salaries”, which are those salaries accrued since the date of the dismissal, until the notification to the employer of the legal ruling. The regulation on procedural salaries substantially varied in the year 2002. With the current regulation, the procedural salaries owed to the employee will be those salaries accrued from the dismissal date until the date of the notification of the judicial resolution declaring the unfairness of the dismissal. However, procedural salaries will not be accrued in cases where the option between readmission or compensation corresponds to the employer, provided that the employer recognizes its unfairness and offers the employee the corresponding legal compensation (usually forty-five days of salary per year of seniority), depositing it at the Labor Court within forty-eight hours following the dismissal and informing the employee that this has been done. Finally, should the mentioned deposit be carried out once the 48 hours since the dismissal have passed, procedural salaries will be accrued from the date of the dismissal until the date the deposit was carried out, provided that this is done within the “conciliation” period, which is until the date of the conciliation before the Mediation, Arbitration, and Conciliation Service.

¹⁶ The Labor Court could deem that the dismissal is null and void if the employee proves that the dismissal was based on discriminatory reasons. In such case, the company would be obliged to readmit the employee in his former position.
The employer must give the affected employee a prior notice period of 15 days;\(^{17}\) and

The employer must provide notification of the dismissal to the employees’ legal representatives, if any.

The employee affected by the redundancy measure is entitled to claim against this dismissal as if it were a dismissal for disciplinary causes, with the same options and proceedings expressed in the preceding point. If the employee files a judicial claim, and the dismissal is declared unfair by the Labor Court, the company would be ordered to readmit or pay the employee a compensation of 45 days’ salary per year of seniority up to a maximum of 42 months.

The decision between readmission and compensation is for the employer (except in the case where the employee is a Trade Union delegate or an employees’ legal representative; in this case, the decision between readmission or compensation is for the employee).

In the first case (option for readmission), the employee should return the 20 days’ compensation already received and, in the second case (option for compensation), the 20 days’ compensation already received by the employee will be deducted from the 45 days to be given.

**Collective Dismissal**

Spanish labor law defines “collective dismissals” as the termination of employment contracts based on economic, technological, organizational, or production grounds when, during a period of ninety days, the termination affects no less than:

- Ten employees, in companies which employ less than 100 employees;
- Ten per cent of the number of employees in companies which employ between 100 and 300 employees; and
- Thirty employees for companies which employ 300 employees or more employees.

One of the peculiarities of collective dismissals against individual dismissals consists of the employer’s obligation to apply for authorization from the Employment Authority, therefore giving rise to a redundancy procedure (Expediente de Regulación de Empleo). The redundancy procedure is started by means of an application for the authorization of the termination of the contracts from the competent Spanish Employment Authorities, accompanied by all the necessary documents.

\(^{17}\) This notice period can be substituted by the payment of the salaries corresponding to the unfulfilled notice period.
necessary documentation to prove the causes that motivate the redundancy procedure, as well as the justification of the measures to be adopted. Simultaneously, an opening of a round of talks with the legal representatives of the employees begins.

The round of talks with the employees’ legal representatives may last no more than thirty calendar days (fifteen days in the case of companies with less than fifty employees) and, during this period, the employer and the legal representatives of the workers must negotiate in good faith with a view to reaching an agreement. If there are no legal representatives in the company, the employer must maintain the round of talks with the employees directly. In this case (no legal representatives), the employees could opt to confer their representation to a commission composed by three employees of the company. The Employment Authorities must be notified of the outcome of the talks held at the end of the negotiation period.

With respect to the finalization of the redundancy procedure, if the round of talks with the employees’ representatives finalizes in an agreement between the parties, the Employment Authorities will generally authorize the termination of the contracts (unless it considers that a fraud has been committed in the negotiating process) within the period of seven calendar days.

If the round of talks finalizes without an agreement between the parties, the Employment Authorities will decide, within fifteen calendar days from the notification of the end of the round of talks, whether they authorize or reject, in whole or in part, the termination of the contracts applied for. In this second case, proof by the company of the economic, technical, organizational, or productive reasons is essential.

If there is agreement between the company and the employees, the amount of the compensation will be that agreed between the parties. If no agreement is reached and the Employment Authorities authorize the collective dismissal, the amount of the compensation per employee will be the legal minimum, i.e., twenty days of salary per year of seniority with a maximum of twelve months’ salary.

**Dismissal of Executives**

Employment contracts for top executive employees, which formalize the offering of services of employees who develop powers inherent to the ownership of the company, with autonomy and full responsibility, only limited by the criteria and the instructions from the person, administration, or governing body which holds the ownership, are not governed by the Workers’ Statute, but by Royal Decree Number 1382/1985 of 1 August 1985.

As opposed to ordinary employment contracts, it is possible for the employer to terminate a top executive employment contract at any time, without having to mention any non-fulfillment by the executive, but it does have the obligation to
compensate him with seven days of salary in cash per year of seniority (with a maximum of six monthly payments) and to notify him three months beforehand, which may be extended to six months by mutual agreement of the parties.

It also is possible to substitute the notice for a compensation equivalent to the period of notice which has not been respected. In the case of a dismissal of a top management employee declared unfair by a Labor Court, the employer would be obliged to pay the executive compensation of 20 days of salary in cash per year of service up to 12 months of salary.

This kind of employment contract usually includes special compensation for the cases of dismissal or resignation by the employer. If the parties have agreed to a special compensation in a so-called “golden parachute clause”, this will prevail over the regulations contained in Royal Decree Number 1382/1985.

**Retirement, Social Security, and Health Care, and Pensions**

Under the employment laws, the ordinary retirement age is established at the age of 65. However, there are possibilities that employees can have access to an early retirement at the age of 64 years old, or before, providing that certain legal requirements are met. In the cases of early retirement, the employees’ pension will be reduced.

Additionally, employees over 61 years of age are entitled, under certain conditions, to a reduction of their working time between 25 per cent and 75 per cent, provided that they have seniority in the company of at least six years immediately prior to the retirement date and they have been contributing to the Social Security for at least 30 years.

Calculation of the retirement pension must be made taking into account the contributions carried out by the employee. However, there is a maximum amount for the retirement pension that is established annually by the Government. In this respect, the maximum pension amount for the year 2010 is € 2,466.20 per month and paid in fourteen installments.

Irrespective of the above, as a complement to Social Security protection, the Collective Bargaining Agreement can establish the employer’s obligation to set up pension schemes. Spanish law establishes the company’s obligation to externalize all its pension undertakings arranged with the employees. The externalization obligation consists of the contracting of the payment of the contributions granted by the Internal Employment Pension Scheme through an insurance contract or an external fund. The non-fulfillment of this obligation to externalize the pension undertakings may be considered a very serious infringement which may be punished with a fine ranging between € 6,251 and € 187,515.

Under Spanish law, it is compulsory for all employees to be registered with the Social Security system, which covers them in cases of necessity, such as illness,
disability, retirement, unemployment, and death and survival. The financing of the system is carried out by means of obligatory contributions from the employer and the employees. The employer is responsible for transferring the employer’s and the employees’ contributions. Considering that the total contribution rate is 36.5 per cent, the employer contributes 30.15 per cent of the Social Security contribution basis and the employee contributes 6.35 per cent of the Social Security contribution basis (or 6.40 per cent in the case of a temporary employment contract).

The contribution to the Social Security system is calculated by multiplying the employee’s contribution base by the rates annually fixed by the government.

Contribution bases are formed by the employee’s salary, including the proportional part of the extraordinary payments and the salary in kind valued according to the Income Tax Law that the Government annually establishes.

Additionally, there are a maximum and minimum contribution bases that are annually established by the Government. Accordingly, for 2011 the maximum contribution base is € 3,230.20 per month and the minimum is € 748.20 per month.

**Conclusion**

The economic and financial crisis suffered worldwide from the beginning of 2008 has caused a great impact in Spain due to a strong fall of the Spanish productive activity. As a result of this situation, Spain has suffered serious employment destruction and, consequently, a serious increase of unemployed persons (Spain currently has an unemployment rate of up to 20 per cent).

The abovementioned situation has spurred an employment reform in Spain basically contained in Law Number 35/2010 of 17 September 2010, whose aim is the reduction of unemployment and the increase of the Spanish productivity. The reform focuses on:

- Contracts for a certain job or service;
- Practical training contracts;
- Job qualification contracts;
- Geographic mobility;
- Substantial modifications of working conditions;
- Individual dismissal for redundancy; and
- Collective dismissal.

The ultimate impact of the reform will begin to emerge only after the legislation and its application have been considered by the courts.
Sweden

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Legal Relationship between Employer and Employee

In General

The employer-employee relationship is regulated mainly by the Act on Employment Protection of 1982 (the “1982 Act”) with supplementary regulation of the public labor market provided by the Act on Public Employment of 1994.\(^1\) In principle, the 1982 Act covers every employee, except the owner of the enterprise, members of his family, partners, and management.

Employment Agreement

The employment should be confirmed in writing no later than one month after employment has started, indicating all conditions of work. Oral agreements also are binding. Even if it has not been explicitly agreed between the parties, a person may be regarded as an employee simply because he is working for the employer.

An employer may lease employees from another employer without entering into an employer-employee relationship with the leased staff. There should be a written employment agreement between the employer who leases out the staff and his employees, regulating employment form, salary, and other conditions.

Foreign Employees

Foreigners who are not citizens of the European Community or the European Free Trade Association member states need a work permit and a residence permit to be able to work in Sweden. To obtain a work permit, the foreigner should prove that he has a guaranteed employment in Sweden.

A special “offer of employment” form may be obtained by the employer from the Employment Service to state that the foreign employee’s salary and other conditions of employment comply with current collective agreements, and that housing arrangements have been secured.

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1\(^{\text{ Lag (1976:600) om Offentlig Anställning.}}\)
The foreigner should apply for a work permit and a residence permit through the Swedish Embassy or Consulate in his own country, and he may not enter Sweden before that process is complete. Due to the labor market situation, it might be difficult to obtain a work permit unless the foreigner possesses special knowledge or skills not available in Sweden. Apprentices and trainees also need permits, but the authorities generally grant permits only for restricted periods.

Transfer of Business

The Act on Co-Determination of 1977 requires the employer to initiate negotiations in the following instances:

- If he is bound by collective agreements, he should negotiate with all trade unions party to such before making any decision of importance that affects the whole company (i.e., investment, budget, employment of employees in superior positions, introducing data systems or implementation of a new organization, transfer of all or part of the business);
- Whether or not he is bound by collective agreements but a member of a trade union, he should negotiate with the trade union concerned before making any decision of importance that affects the working conditions of that employee (i.e., replacement, dismissal, or withdrawal of benefits); and
- If he is not bound by collective agreements, he should negotiate with all trade unions that have members that are his employees before making any decision leading to redundancy or resulting in a transfer of all or part of the company or business.

Prior negotiation is not required if the acquisition of the company means solely a transfer of shares, as this will have no effect on the employer-employee relationship. If the acquisition is a transfer of all or part of the business and activity, and the buyer continues the same business, the employment will automatically be transferred along with the company. Employees are free to refuse a transfer but risk dismissal if the seller can no longer provide work.

However, the seller may not dismiss employees before the transfer due only to the acquisition itself, but may do so for other reasons (i.e., economic, administrative, organizational). Even if the seller cannot dismiss employees, they may still be dismissed by the buyer. If the acquisition causes redundancy within the buyer’s company, the buyer may dismiss employees. The seller and buyer should try replacement and then follow the “last in-first out” rule, before resorting to dismissal.

The employee with a longer period of employment may claim the right to another employee’s job, provided that he is qualified for such job. Employees dismissed due to redundancy have priority for reemployment if the dismissing employer (or buyer) finds that there is a need to increase the workforce again, provided that the employee has enough qualifications for the job available. The employer does not have to offer employment on the same conditions as the

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previous employment as long as the conditions are not in conflict with binding collective agreements or mandatory law. The “last out-first in” rule is the reverse to the rule of dismissal and runs during the period of notice and nine months after the employment agreement has expired.

Child Labor

The Act on Working Environment prohibits the use of a minor (a person under 16 years of age) for work. However, a minor of at least 13 years may do light work on the condition that it does not seriously affect his health, personal development, or schooling. The State may require medical examinations for working minors. Working time for minors also is strictly regulated by the State.

Terms and Conditions of Employment

Remuneration

There are no minimum wage laws in Sweden. However, employers bound by industry-wide collective agreements should adhere to minimum wages stipulated by these agreements. The employer may not enter into contracts in conflict with such agreements. Employers not bound by collective agreements may enter into contracts with the employees on less favorable conditions than what collective agreements stipulate.

Hours of Work

Ordinary working time is 40 hours a week, or an average of 40 hours a week for four weeks. The employee also can be placed at the employer’s disposal for any work that may arise for 48 hours over four weeks or 50 hours in a calendar month.

Overtime is time in excess of the ordinary working time for a fulltime employee. More time is time in excess of the ordinary working time for a part-time employee. Overtime/more time may be required for a maximum of 200 hours in a calendar year. Extra overtime/more time may be required up to another 150 hours per calendar year, on condition that it depends on circumstances not foreseeable to the employer and that no other solution is possible to avoid extra overtime/more time.

Overtime/more time will be compensated only if it has been ordered in advance or approved by the employer after the work has been performed. Overtime also may be taken as compensatory leave. Overtime/more time plus extra overtime/extra more time are restricted to a maximum of 48 hours in four weeks or 50 hours in a calendar month. Emergency overtime may be imposed as needed.

Employees are entitled to 11 hours of consecutive leave for every 24 hour period. Night rest for employees is mandatory from midnight to 5 a.m., but
exceptions may be allowed under special circumstances. Weekly rest is mandatory during the 36 consecutive hours after every seven days of work. Daily breaks in the working day are mandatory after each five consecutive hours of work. The employee is not required to remain at the workplace during breaks.

**Sick Leave**

An employee will not receive pay during his first day of sick leave. However, the employer should pay 80 per cent of the employee’s salary during the following 14 days of illness. From the fifteenth day, the employee will receive sickness allowance from the State or from assurance.

The employer is primarily responsible for investigating the employee’s need for rehabilitation with emphasize on the employee’s working abilities. The employer must be able to prove that he has made active attempts to find suitable measures for rehabilitation, including transfer to other available positions. The main purpose must be to make it possible for the employee to return to work with the employer.

**Parental Leave**

The mother is entitled to seven weeks’ leave of absence before and seven weeks’ leave of absence after the birth of a child, with or without parental allowance. The father is entitled to 10 days’ leave of absence in connection with the birth or adoption of a child.

The parents are also entitled to reduce their working hours per day to 75 per cent of a normal workday until the child is eight years of age. A parent is likewise entitled to 120 days’ leave from work every year to care for a sick child, to be taken as a whole day or part of a day.

Parental allowance of approximately 80 per cent of a parent’s income is available until the child is eight years old, and is paid for 480 days per child. Parents with joint custody are entitled to 240 days each with parental allowance, with 60 of these days reserved for each parent.

The rest of the days may be transferred to the other parent. Parental allowance may be taken as a whole day or a fraction of a day. A parent also is entitled to take a leave from work without pay and without parental allowance during the child’s first 18 months.

**Urgent Familial Leave**

An employee is entitled to take a leave from work for urgent family reasons equal to force majeure and which call upon his immediate and necessary presence. The leave is limited to a couple of days, and the employer is not required to pay the employee his salary during the leave.

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Vacation

An employee is entitled to 25 days of paid vacation yearly after full earning. According to the Vacation Act, year one is the earning year and year two is the vacation year, running from 1 April to 31 March, but many employers prefer to handle the one and the same calendar year as both earning and vacation year.

The employer may choose to give the employee the same salary during vacation plus a vacation supplement of 0.43 per cent of the monthly salary per vacation day or 12 per cent of the employee’s salary during the preceding year.

Educational Leave

An employee is entitled to take a leave from work for educational purposes under the Act on Education of 1974.² A condition is that he has been employed for the last six consecutive months or during a total of 12 months during the last two years. He may choose any kind of education he wishes, even if it has no connection with his present work or the company’s activity, as long as he can present a training schedule.

The leave is not limited in time, and may last for several years. The employer may postpone the leave of absence up to six months. If the employee has not been granted leave of absence after two years from his application was made, he may take the matter to court.

An employee will be given the same duties and terms when he returns to work from the leave. An employer is not required to pay any salary during the leave but may be required to pay vacation money under certain circumstances, corresponding to an earning period of a maximum of 180 days.

Trade Union Duties Leave

An employer is required to allow employees engaged in trade union work as trade union representatives’ reasonable time off to fulfill their duties. The time off may be with or without pay. The trade union representative is entitled to full pay if the purpose for the time off reasonably concerns the relationship between trade union members and the company. Thus, an employer should pay for education that the trade union representative may need in connection with his duties, as long as the education is relevant to the company and the workplace.

Military Service Leave

An employer should grant an employee unpaid leave from work for compulsory military service during the period required by the military authorities, including military work for the United Nations and similar organizations. An employee is entitled to return to the same position and conditions prevailing before the leave.

Discrimination

The new Discrimination Act came into force on 1 January 2009, superseding previous laws on discrimination. It includes two new grounds for discrimination, i.e., age and gender-crossing identity or behavior. Age is not restricted to an older person. Even a young person or child may be found to be discriminated against on the ground of age.

A person with a gender-crossing identity or behavior is someone who does not identify himself as a man or a woman or through his way of dressing or in other ways expresses a belonging to the opposite sex. Such person may be a transsexual, transvestite, intersexual, inter-gender, or trans-genderist.

The prohibition against discrimination applies to various areas such as working life, education, labor market political activities and employment offices without public missions, starting and conduct of industry and professional competence, membership in certain organizations, goods, services, and housing, health and medical care, social welfare, social security systems, unemployment insurance, educational support, military and civil duty, and public employment.

Discrimination may be direct or indirect. There is direct discrimination when someone is treated unfairly, or should have been treated unfairly in a similar situation, with the unfair treatment having a connection to gender, gender-crossing identity or behavior, ethnicity, dysfunction, sexual disposition, or age. Three criteria have to be fulfilled:

- Unfair treatment;
- Comparison; and
- Causal connection.

There is indirect discrimination when someone has been treated unfairly through the application of a provision, criteria, or procedure that may seem neutral but instead causes unfair treatment of an individual of a certain gender, gender-crossing identity or behavior, ethnicity, religion, functional disorder, sexual disposition, or age.

There is no indirect discrimination if the provision, criteria, or procedure has a justified purpose and the means used are suitable and necessary to obtain such purpose.

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3 These are the Act on Equality between Men and Women (1991:433); the Act on Measures against Discrimination in the Working Life on the Grounds of Ethnic Belonging, Religion, or Other Doctrine of Faith (1999:130); the Act against Discrimination in the Working Life on the Grounds of Dysfunctions (1999:132); the Act against Discrimination in the Working Life on the Grounds of Sexual Disposition (1999:133); the Act on Equal Treatment of University Students (2001:1286); the Act against Discrimination (2003:307); and the Act against Discrimination and Other Offensive Treatment of Children and Pupils (2006:67).

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Collective Bargaining and Worker Participation in Management

Collective Bargaining

The Constitution secures the right of employees to join a trade union, and the right of trade unions to recruit and organize members. Before a trade union can claim a right to negotiate with an employer, it should form a local organization, adopt statutes, appoint a board, and inform the employer of the names of its local representatives.

Most trade unions are organized at the national level. Collective bargaining also is normally conducted at the national level. While the local trade union represents employees within a certain company in relation to their employer, the employer may be bound by a collective agreement, such as those negotiated by the Confederation of Swedish Enterprise. Labor disputes are dealt with under the “negotiation procedure”, which is regulated by collective agreements covering approximately 80 per cent of the employees. The first step is local negotiations between the trade union’s local representatives and the employer.

If the parties cannot come to an agreement, either party can demand central negotiations where the employer will be represented by the Confederation of Swedish Enterprises if he is a member. If the employer is not a member of the Confederation of Swedish Enterprises, but party of a local collective agreement directly with the trade union, he must negotiate on his own behalf.

After termination of central negotiations, the dispute can be brought to the Labor Court, which is the final court concerning labor disputes and whose decision is binding. In some matters, an employer may initiate negotiations and then bring the case directly to the Labor Court, such as when the dispute involves claims for salary or other compensation or an employee’s obligation to perform certain duties. Employers and employees bound by collective agreements are not allowed to initiate or take part in unlawful actions such as strikes, lockouts, blockades, or boycotts. The action is regarded as unlawful if any of the following conditions exist:

- It has not been permitted by the trade union that is a party to the collective agreement;
- It conflicts with a rule in the collective agreement; or
- The purpose of the action is to bring pressure to bear in a pending negotiation between the parties, change the collective agreement, enforce a decision following expiration of the collective agreement, or support a third party also under obligation not to strike.

Lawful labor actions include the following:

- Actions related to non-judicial disputes which are not ruled by collective agreements or by law;
- Sympathetic actions in favor of a party involved in lawful offensive actions;

(Release 1 – 2012)
• Actions to collect a clear and due debt; and
• After following collective bargaining negotiations in situations when there remains a so-called surviving right to strike, i.e., if a request of co-determination has been raised by the trade union during the negotiations without resulting in an agreement.4

Worker Participation in Management

Under the Act on Co-Determination and the Act on Employee Representation on Boards of Directors,5 trade unions — as parties to collective agreements — have a great deal of influence on employers.

An employer should keep trade unions informed of the company’s activities and development. If an employer is not bound by collective agreements, he may still under certain circumstances be required to negotiate before any decision is made.

In such negotiations, the trade unions should be given the opportunity to influence the employer's decision-making. Thus, an employer is required to supply the trade unions with information sufficient for them to assess the issues. He also is required to ensure that the trade unions participate at such a level where his decision may be influenced.

If a joint decision is reached, the negotiations have fulfilled their most important purpose. The employer is free to make a final and binding decision where no agreement is reached. Trade unions may appoint members in a joint-stock company’s or an economic association’s board of directors under certain conditions, i.e., the enterprise or association comprises at least 25 employees.

A combined group of companies will be treated as one company with regard to worker participation. Thus, even if one company does not have 25 employees and will not be subject to the right of worker participation, trade unions may still appoint a representative from that company to the board of directors of the parent company. The local trade union will decide whom to appoint, but the member should be employed by the company or, when the board of directors of a parent company is involved, within a company in the group.

Trade unions may normally appoint two regular members and two deputy members. If the company has more than 1,000 employees with various activities in different fields of business, the trade unions may appoint three regular members and three deputy members. Employee representatives have rights equal to those of other board members, including the right to vote.6 They also have the same responsibilities and obligations, including that of confidentiality. The representative is personally liable if the company continues to operate after

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4 The trade union retains the right to strike over the question of co-determination.
obligation to establish a balance sheet or if it should have gone into liquidation. However, employee members are excluded from board meetings that concern collective agreements, industrial action, or other questions where the trade unions and the employer have conflicting interests.

Health and Safety in Workplace

The Act on Working Environment contains basic provisions regarding occupational safety and health, and sets rules on how employers and employees should cooperate in matters relating to the working environment. It also expressly grants to employees the right to influence their own working situation.

It is supplemented by a Work Environment Ordinance, which authorizes the National Board of Occupational Safety and Health (the “Board”) to issue more detailed rules in the form of ordinances and general recommendations pertaining to the matters covered by the Act on Working Environment.

The employer has the duty to plan, direct, and supervise measures relating to the occupational environment. He also should ensure that organized job modification and rehabilitation activities are conducted at the workplace. Technology, working organization, and job content should be designed so as not to expose an employee to physical or mental strains that may cause ill health or accidents. Under the Penal Code, a person deliberately or negligently defaulting on his obligations to prevent ill health or accidents can be convicted of a working environment offense if death, injury, or exposure to danger results.

Workers’ Compensation and Survivors’ Benefits

Work injury insurance is the oldest form of social insurance in Sweden, now regulated in the Social Insurance Code. “Injury” includes injuries and diseases caused by accidents or other harmful factors at work, which qualify for compensation under a work injury insurance scheme.

The allowance received by an injured person is the same as that provided for sickness. The law does not regulate issues regarding compensation for incapacity, injury, and other inconveniences, thus an employee may obtain compensation under special security insurance agreements concluded between associations of employers and trade unions.

Compensation for non-financial damage is provided for pain, suffering, and other inconveniences. Rehabilitation expenses also are paid. An employer is primarily responsible for identifying rehabilitation measures that may be conducted within or in connection with the company's operations. The National Insurance Office is responsible for coordinating various rehabilitation measures,

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7 Arbetsmiljöförordning (1977: 1166).
8 Brottsbalken genom Lag (1964:163) om Införande av Brottsbalken.
for ensuring that the requisite measures are taken on behalf of those in need of
them, and for paying compensation during occupational rehabilitation.

When a death is caused by a work injury, the survivors are entitled to receive
burial assistance and an annuity. The annuity is related to the income that the
deceased had and payable under the same conditions as survivors’ pension and
for a certain period, while the burial assistance is a single cash benefit.

A child is entitled to an annuity in the event of death of one or both of his
parents before he reaches the age of 18. If he is enrolled in a study program, the
annuity period can be extended until June of the year when he reaches the age of
20. If an injured person dies, the surviving widow or widower is entitled to an
adjustment annuity for 12 months that can be prolonged if the widow or
widower has custody of a child less than 18 years.

If the survivor is not able to earn a living when the annuity period is over, he is
entitled to a special survivor’s annuity. Survivor’s annuities, like annuity
payments made to insured persons, are coordinated with benefits under the
general social insurance scheme.

**Dispute Resolution**

**Dismissal**

If an employee is dismissed without objective grounds, the dismissal can be
declared null and void at the request of the employee. This will not be the case if
the dismissal is opposed solely because it conflicts with priority rules, when an
employee only may claim damages.

Should a dispute arise concerning the validity of the dismissal, the employment
will not cease before the dispute has been settled. The employee also may not be
kept away from work on account of the circumstances that caused the dismissal,
except for special reasons. The employee is entitled to receive salary and other
compensation for as long as the employment continues.

**Discharge**

Should an employee be discharged, i.e., dismissed without a notice period, under
circumstances that would not even have sufficed for a valid dismissal, the
discharge can be declared null and void at the request of the employee. The
employee should take the request to court.

The court can decide that, despite the discharge, the employment will continue
until the case has been settled. Thus, the employer may not keep the employee
away from work for the reasons upon which the discharge was based. The
employee is entitled to receive his pay and other benefits as long as the
employment continues.
Termination of Short-Term Employment

An employment agreement that has been concluded for a limited time in conflict with the 1982 Act can be declared valid until further notice at the request of the employee. The court can decide that, despite the agreement, the employment will continue until the dispute has been settled. The employee is entitled to receive his pay and other benefits as long as the employment continues.

Notice to Employer

An employee who intends to request that the dismissal or discharge be declared null and void should inform the employer of his intent within two weeks after the dismissal or discharge. The employee should pursue his claim within two weeks after the expiration of the notification period.

If an employee shows that his employment agreement was concluded for a limited period in conflict with the 1982 Act and intends to request a declaration that his employment be continued until further notice, he should inform the employer of his intent within one month after the termination of his employment contract. He should pursue his claim within two weeks after the expiration of the notification period. If information is not provided or claims are not taken to court within these time limits, the employee will be deemed to have waived his claim.

Damages

If the employer refuses to comply with a decision of the court declaring a dismissal or discharge to be null and void or that an employment for a limited period will continue until further notice, he will be liable for damages to the employee. Such damages cannot be mitigated even if the employee takes up another employment.

If an employee prefers to accept the dismissal and claim damages instead, he should advise the employer of his intent within four months from the dismissal, and should pursue his claim within another four months. If the court finds that the employer did not have reasonable grounds for dismissal, the employee also will be entitled to damages for loss of income. However, income received by the employee from another employer will be deducted from the damages. Damages are calculated on the basis of an employee’s total period of employment with the employer and are assessed at an amount ranging from 16 to 32 months of salary. However, damages may not be assessed at more months of salary than that corresponding to the number of months of employment. The minimum assessment is based on six months of salary.

Courts

An employee who is not a trade union member, or who is not supported by his trade union, must first take the dispute to the district court and then to the Labor
Court. The Labor Court is the final court for settling disputes regarding employment agreements.

If the employer is a party to a collective agreement and the employee is a trade union member and his trade union supports his case, the dispute will be taken to the Labor Court as the first and final court. However, the parties should first follow the procedures prescribed in their collective agreements. They should first attempt to settle the matter by local negotiations, and then by central negotiations if the dispute remains unsolved. The Labor Court should be the final venue.

**Termination of Employment**

**In General**

A dismissal by an employer should be based on objective grounds, but resignation by an employee does not require any ground. An employee may resign at any time, provided that he has not committed himself for a certain period. If he is bound by a non-competition clause during a certain period after termination, he may be liable to pay damages if he is found guilty of breach of contract.

Employment also may be terminated by a mutual understanding between the parties. This will not be regarded as dismissal by the employer. The law does not give a precise definition of “objective grounds”, thus the term is applied on a case-by-case basis. In general, the employer should investigate the circumstances and conditions for a dismissal, and should prove that he has done everything possible to avoid dismissal. However, certain fundamental principles for interpreting the term emerge from case law, namely:

- Dismissal or discharge may not be based solely on circumstances known to the employer for more than two months before the notice of dismissal or discharge was given (the “two-month rule”).
- The company’s size is relevant as larger enterprises often have better possibilities to solve employment problems by measures other than dismissal or discharge. Transfer to another department is easier. Even the personal relationship between employer and employee in a small company may affect judgment.
- The employee’s position is relevant, such that the higher the position, the higher the risk that the company may suffer from damage due to the employee’s unsuitability for the position. The degree of autonomy that the employee has in his work and if he misuses the freedom to the disadvantage of the company or the relationship with its customers also should be considered.
- The demands of reasonable grounds for dismissal or discharge are higher the longer the employee has been employed.
- The employer should explore and utilize all possible alternatives before resorting to dismissal or discharge. Transfer should be considered only when the employee cannot meet the demands of the position (the “everything possible” rule).

- The employer should make it absolutely clear to the employee that he risks loss of employment if performance is not improved. The employee should be given a last chance to rehabilitate himself. The same degree of effort is not required where the employee is guilty of gross misconduct that would justify discharge. However, the circumstances in each case are decisive as to the degree of responsibility that can be requested.

As long as an employee is entitled to sickness allowance, dismissal is generally not possible. However, if a physician states that the employee will not recover or that his working capacity will be permanently reduced to an extent that he will not be capable of important work, the employee may be dismissed.

**Shortage of Work**

Dismissal by an employer may be based on grounds not depending on an employee but on the requirements of the company. Shortage of work, which is a technical term for the closing of all or part of an enterprise and the effect of cutbacks, is regarded as an objective ground for dismissal.

The 1982 Act does not interfere with an employer’s freedom to manage his business. Thus, considerations on the number of employees resulting from reorganization, cutbacks, outsourcing, or other economic, administrative, or organizational decision constitute reasonable grounds for dismissal.

**Personal Reasons**

The employer also should be able to show that the reason for the dismissal or discharge is based on the employee’s misconduct, lack of ability to do the job, uncooperative behavior, or other similar reasons. The employee’s misbehavior may be explained by reasons not related to working conditions or the workplace but by private reasons.

Such difficulties can be temporary, and the employer should take that into consideration. If the employer has made reasonable attempts to solve the employee’s problem and is unsuccessful, he may dismiss the employee on personal grounds.

**Required Notice Periods**

The employer and employee are entitled to a minimum notice period of one month. They may agree on the length of the notice period in case of resignation, but dismissal by an employer is strictly regulated by the 1982 Act. Agreements that are less favorable to an employee than the provisions of the 1982 Act are not binding. Only if the conditions are to the advantage of an employee may the
parties agree otherwise. After two years of employment, an employee will be entitled to the following notice periods:

- For employment of two to four years, two months’ notice;
- For employment of four to six years, three months’ notice;
- For employment of six to eight years, four months’ notice;
- For employment of eight to ten years, five months’ notice; and
- For employment of over ten years, six months’ notice.

If the employment is governed by collective agreements, the notice period may be more advantageous to the employee than what is provided in the 1982 Act. White-collar employees governed by collective agreements may be entitled to 12 months’ notice at the age of 55 if they have been employed for more than 10 years in a company. A dismissed employee is entitled to receive pay and other benefits of employment during the notice period, even if the employer does not give him any work or if his work assignment is changed.

**Procedures for Termination**

*In General*

Every dismissal or discharge will be judged according to its specific circumstances. Since the employer has the burden of proof, he should accurately investigate the attendant circumstances. Measures such as discussions and warnings should be sufficiently documented.

If the employer wishes to dismiss an employee, such employee should be informed at least two weeks in advance. If the employer wishes to discharge the employee, i.e., without a notice period, such employee should be informed at least one week in advance. The employee’s local trade union (if he is a member) should be informed at the same time. The employee and the local trade union to which the employee belongs can claim the right to discussions with the employer concerning the reasons for the dismissal or discharge. However, the discussions are conditional on their being requested no later than one week after the employee was advised of the dismissal or discharge.

If discussions are requested by the trade union, the employer may not put the measure into effect until the discussions have ended. Notice of dismissal or discharge should be given in writing. The employer should state the conditions that the employee should observe in the event that he should wish to claim that the dismissal or discharge is null and void or to claim damages.

*Resignation*

There is no particular procedure required for an employee’s resignation. However, it is recommended that the resignation be confirmed in writing.
Shortage of Work

If an employer is bound by collective agreements, he should timely inform the local trade about any change that might lead to a work shortage. He also should inform the employees as soon as possible of developments that may affect the availability of work.

Before a decision resulting in cutbacks is taken, the employer should take up negotiations with the trade unions that are parties to the collective agreements. If the employer is not bound by any agreement, but have employees that are members of trade unions, he should negotiate with all trade unions concerned before any such decision may be taken.

The counterpart of the local trade union at first instance is the local shop committee. If there is no local shop committee, the employer should contact the local branch of the relevant trade union. If there are more than four employees that will be affected by a cutback, the employer should inform the local Employment Office.9 Notice should be given as soon as the employer has decided to dismiss any employee, and two to six months before the first employee terminates his employment.

Depending on the number of employees to be dismissed, the notice period will be at least two months if the cutback comprises of up to twenty-five persons, four months if the cutback comprises of up to 100 persons, and six months if the cutback comprises more than 100 persons.

The periods of notice to an employee and to the local Employment Office run parallel. The employer is not legally required to prolong the employees’ respective periods of notice, but failure to observe notice periods may make the employer liable for economic damages to the State or even for imprisonment.

If the redundancy affects more than 50 employees, the local trade unions may claim help from an “employee consultant” to determine possibilities to avoid redundancy. The local trade unions may require such consultant at the company’s expense within reasonable limits. The company should state the limits of cost and time for the consultant’s work.

The employer is free to make a cutback after local negotiations have ended if the parties share the same opinion about the necessity of redundancy or do not agree, but the local trade unions declare that they will not bring the dispute to central negotiations. The employer may not execute the cutback after negotiations have ended if the local trade unions have declared that they do not accept the company’s proposal and require central negotiations. Central negotiations should be requested within certain time limits from the trade unions. If the trade unions do not comply with these formalities, they will lose the possibility of influencing the employer’s decision.

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9 Act on Certain Employment-Promoting Actions; Lag (1974: 13) om Anställningsfrämjande Åtgärder (Främjandelagen).
Central negotiations will be undertaken by the Confederation of Swedish Enterprise and the trade unions. The employer is free to act upon completion of central negotiations, even if the parties do not agree and no understanding is possible. The employer should inform the local trade unions and the employees about the decision. However, the employer has no discretion to select the employees who will be dismissed. The 1982 Act provides detailed rules on the selection of employees to be dismissed.

Shortage of work does not necessarily require the dismissal of employees whose department or section is affected. The employee who runs the risk of dismissal is normally required to accept an offer of transfer. If there are several vacancies available in another part of the enterprise, the employer will likely offer the post that is most equivalent to the employee’s present post. On the other hand, the employee should be prepared to accept transfer to an inferior post if that is the only one available.

The employer has the burden to prove that a transfer investigation has been conducted in accordance with the 1982 Act. If the employer finds no alternative to dismissal, he should follow the “last in-first out” principle. A priority list covering all employees should be drawn up. Sufficiently qualified employees with longer periods of employment can claim priority for transfer to jobs occupied by employees with shorter periods of employment.

It is essential to determine the employees’ earlier working experience, education, and positions. If an employee has exceptionally good qualifications for a certain position but a shorter period of employment than another employee, the employer should, however, offer the post to the employee with longer period of employment, on condition that he is competent to do the work.

Exceptions from the priority rules are allowed only if they are permitted in collective bargaining agreements that are binding on the employer. Most collective bargaining agreements give the parties the option to agree on the employees who will be dismissed in cases of redundancy. Such agreement is binding even on employees who are not members of the trade union.

Employers that are not parties to any collective agreement generally cannot make exceptions to the rules. The priority rules of the 1982 Act are mandatory on them. However, smaller companies with up to 10 employees are allowed to except two employees who are important to the business from the priority list.

The employer alone is responsible for evaluating employee qualifications. When a decision is made regarding the employees to be dismissed, it may be executed with immediate effect. Dismissals should be confirmed in writing to avoid disputes. While an oral dismissal is valid and binding, the employer may be liable for damages for failure to provide sufficient information to the employee.

10 “Sufficient qualifications” means that the employee, after a reasonable period of introduction, can do the tasks in an acceptable way.

(Release 1 – 2012)
The employee should be informed regarding the length of the notice period and if he has priority for reemployment.

Employees dismissed due to shortage of work have priority for reemployment in case there is a need to increase the workforce again. The priority runs during the notice period and nine months after the employment agreement has expired. If there is a need to reemploy during the priority period and there is more than one person who can claim priority, the employer should negotiate with the local trade union to revise the priority list. Employees are to be taken back according to the “last out-first in” principle, but parties to collective bargaining agreements may agree otherwise.

To claim priority for reemployment, the employee should meet the required qualifications for the job. An employee with priority right should be offered reemployment even if he has taken up a new employment with another employer. The employee also should be available for work within a reasonable time, depending on the employer’s need for immediate help and the employee’s possibility to be present.

**Severance or Redundancy Payment**

A dismissed employee is entitled to receive his normal salary and other benefits of employment during the notice period. A discharged employee is not entitled to any notice period, and he will receive no payment after the employer’s decision has been executed.

If the reason for dismissal is shortage of work, the employee’s income or other benefits will not be reduced even if the employer cannot provide work. Companies not bound by collective agreements do not have to make redundancy payments in addition to salary. However, many employers do observe a longer notice period or provide severance payments to dismissed employees. Most collective bargaining agreements include different forms of safety insurance, e.g., educational aid or redundancy payments for dismissed employees.

**Worker Benefits under National Insurance Programs**

The unemployed will be compensated partly from a basic insurance and partly from a voluntary income shortfall. There are no mandatory job retraining programs that are binding on the employer.

**Retirement, Healthcare, and Old Age Pensions**

**In General**

The various services connected with medical care, hospital care, and dental care are provided under the national health insurance system. They are financed out of taxation revenue and through contributions from the government’s social
budget. However, the patient also is usually charged a fee for medical examinations. Refunds are given for pharmaceutical prescriptions.

The national pension scheme covers basic pension, partial pension, and supplementary pension. The payouts are calculated according to a basic amount that is fixed annually and which adheres to the general price level. An additional old age pension is given to those who have been employed under collective agreements between the employers and trade unions.

Summary of Social Costs

The employer’s contribution to social benefits 2012 was 31.42 per cent of the total amount of salary which is subject to contribution, and covers fees for old age pension (10.21 per cent), health insurance (5.02 per cent), parental insurance (2.60 per cent), survivor’s pension (1.17 per cent), industrial injury (0.30 per cent), labor market insurance (2.91 per cent), and general wage fee (9.21 per cent). Employers bound by collective agreements will have to pay extra fees on top of the mandatory state fees above, approximately 10 to 15 per cent.

Conclusion

Almost every aspect of employment in Sweden is covered by special labor laws. The employment contract itself regulates basic employment conditions. However, labor legislation is characteristically very general, leaving questions to be regulated in detail by the parties. Collective agreements between the employer and trade unions are applied not only to the trade union members but also to all employees.

Failure to observe the provisions of labor law normally makes the employer liable for substantial economic and punitive damages. Thus, an employer should be aware not only of the content of the individual employment contract but also of the applicable labor law and collective agreement.
Switzerland

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Introduction

Switzerland fosters a competitive but social market economy. Its legislation enables a very liberal and flexible labor market compared to the rest of Europe, while regulations provide for adequate employee protection. Apart from individually negotiated employment contracts, collective bargaining has a prominent place as evidenced by the fact that about forty per cent of employees are subject to a collective labor agreement.

The character of employment law has been partly shaped by federalism and direct democracy. Federalism enabled the cantons to be a breeding ground for new regulations before their enactment on a national level by the Confederation. Over the course of time, more competencies were transferred to the Confederation such that employment law is presently almost exclusively based on federal legislation.\(^1\)

Direct democracy had a delaying effect on the development of employment law due to the fact that the voters were often skeptical about new regulations. The necessity of consulting cantons, political parties, and interested groups when preparing legislative projects also very often presented a compromise solution. Overall, employment law is well-accepted by employers and employees, as indicated by the low unemployment rates and very peaceful labor relations.

The government shows restraint in intervening in industrial relations and relies on the social partners to agree on the terms and conditions of employment within the legal framework, although government organizations monitor compliance with employment regulations.

Employment law is based on various legal sources such as the Constitution,\(^2\) different acts and ordinances belonging to private and public law, and

\(^1\) For instance, the canton of Glarus enacted the first act on factory work in continental Europe in 1864. This influenced the legislation of other cantons and the eventual entry into force of a Federal Act on factory work in 1877.

\(^2\) Among other things, the Constitution authorizes the Confederation to enact legislation regarding the protection of employees, social security, and employment contracts. It also prescribes equal payment rights for men and women and full employment, and
international treaties. Some can be directly invoked before the courts while others merely contain programmatic statements or guidelines directed at the domestic legislator.3

Legal Relationship of Employer and Employee

In General

The most relevant definition of the employment relationship is found in private law. Pursuant to Article 319 of the Code of Obligations, an employment contract exists when one party (employee) works for a specified or unspecified period in return for payment while being part of an external organizational work structure.

The criterion of subordination is decisive in differentiating employment contracts from other contracts that involve the duty to undertake work. Contractors and agents are not considered employees as their contractual relationships lack the required degree of subordination to an employer. Board members of stock corporations and partners of partnerships are not considered employees, but may have an employment contract with their firm if they additionally serve as managing directors.

Employees in public service generally do not have an employment contract but are employed under public personnel laws, i.e., the Confederation Personnel Act. However, the State may regularly employ personnel under private law terms.

Specific Categories of Employees

The law provides for different categories of employees, although no distinctions are made between full-time and part-time employees. One such category is an apprentice. A contract of apprenticeship enables the apprentice to acquire a comprehensive and systematic vocational training while working in the employer’s service. It has to be concluded in writing and can only be terminated for important reasons after the probationary period and before the training is finished.

Aside from the Code of Obligations, apprenticeships are extensively governed by the Federal Act on Vocational Training, which provides that a contract of apprenticeship should be approved by the responsible cantonal authority and that

provides for the freedom to choose an occupation, to form associations, and to go on strike, with some restrictions.

3 Switzerland is bound by more than fifty conventions of the International Labor Organization. It also is a signatory to the International Covenant on Economic, Social, and Cultural Rights; the International Covenant on Civil and Political Rights; and the Agreement on the Free Movement of Persons with the Member States of the European Union. It signed the European Social Charter of the Council of Europe but never ratified it, as provisions on the general right to strike for employees in public service and issues related to immigrant workers were controversially discussed in Parliament.
the employer should obtain permission to train an apprentice. Apprentices receive more systematic and comprehensive training in contrast to interns and trainees, although interns and trainees are legally regarded as regular employees so long as they receive a wage.

Another special employment contract is that for commercial travelers or employees working in the field brokering or concluding all manner of transactions for the employer. The nature of the work allows for special provisions regarding remuneration and expenses, and is further regulated by the Federal Act on Commercial Travelers.

Another special kind of employment contract is the homeworker’s contract, which pertains to an employee who works for the employer off-site, usually at home, with or without the help of his family. Although the employer exerts much less control over a homeworker than a regular employee, the Code of Obligations has qualified it as a special type of employment to inhibit the exploitation of homeworkers, and stipulates special provisions along with the Federal Act on Working at Home.

The Federal Act on Placement Services and Employee Lending provides that the employment contract between a lender and an employee should be in writing and that the regular notice period is shortened. Contracts for seamen do not often occur in practice, but are principally governed by the Federal Act on Maritime Shipping and subsidiarily by the Code of Obligations.

The Labor Act does not apply to public servants, employees in public transportation and private households, farmers, fishermen, clerics, employees of international organizations, crews of Swiss airlines, homeworkers, and traveling salesmen.

In principle, it also does not apply to managers, other executive employees, academics, artists, teachers at private schools, and teachers, caretakers, educators, and wardens in institutions. These employees do not benefit from the provisions on working hours, rest periods, and safety and health protection. Among the employees that are covered by the Labor Act, minors and pregnant and breastfeeding women enjoy special protection.

Foreign Employees

Although foreigners and citizens are subjected to the same set of employment rules, foreigners need a work permit to work in Switzerland. A national from a State not belonging to the European Union (EU) or the European Free Trade Association (EFTA) has to satisfy the requirements of the Federal Act on Foreign Nationals. A foreigner will only be allowed to work in Switzerland if:

- He is a manager, specialist, or other kind of highly qualified worker, although there are some exceptions to this requirement, e.g., being an investor who creates new jobs in Switzerland;
- It serves the interest of the economy as a whole;
• The wage and employment conditions are within the custom;
• He can find suitable accommodation; and
• There is the prospect of lasting integration.

A foreigner also will only be admitted if the relevant quota\(^4\) is not exhausted and if it is proven that no suitable local employee or citizen from an EU or EFTA Member State can be found for the job. Nationals from an EU or EFTA Member State\(^5\) are not subject to these requirements and limitations, as they are granted the same treatment as Swiss nationals with regard to residence provisions and access to the labor market. They may not be discriminated against and can thus be employed as easily as a citizen.

If a foreign employer dispatches employees to Switzerland to provide services, he should provide them with the local minimal work and wage conditions. The authorities carry out inspections to ensure compliance with these conditions. This is regulated in the Federal Act on Employees Dispatched to Switzerland to prevent social dumping.

**Formation of Employment Contract**

Before entering into an employment relationship, the employer and the applicant have to act in good faith and respect each other’s personality and data privacy.

Acting in good faith requires the applicant to disclose all relevant facts that render him objectively unsuitable for the job in question even if he has not been asked about it. It also calls for the applicant to answer truthfully in job interviews, provided that the questions asked were permissible. Should the employer ask an impermissible question, the applicant may give a false answer without having to fear any consequences. In principle, all questions that relate to the suitability of the applicant for the job (e.g., inquiries regarding education, experience, and skills) are permitted. Questions about party or religious affiliation are generally forbidden, but allowed if the employer has a certain ideological bias (e.g., church organizations, kosher butcher shops, and special interest organizations).

If asked about any existing health issues, the applicant only has to name health problems that affect his capability to fulfill the required tasks. Questions

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4 In 2010, the quota for temporary residence permits for work purposes was 8,000 while the quota for first-time annual residence permits for work purposes amounted to 3,000.

5 For some States, the full freedom of movement is not yet in force as transitional measures apply. Nationals from France, Germany, Austria, Italy, Spain, Portugal, the United Kingdom, Ireland, Denmark, Sweden, Finland, Belgium, the Netherlands, Luxembourg, Greece, Cyprus, Malta, Norway, Iceland, and Liechtenstein currently have full rights to freedom of movement. For nationals from Poland, Hungary, the Czech Republic, Slovenia, Slovakia, Estonia, Lithuania, and Latvia, restrictions may be imposed until 30 April 2011. For Romania and Bulgaria, transitional measures may be applied until 2016.
regarding convictions have to be limited to any crime pertinent to the job function. Questions about an existing or a planned pregnancy are not allowed except for jobs that are objectively unsuitable for pregnant women.

Regarding data privacy, an employer may request third parties such as previous employers for information. However, if the applicant has an ongoing employment, the current employer may be approached only if the applicant expressly agrees. Any past employer may only give information to potential employers if the former employee has consented.

An employment contract is concluded when both parties mutually agree to its essential terms such as the approximate nature and amount of the work, the provision to perform work for a period of time, the subordinative relationship, and the payment of a salary. It is not necessary to fix the amount of the salary since the Code of Obligations only provides that the employer should pay the customary wage if no wage is agreed upon.

An employment contract also is deemed concluded if someone accepts work for a period of time in someone else’s service under circumstances in which it cannot be presumed that such work would be performed without a salary.6

An employment contract can be concluded without adhering to any formal requirements, although certain stipulations have to be in writing to be valid.7 Only a natural person can be an employee, while an employer may be a natural person or a legal entity.

All persons above eighteen years of age can conclude an employment contract unless they are unable to consent due to mental illness, mental incapacity, inebriation, or similar circumstances, or if they have been made a ward of court.

A minor may enter into an employment contract if his guardian consents. In principle, all children below the age of fifteen may not work,8 except in family businesses, for very light work, for advertisement, and for cultural, artistic, or athletic performances.

Transfer of the Employment Relationship

In principle, an employment relationship cannot be conferred upon third parties due to its individual-related nature. Like any other contract, a transfer requires the consent of all parties involved.

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6 Code of Obligations, Article 320, Paragraph 2.
7 For example, a non-compete clause may only be validly concluded in writing. If the employment contract is indefinite or lasts longer than a month, the employer has to inform the employee in writing of both parties’ names, the starting date, the employee’s position, the wage and any extra pay, as well as the weekly working hours within one month after the starting date. This written notification duty does not affect the possibility of informally concluding a contract.
8 Labor Act, art 30.
If the employer transfers the business or a part thereof to a third party, the employment relationship is passed to the acquirer unless the employee declines. If the employee declines, the employment relationship will be terminated upon expiration of the statutory notice period regardless of whether the employment contract contains a different notice period. The previous employer and the acquirer of the business are solidarily liable for the employee’s claims for a limited period of time.

Where the transferred relationship is governed by a collective employment contract, the acquirer is required to abide by it for one year unless it expires or is terminated sooner. Prior to the transfer of the business or a part thereof, the employer has to inform the employees or their representative body of the reasons for the transfer and its legal, economic, and social impact on the employees.

If the transfer results in the planning of measures concerning the employees such as salary reduction, relocation, or layoffs, the employees’ representative body (or the employees, where there is none) have to be consulted before finalizing such plans.

**Terms and Conditions of Employment**

**In General**

The terms and conditions of employment are set forth in the legal framework, individual employment contracts, collective agreements, standard employment contracts, work rules, directives, instructions, and usage.

Collective agreements are formed between employers or their associations and employees’ associations. They jointly establish provisions on the conclusion, terms, and termination of the individual employment relationships of participating employers and employees, among others.

A collective agreement takes precedence over an individual contract concluded between an employer and an employee who are covered by the collective agreement. Provisions of an individual employment contract which conflict with a collective agreement are void except when they are more favorable for the employee.

Standard employment contracts are not really contracts but regulations issued by the Federal Council or the cantons. They contain provisions on the conclusion, terms, and termination of certain types of individual employment relationships, and they govern certain groups of employees that structurally have difficulties in establishing a collective agreement.

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9 Code of Obligations, art 333. This also applies in case of a merger, demerger, and a transfer of assets and liabilities under the Federal Merger Act.

10 Code of Obligations, art 357.
The provisions of a standard employment contract only apply where the parties have not agreed otherwise. Only the provisions on minimum wages are mandatory. In contrast to collective agreements, standard employment contracts are of limited importance in practice.\footnote{An example is the standard employment contract for domestic workers that came into force on 1 January 2011 and sets the minimum wage for unlearned and inexperienced domestic workers at CHF 18.20 an hour.}

Work rules are either unilaterally set by the employer after having heard the employees or mutually agreed by the employer and chosen employee representatives. Work rules have to be submitted to the cantonal authority for review but not for approval. Industrial enterprises are required to have work rules, while other enterprises may have them.

Work rules contain provisions on health protection, accident prevention, the organization within the enterprise, and the conduct of employees. Mutually agreed work rules may contain further provisions regulating the employment relationship so long as they do not concern issues which are usually subject to collective agreements. Any administrative work penalties have to be contained in the work rules.

An employer may issue general directives such as employee handbooks, house rules, and individual instructions regarding the employee’s conduct or execution of work. Instructions, especially those concerning conduct, are only permissible to the extent that they are directly related to work and consistent with the employee’s personality and with good faith.

Usage may further shape the terms and conditions of an employment relationship. It is explicitly referred to in law in some instances,\footnote{For example, art 323, para 1 of the Code of Obligations states that the wage should be paid at the end of each month unless the contract, collective agreement, standard employment contract, or usage provides for shorter intervals or other dates.} but usage also may form some kind of binding tacit collective understanding within the company. When something has consistently been practiced for a while (i.e., more than three years), legal claims to this practice may arise.

**Duties of the Employee**

An employee has the duty to personally perform the work. He may only bring in someone to help him by explicit agreement or as allowed by circumstances.

The employee has to perform the work that has been agreed upon and that which is further specified by the employer’s directives and instructions. The work may include all tasks usually associated with the job position as well as accessory tasks. The duty to work may temporarily be expanded or limited under special circumstances.

The workplace may be any location where the employer’s work organization extends. However, an employee can only be transferred to other premises of the
same employer against the employee’s will if such can reasonably be expected of him.

The employee does not have to work if he is not furnished such, if the employer has not yet paid wages that are due, and if it is impossible to do the work. The employee also does not have to work when fulfilling higher legal duties such as military service, sick, pregnant, or is in an accident.

The employee has to carry out the work with due care, handle the employer’s equipment in a professional manner, and handle all materials entrusted to him with care. A violation of the duty of care may give rise to liability.

The employee is responsible for any damage which he has willfully or negligently caused. The degree of care for which he is liable is determined by the individual employment contract, taking into account the occupational risk, level of training, and technical knowledge associated with the work, as well as his aptitudes and skills of which the employer was or should have been aware. Any agreement that stipulates liability without fault is illegal.

The employee also has the duty of loyalty. He should loyally safeguard the employer’s legitimate interests, and should abstain from anything that may economically hurt the employer. The degree of loyalty depends on the status of the employee. A high-level employee has a heightened duty of loyalty in comparison to a low-level employee.

One aspect of the duty of loyalty is the prohibition of competition. An employee may not take another job with which he competes against the employer. However, he is generally not barred from taking another job unless it is so strenuous that he cannot properly fulfill his work.

During the employment relationship, the employee also has an absolute duty not to divulge any manufacturing or business secret or any other confidential matter that come to his knowledge in the employer’s service. This duty continues to exist even after the end of the employment relationship, but only insofar as necessary to safeguard the employer’s legitimate interests. Breach of this duty may give rise to a liability under the Penal Code.

The employee also has to account for anything he has received on the employer’s behalf and to immediately remit to the employer anything he has received or produced in the course of his work. He also has to abstain from enticing customers to breach their contracts with the employer, and he should inform the employer of problems and irregularities at work.

However, an employee’s legitimate interests and fundamental rights set the boundaries to his duty of loyalty. He does not have to physically, mentally, or economically sacrifice everything for his employer.

The employee has to observe the employer’s directives and instructions in good faith. He does not have to follow them if the requested action is illegal, does not
relate to his duty to work, cannot reasonably be expected of him, or is plain harassment.

Nevertheless, if he does not follow legally permitted directives or instructions, the employer may take disciplinary measures such as reprimand, claim for damages, or even termination without notice. The employer also may impose special disciplinary measures such as wage cuts, fines, or relocation provided that such measures are specifically included in the work rules and that there is a procedure to impose these measures that adhere to due process.

**Remuneration for Work**

*In General*

The employer has to pay the wage in the amount that has been agreed upon. Otherwise, the employee is entitled to a wage usually paid in the same or similar environment for the same or equivalent work, taking into account his personal circumstances.

There are no legal minimum wages in Switzerland, but collective agreements and standard employment contracts may fix such. Men and women have the right to equal pay for work of equal value. Wage parity also applies to some extent to foreign nationals not from an EU or EFTA member State. Similarly, any foreign employee who is temporarily dispatched to Switzerland should be paid at least the customary local wage.

Normally, the wage is due and paid in money. It also can be partly due and settled in kind, i.e., using the company car for private purposes, receiving company stocks, or free lodging. Employees usually receive a time wage where the amount is computed on the time spent. Time wages are fully due regardless of the quality of work performed, as long as the employee has spent the time working or was merely present and ready for work. Monthly and hourly wages differ insofar as monthly wages are based on the lapse of calendar time while hourly wages are based on effectively rendered hours.

Employees on call should get paid for the time they spend waiting and being ready for a call if they are required to come to work when they are called in. However, the time spent in waiting may be remunerated with a reduced wage.

Piece or task wage, where the amount is computed on the quantity of work produced by the employee regardless of the time spent, also is possible. Pure piece wage is rare in practice and is usually combined with a time wage or a guarantee of a minimum wage.

In the event of the employer’s bankruptcy, any wage claim that has accrued within the last six months before the bankruptcy enjoys the privilege of being satisfied before any other claims. Employees’ claims also receive preferential treatment at the distribution of the proceeds from the realization of seized assets.
The employee may only assign or pledge his future wage claims to secure obligations under family law (i.e., spousal and child support) to the extent that the wage can be seized. The employer may only set off his counterclaims against wage claims to the extent that the latter are capable of being seized, but claims for willful damages may be set off without limitation. Any agreement as to the use of wage in the employer’s interest is null and void.

**Supplements**

Basic wages may be increased by different types of bonuses. A bonus can enable the employee to participate in company results by receiving a share of the revenue or earnings. It also may be designed as a reward for very satisfying work performance. Commissions also are a way of rewarding an employee for arranging or closing transactions.

Gratifications are particular remunerations voluntarily paid by the employer on special occasions. They are not considered a gift but an appreciation of the work done and an incentive for the future. If gratifications have been regularly paid out without reservation, they may become a binding part of the wage by tacit agreement, such as the thirteenth monthly wage at the end of the year. However, employment contracts and collective agreements usually explicitly stipulate that a thirteenth monthly wage has to be paid at the end of the year and *pro rata temporis* in case of periods less than a year.

An employer may have to supplement the wage with extra remuneration for overtime, night work, work on Sundays, or work on public holidays. Employees with children also are entitled to family income supplements.

The employer also should reimburse the employee for all expenses that necessarily arise from the performance of the work. Expenses that the employer does not have to compensate include clothing (unless a uniform or very special work clothing is required), commuting, meals, or relocation costs.

Reimbursement of costs may be replaced with a fixed allowance, but only if agreed in writing or stipulated in a collective agreement or a standard employment contract, and if the allowance sufficiently covers all expenses. Any agreement where the employee has to bear the expenses in whole or in part is null and void.

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13 Code of Obligations, art 325.
14 Each canton has its own regulations regarding family allowance. However, the Federal Act on Family Allowances has set minimum standards that cantons should observe. An employee is entitled to receive a supplement of at least CHF 200 a month per child below sixteen years old and a supplement of at least CHF 250 a month per child aged sixteen to twenty-five who is still receiving an education.
Reductions

The employer may be required to make some deductions from the wage, such as contributions to social security insurances. Taxes have to be deducted when the employee does not permanently reside in Switzerland.

A small amount of the wage also may be withheld as a guarantee to cover the employer’s claims arising out of the employment contract, but only if agreed upon by the parties, is customary, or is provided for in a collective agreement or standard employment contract. This provision is currently only relevant in the hospitality industry.

Should any work rules contain wage reductions as an administrative disciplinary penalty, such penalty may be deducted from the wage as long as the remaining wage is still subject to attachment. Wages are paid at the end of the month unless shorter intervals or other dates have been agreed upon or are usual. If the employee is in financial distress and if the employer is in a reasonable position to do so, the employer has to grant the employee an advance in proportion to the work already performed.

Pursuant to the Debt Enforcement and Bankruptcy Act, wages may only be seized to the extent that the enforcement official deems them dispensable for the debtor and his family. If part of the wages is seized, the employer has to make those payments to the enforcement office.

Remuneration without Performance of Work

The law provides for some instances where the employer remains liable to pay wages although no work has been performed. These include instances where the work cannot be performed due to the employer’s fault or if the employer defaults in accepting the performance of work for other reasons.

Only in case of force majeure may the employee be required to make up some of the lost work. Any expense that the employee has saved because he was prevented from working and any salary he earned from substitute work or which he willfully failed to earn may be deducted from his wage.

The employee is still entitled to his wage when he is incapacitated from doing his work through no fault of his own. Slight fault of the employee is not

15 The employer is at fault if he does not let the employee work, fails to take the necessary safety precautions, neglects the necessary preparations, or fails to provide the necessary assistance.

16 This occurs when there are other reasons for defaulting which are attributable to the employer’s sphere of risk, particularly business risks (operational disruptions) and economic risks (e.g., lack of orders, shutting down of operations, liquidity squeeze). Whether a strike is part of the risks that the employer has to bear is a controversial issue. As strikes are rare in Switzerland, the courts never had to rule on this.

17 Code of Obligations, art 324a.
sufficient for losing the wage since fault should be obvious. The employee bears the burden of proof that he is incapacitated from working.

The employee may prove sickness or accident with a doctor’s certificate. If there are reasonable doubts as to the doctor’s certificate, the employer may bring in a trusted doctor who will provide him with an opinion regarding the employee’s capacity to work.

Incapacity can mean that it is impossible for the employee to work or that working cannot be reasonably expected of him although it is technically possible. The incapacity should be caused by a personal or other reason somewhat related to the employee, such as sickness, accident, pregnancy, compliance with legal obligations, exercise of a public office, marriage, birth of a child, nursing a sick child, or death of a close relative.

Incapacity due to sport injuries is not considered a fault of the employee even with riskier sports, as long as the employer cannot prove gross personal fault. The employer does not have to continue to pay the wage when there an objective impediment that affects a larger group of people and is not attributable to his sphere of risk (e.g., heavy snowfall, traffic collapse, political unrest, or natural disaster) which prevents the performance of work.

The continuation of wage payment does not immediately apply to all employees upon the commencement of the employment relationship, as the law requires that the employment relationship should have lasted or was concluded for more than three months.

If the employment contract is indefinite and provides for a notice period of more than three months, or if the contract has a fixed term longer than three months, the corresponding wages are normally due from the beginning of the employment relationship.

However, if the contract is indefinite and contains a notice period of three months or less, wage continuation only applies after the first three months have passed. Finally, if the employment contract has a fixed term of three months or less, the employee will never benefit from the provision on the continuation of wage payment.

The employee is entitled to receive his wage and remuneration for benefits in kind that he would have received while normally working. Any commission or supplement he would have earned also has to be paid by the employer. In general, the employee has to be put in the same financial position he was in when he was not prevented from performing his work.

The continuation of the wage payment is not unlimited. The employer has to pay the wages for up to three weeks during the first year of employment, and then

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18 Objective impediments that nevertheless affect the employee also are considered reasons somewhat related to him, such as his house getting flooded in a disaster which would require him to miss work to clean up.
for an appropriate longer period depending on the duration of the employment relationship and the particular circumstances.\(^\text{19}\)

How to proceed with employees that are only partly prevented from working is a source of controversy which is handled inconsistently by the courts. Under the prevailing doctrine, there is no minimum time for the continuation of wage payment, but a minimum amount of wage is calculated after the pay within a certain period. The parties may deviate from wage continuation by written agreement, as long as it is at least of the same value for the employee.

The employer’s duty for wage continuation is largely mitigated by obligatory and voluntary insurances. The employer does not have to continue to pay wages if the employee is obligatorily insured against the economic consequences of being prevented from working, provided that the insurance benefits cover at least four-fifths of the applicable wage.\(^\text{20}\) Such benefits may accrue in case of accidents, absence from work due to pregnancy, military, or civil service, and disabilities (to some extent).

The benefit payments may arise from the Federal Act on Earning Compensation for People in Service and for Maternity ("Earning Compensation Act"), the Federal Act on Military Insurance, the Federal Act on Accident Insurance, or the Federal Act on Invalidity Insurance.

The maximum insurance benefit for being incapacitated from doing work differs depending on the obligatory insurance scheme. The Earning Compensation Act allows benefits of up to CHF 245 a day, except in case of pregnancy where the maximum amount is CHF 196 a day. The Military Insurance Act pays up to CHF 310 a day, the Accident Insurance Act pays up to CHF 277 a day, while the Invalidity Insurance Act pays up to CHF 346 a day.

If the insurance benefits are below eighty per cent of the employee’s wage, the employer should pay the difference up to 80 per cent, although employers usually pay the full wage instead of only eighty per cent.

**Duty of Care to the Employee**

The employer should respect and protect the personality rights of his employees. Employees should be protected from mobbing or sexual harassment, among

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\(^\text{19}\) Code of Obligations, art 324a. The cantonal courts have developed different scales to help determine the length of time that the employer is required to pay wages for an incapacitated employee. Most common are the scales from Berne (the most popular), Basle, and Zurich. Under the Berne scale, the period of continuation of wage payment is one month in the second year of service, two months in the third and fourth years of service, three months between the fifth and ninth year of service, and an additional month every five years thereafter. With the beginning of each service year, the right to continued wage payment is renewed. Absences within one year of service are added together if an employee is prevented from performing his work more than once.

\(^\text{20}\) Code of Obligations, art 324b.
others. An employer’s duty of care also includes the protection of his employees’ health and the prevention of accidents at work.

The employee’s right to privacy also has to be respected, such that secretly installed optical surveillance devices are not permitted.21 The employee also has a right to his own data that are in the employer’s files, which he may ask for at any time.

The Federal Act on Human Genetic Testing prohibits genetic testing on employees or job applicants despite their consent. Only under very limited circumstances where consent is only one of several preconditions is a presymptomatic genetic test permitted.

Under court practice and the older prevailing doctrine, the employer is in principle under no obligation to provide the employee with work. However, a duty to provide work can be derived from the duty of care in particular circumstances (e.g., performing artists or journalists). The newer doctrine holds that all employees have to be given work. The employee also has to be given a sufficient amount of work if his remuneration is not computed on the time spent but on the work done.

The employer also should protect the economic interests of the employee. The safety of the employee’s belongings which are used for working or which are usually brought to work should be ensured. The employee also has to be provided with the necessary tools and materials to fulfill his task, unless otherwise agreed, and he has to be reimbursed for all expenses that necessarily arise out of the performance of his work.22

The employer has certain duties with respect to social insurance, specifically the partly company-sponsored pension plan (occupational benefit plan). For instance, the employer has to inform the employee of his rights arising out of the pension plan.23 The duty of care further entails the duty to promote the employee’s economic advancement by giving him a certificate of employment upon his request.24

The employer has to attest to the nature and duration of the employment relationship as well as the performance and conduct of the employee, although the employee may request that the certificate be limited to statements about the nature and duration of the employment relationship. The certificate should be true, complete, and clear.

An employee is further entitled to references and to ask his former employer to give information to potential employers about himself and his work. Without

21 Article 26 of the third Ordinance of the Labor Act provides that surveillance and control systems that are intended to monitor the conduct of employees at work are not permitted.
22 Code of Obligations, art 327, para 1 and art 327a, para 1.
23 Code of Obligations, art 331, para 4.
authorization, an employer may not give out any information regarding the (former) employee.

**Working Hours**

*In General*

In principle, working hours are expressly or impliedly agreed upon by the parties within the limits of public law and a collective agreement or a normative standard contract. Working hours vary between full-time and part-time work. Nearly one-third of all employees are engaged in part-time work.

The working hours can be stiff (e.g., eight o’clock in the morning to five o’clock in the evening, including a one-hour lunch break), they can be largely left to the discretion of the employee, or they can be a combination of both as is the case with sliding working hours that is common in many enterprises. Workers subject to the Labor Act should perform their day’s work within fourteen hours.

**Overtime**

An employee is required to perform overtime work if necessary for the employer (e.g., unexpected shortage of staff or urgent deadlines), possible for the employee, and only to the extent that it can be reasonably expected of him.25

Overtime work is not possible when it exceeds the employee’s strength or when he is committed to another part-time job. Overtime also cannot be reasonably expected of him if it regularly occurs and could have been avoided through better scheduling by the employer or if the employer could engage auxiliary workers or other employees instead of asking for additional work.

Any overtime has to be remunerated with the regular wage plus twenty-five per cent or, with the agreement of the employee, compensated with extra free time of the same duration.26 However, the parties may agree beforehand that overtime work is not additionally remunerated and already fully compensated with the regular wage.

An employee may only waive his right to extra compensation for overtime work below the maximum weekly working hours. The extra compensation is mandatory for workers with maximum weekly working time of forty-five hours after the first sixty hours above the weekly limit.

All workers employed in industrial enterprises, white-collar workers, and sales staff in large retail enterprises have a maximum working time of 45 hours per week. All other workers (i.e., workers in construction and craft trades) have a weekly maximum working time of 50 hours. In principle, the weekly maximum working time may not be exceeded, except in the following instances:

26 Code of Obligations, art 321c, paras 2 and 3.
• It may be temporarily extended for four hours, so long as it is not exceeded on a semi-annual average, in activities dependent on weather, and in enterprises with considerable seasonal fluctuation of the workload;

• If the employee has a maximum weekly working time of forty-five hours and regularly works five days a week, such may be extended for two hours if it is not exceeded on average over eight weeks, or for four hours if it is not exceeded on average over four weeks;

• It may be extended for four hours by official authorization in very exceptional circumstances, such as a natural disaster; and

• It may be exceeded by no more than two hours a day or 170 hours a year for workers with a maximum weekly working time of forty-five hours, and 140 hours a year for those with a limit of fifty hours, provided that such overtime work is needed for urgent work, exceptional workload, inventory, closing of accounts, liquidation, or prevention and elimination of operational disruptions.

Night Work and Sunday Work

Night work is performed from 11 o’clock in the evening to six o’clock in the morning. In principle, night work is prohibited by the Labor Act if it is not moved by one hour by the employees’ representative body or a majority of the affected employees. However, a permit may be obtained if continuous or regular night work is indispensable for technical or economic reasons. A permit for temporary night work also may be granted upon demonstration of an urgent need.

The employee also has to explicitly consent to night work, which consent can be given upon the conclusion of an employment contract. An employee who temporarily performs night work is entitled to an extra charge of 25 per cent, while an employee who constantly or regularly performs night work is entitled to a time compensation of 10 per cent for the night work.

Sunday work is similarly regulated. A permit for temporary, continuous, or regular Sunday work can be obtained for the same reasons as night work. An employee who temporarily performs work on Sunday is entitled to an extra charge of fifty per cent for the Sunday work. The weekly rest is fixed at one-and-a-half days per week, normally a Sunday and a supplementary half day. However, the majority of employees work five days a week in practice.

Rest Periods and Holidays

Work has to be interrupted by breaks, which have to last at least fifteen minutes if the daily working time is more than five-and-a-half hours, at least thirty minutes if the daily working time is more than seven hours, and at least one hour if the daily working time is more than nine hours.

If the employee is not allowed to leave the workplace during his break, such does not qualify as a break but as work time. The daily rest period should be at
least eleven successive hours. For adult employees, the rest period may be reduced to eight hours once a week, provided an average of eleven hours is maintained over two weeks.

The employer has to grant the employee one day off every week as well as justified leave. Justified leave covers the customary free hours and days during the usual working time for special occasions and important personal matters. Due regard has to be given to the interests of the employer and the employee when determining such free time.

The Swiss national day (1 August) is a federal public holiday that is equivalent to a Sunday in employment terms with equivalent rights to pay. Article 20a of the Labor Act allows the cantons to declare eight other days as public holidays that also are treated similarly, such that employees principally do not have to work on these days. Thus, public holidays are different in each canton according to local customs and traditional religious affiliation. The Labor Act also allows an employee to interrupt his work for religious ceremonies other than those recognized by the cantons if he informs his employer of his intention at least three days in advance.

An employee is entitled to at least four weeks of vacation during each year of service. Employees under the age of twenty are entitled to at least five weeks of vacation. Part-time employees are entitled to the same amount of vacation as full-time employees. At least two weeks of vacation should be granted consecutively in the course of the year of service. Vacation days that have not been taken during the year of service in which they accrued are carried forward to the next year. The employer should determine when vacations are taken, but after considering the employee’s wishes to the extent that they are compatible with the interests of the business.

Vacation time may be extended if: (a) the employee falls seriously ill or has an accident during the vacation that impedes its recreation purpose; or (b) if a public holiday occurs during vacation and does not fall on a day that is usually work-free. If an employee is prevented from working for more than one month due to his own fault, his vacation is reduced by one-twelfth for each full month that he was unable to work.

During his vacation, the employee is entitled to receive his full wage as well as fair compensation for any lost benefits in kind. Employees receiving an hourly wage are equally entitled to receive their normal wage during vacation. Generally, a certain percentage of the hourly wage is explicitly designated as vacation pay (8.33 per cent for four weeks of vacation per year).

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27 For instance, to visit the doctor, lawyer, or authorities, to relocate in the event of death or marriage of close family members, and to apply for a job after notice of termination.

28 Code of Obligations, art 329a.
As long as the employment relationship has not been terminated, vacations should be taken and cannot be compensated with monetary payments or other benefits. Only after the employment relationship has ended can any unused vacation be compensated.

Public holidays do not entitle the employer to reduce the wage, as employees are entitled to their wage irrespective of work-free days. However, employees with an hourly wage do not have to be paid on public holidays if they are not working, except during the National Day when every employee is entitled to a wage.

**Vocational Training**

Under Article 329e of the Code of Obligations, the employer should grant employees under the age of thirty leave without pay of up to one working week for extracurricular youth work for cultural or social organizations and for related training. Apart from this provision and the special provisions on apprenticeship, the vocational training of employees is not subject to the Code of Obligations.

It is common for an employer to bear some or all of the costs of an employee’s external education and reduce the amount of work so that the employee can attend classes. In such cases, the employee usually agrees to stay with the employer for a certain period. It also is often agreed that if the employment relationship prematurely ends, the employee is required to pay back some of the fees to the employer.

However, the commitment to stay with the employer generally may not exceed three years, and the obligation to repay the employer is only permitted if the employee has a lasting benefit from the vocational training. Nor may pay back clauses also may come into effect if the employment contract has prematurely ended without the employee’s fault. An employer may grant his employee unpaid vacation, with the latter’s consent, to enable him to pursue further education.

**Intellectual Property**

Any invention or design produced by the employee exclusively or in collaboration with others in the course of his work for the employer and in the performance of his contractual obligations belongs to the employer, without need for remuneration.

The employer also may reserve by written agreement the right to acquire inventions and designs produced by the employee in the course of his work but not in the performance of his contractual obligations.

If the employer is able to acquire such, he has to pay the employee a separate and appropriate remuneration determined after considering all pertinent

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29 Code of Obligations, art 332.
circumstances. These circumstances may include the economic value of the invention or design, the degree to which the employer contributed, any reliance on other staff and on the employer’s facilities, the expenses incurred by the employee, and his position in the company. The rights to any invention or design that are not related to an employee’s work are his.

Employment law does not have any rule on copyrights. Unless otherwise agreed, it is assumed that upon the conclusion of an employment contract, the employee agrees to confer in advance any copyright to work that he produces during his employment with the employer. On the other hand, copyright law provides that any software developed during work originally belongs to the employer.

**Discrimination**

**In General**

The Constitution states that everyone should be equal before the law, and that no one may be discriminated against, particularly on the grounds of origin, race, gender, age, language, social position, or way of life; religious, ideological, or political convictions; or because of a physical, mental, or psychological disability.

These fundamental rights directly bind all governmental bodies and everyone engaged in public affairs qualified in legislation and application of law. However, these rights are not addressed to private individuals or entities and do not directly apply to relationships among them. Hence, relationships between employers and employees are primarily governed by the freedom of contract.

The law does not set significant boundaries to discriminatory hiring policies except in case of gender discrimination, which is separately and extensively regulated by law. A discriminated applicant may be awarded a lump sum payment for compensation in case of blatant discriminatory conduct, but he cannot force the employer to hire him.

A job applicant is legally better protected against discriminatory conduct from the employer once he has entered into an employment contract. For instance, a notice of termination is unlawful on account of an attribute pertaining to the person of the other party, unless such attribute relates to the employment relationship or substantially impairs collaboration at the workplace.

The general principle of equal treatment of all employees by the employer is based on the latter’s duty of care. However, the freedom of contract takes precedence over the equal treatment of employees. Employees employed by the same company and having a similar position are not entitled to be treated

30 Such personal attributes include gender, marital status, pregnancy, family background, race, nationality, age, physical appearance, illness, disability, religion, personal belief, and sexual orientation.
equally under the law, and the employer may differentiate arbitrarily between individual employees.

Unequal treatment is only tantamount to a violation of the legal personality of the employee if he is treated considerably worse than a multitude of other employees for no relevant reason. However, a beneficial treatment of some employees may result in the others assuming in good faith that there is a general tacit amendment of the employment contracts to their benefit, which would oblige the employer to give the beneficial treatment to all.

**Discrimination Based on Gender**

The Constitution states that men and women have equal rights which the law will ensure in law and in practice, particularly in the family, in education, and in the workplace. Men and women also have the right to equal pay for work of equal value. However, the wages of women are in reality still lower than the wages of men who are doing the same jobs.

The Federal Act on Gender Equality (“Gender Equality Act”) stipulates that employees may not be directly or indirectly discriminated against on the basis of their sex. The prohibition applies to hiring, allocation of duties, setting of working conditions, pay, basic and advanced training, promotion, and dismissal.\(^{31}\)

However, the Gender Equality Act enables positive discrimination to some degree, which is constitutionally questionable, as it holds that appropriate measures aimed at achieving true equality are not regarded as discriminatory.

Sexual harassment in the workplace also is prohibited. A sexually harassed person is entitled to compensation of up to six median monthly salaries, unless the employer proves that he took measures that have been proven in practice to be necessary and adequate to prevent sexual harassment and which he could have been reasonably expected to take.

If a person has been discriminated against through the refusal of employment, he may claim compensation of up to three monthly wages, but may not claim employment. A person whose application for employment has been refused and who claims discrimination may request a written statement of reasons from the employer. In case of discrimination through dismissal, the compensation due can amount to six monthly wages.

In all cases of gender discrimination, the employee may apply to the court for an order prohibiting threatened discrimination, requiring existing discrimination to cease, confirming that discrimination is taking place if it is continuing to have a disruptive effect, or for the payment of any salary due.

\(^{31}\) Discrimination is presumed to exist if the person concerned can substantiate it by *prima facie* evidence. Thus, the reduced burden of proof does not apply in cases of discrimination during hiring and in sexual harassment cases.
Collective Bargaining and Worker Participation

Associations

The Constitution guarantees the freedom of association to enable the collective safeguarding of the interests of employers and employees. This is likewise confirmed by Switzerland’s ratification of the European Convention on Human Rights, Conventions of the International Labor Organization, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social, and Cultural Rights.

Any employee or employer is free to establish, join, or stay away from an association without direct or indirect governmental coercion. Thus, a notice of termination that is given due to an employee’s membership in an employees’ organization or due to his lawful engagement in labor union activities is unlawful.

Any clause in a collective agreement or arrangement intended to compel an employer or an employee to join a contracting association also is void. Thus, a closed shop clause or union shop clause is unlawful. However, preferential shop clauses which are not intended to keep outsiders from the labor market but to disadvantage outsiders are generally permitted under the following conditions:

- Outsiders should be able to accede to the collective agreement without limitation and without having to join a union; and
- The preferential treatment of union members should not be excessive.

Preferential shop clauses may include provisions where benefits arising out of the collective agreement may not be given to outsiders or provisions where union members have to be preferentially treated with regard to certain employment conditions.

The freedom of association not only acts in favor of individuals forming an association, but also in favor of the associations themselves. Apart from their formation and existence, associations are guaranteed to be able to pursue their ends. They enjoy tariff autonomy which empower them to set binding employment conditions through collective agreements without government interference. The right to conclude a collective agreement is reserved for employers or their associations and for employees’ associations, including company unions which consist solely of the employees of one employer.

An association with collective bargaining power should be a legal entity, independent from the counterpart and to some extent from third parties, voluntary associated, and has the set goal to shape employment conditions.

The foremost function of associations is the representation of the interests of their members by bargaining collective agreements or through other means. Associations also may request for the declaration of the general binding force of
collective agreements, or may recommend representatives for labor courts and conciliation authorities.

They also have an autonomous right to file an action concerning their interests or the interests of their members, as well as the right to be heard before a standard employment contract or executing provisions to the Labor Act and the Act on Vocational Training are enacted.

**Collective Agreements**

*In General*

Employers or their associations and employees’ associations may enter into collective agreements which establish provisions on the conclusion, terms, and termination of individual employment relationships, among others. Around half of all employees in Switzerland are covered by a collective agreement.

A collective agreement may contain normative provisions which concern the conclusion, terms, and termination of covered individual employment relationships. These provisions are directly binding on the relevant employers and employees during the validity of the collective agreement, regardless of any assent on their part.

Normative provisions may not be excluded by individual agreement unless the latter is more favorable for the employee or unless the collective agreement expressly allows it. The employee may not relinquish his claims arising from normative provisions during the employment relationship and one month thereafter.

A collective agreement also may provide for the rights and duties of the parties which are confirmed by law. These include ensuring compliance with the collective agreement, and maintaining harmonious industrial relations on matters regulated by the collective agreement such that no collective action may be taken in this regard (“relative duty of labor peace”). The relative duty of labor peace can be reinforced by a stipulation of the “absolute duty of labor peace”, i.e., no collective action may be taken as long as a collective agreement is in effect.

A collective agreement also contains other provisions which stipulate obligations of the employer toward a third party, i.e., establishing a day nursery, allowing additional participation rights of the employees, or making contributions to joint establishments.

Collective agreements should be in writing and may be concluded for a fixed or an undefined period. If a collective agreement is open-ended and does not provide otherwise, the parties may withdraw from it at any time after one year with a six months’ notice.

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32 Code of Obligations, art 357a, para 1.
33 Code of Obligations, art 357a, para 2.
Extension of Scope

In principle, collective agreements are only applicable to the employers and employees that are members of the contracting associations. However, single employers and employees who are not union members but who are employed with an employer that is covered by the collective agreement may accede to the agreement.

The parties may allow an outsider to accede to the collective agreement through a written approval without having to join an association. The contracting parties are not required to let outsiders accede, unless not doing so would be an abuse of rights.

The accession of outsiders is usually tied to the payment of a “solidarity contribution” to cover expenses for bargaining, controlling, and enforcing the collective agreement. The amount of the solidarity contribution should not be so high as to pressure the outsider to join an association to be covered by the collective agreement. The collective agreement may stipulate that the covered employers may only take into service employees who are willing to accede to the agreement. This does not coerce employees into a union, unlike in a closed shop clause.

A collective agreement also may contain clauses that require employers to treat unionized and non-unionized employees equally. An outsider also may accept the duties arising from a collective agreement by voluntary declaration. Further, parties to an individual employment contract may agree to include the provisions of a collective agreement as an integral part thereof.

A collective agreement also may be given general binding force by official act, which should be requested by the associations that are parties to the agreement. The scope of a collective agreement can thus be extended to all employees and employers of a certain trade or commercial sector under the following conditions:

- It is necessary in the sense that employers and employees bound by the collective agreement would seriously be disadvantaged otherwise;
- The collective agreement already covers more than half of all employers and employees to which it will be extended;
- The already covered employers employ more than half of all employees concerned;
- The extension of scope does not run contrary to the overall interest nor interfere with legitimate interests of other commercial sectors and population groups; and
- The declaration of the general binding force also should accommodate minority interests within the trade or commercial sector in question.

In general, only the normative provisions of the collective agreement are made binding. Although there are a few generally binding collective agreements, their
number is growing. As of end of 2010, there were seventy-two generally binding collective agreements of which around half extended to only one canton.

Collective Action

Collective action is a constitutional right and principally allowed under certain circumstances. It encompasses strikes for employees and lockouts for employers.

The law may prohibit certain categories of persons from going on strike. Everyone in the federal government’s service who fulfills essential work for national security, protection of important interests in foreign relations, or safeguarding the national supply of indispensable goods and services is prohibited to go on strike. For a strike (or lockout) to be lawful and permitted, the following conditions have to be met:

- Only associations that are able to enter into a collective agreement and thus end the labor dispute are allowed to call a strike. Hence, associations have the monopoly on strike. A wildcat strike where unorganized employees take collective action themselves is not allowed.

- Strikes are only permitted for employment matters that can be regulated by collective agreements. Hence, a sympathy strike to support other employees upon which one’s association has no influence is illegal. Political strikes also are not permitted. Strikes are only meant to rearrange employment conditions, thus they also are not allowed to enforce legal claims that have arisen.

- No labor peace obligations may stand in the way. As collective actions are not allowed without first trying to come to a mutual agreement (i.e., initiation of conciliation proceedings), collective actions are not permitted while such proceedings are under way.

- Strikes should be proportionate to the goals they try to achieve. The prevailing view is that strikes are a means of last resort, thus warning strikes to demonstrate the seriousness of demands are not allowed. The means of collective action should be peaceful and fair and may not include any criminal behavior.

Lawful collective actions temporarily suspend the main obligations from employment contracts. An unlawful strike may authorize the employer to immediately terminate the employment contract if the employee was aware that the strike was illegal. Individual employees, employers, and the involved associations also can be liable for damages caused by unlawful collective actions.

Collective actions rarely occur in practice due to the widespread duty to preserve peaceful employment relations. From 1996 to 2008, Switzerland experienced an average of five strikes and lock-outs per year that affected an average of merely 1,780 employees per incident.
Worker Participation

The Federal Act on Information and Consultation of Employees in the Enterprise (“Participation Act”) provides guidelines for employee participation. Employees in Switzerland have no managerial influence by law. They are only entitled to be involved under some circumstances, but they have no right of co-determination.

The Participation Act is applicable to all enterprises that regularly employ people in Switzerland. An employees’ representative body may be appointed in enterprises that have at least fifty employees. Upon request of one-fifth or 100 employees in enterprises with more than 500 employees, a secret ballot should be held to find out whether the majority of the voting employees desire an employees’ representative body.

If the majority vote is affirmative, the representatives are then chosen in a general and free election. The election is secret if requested by one-fifth of the employees. The size of the representative body is mutually determined by the employees and the employer, but has to consist of at least three people.

An elected representative may only be dismissed if the employer can prove just cause for termination. Candidates and elected representatives may not be disadvantaged due to their activity.

The representative body is entitled to comprehensive information on all relevant issues in due time. The employer has to inform the representative body about the effects of the course of business on employment and the employees at least once a year. The representative body also has the following special participation rights:

- The representative body is entitled to be heard, to have a debate and, if the employer does not follow the employees’ proposals, to receive an explanation with regard to all aspects of health protection, the organization of working time, and measures relating to night work. It also is entitled to participate in all matters concerning the prevention of accidents and occupational illnesses.

- The employer has to inform the representative body of the reasons for a transfer of the business or a part thereof and its legal, economic, and social impact on the employees. If measures concerning the employees (i.e., wage reduction, relocation, or layoffs) are planned, the representative body has to be consulted in due time before such measures are decided.

- If a mass layoff is planned, the representative body should be given the opportunity to formulate proposals on how to avoid the layoff or mitigate its consequences. It should be furnished with all appropriate information and, in

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34 The same information and consultation rights apply if a company is merged, demerged, or if assets and liabilities are transferred pursuant to the Merger Act. In such cases, the representative bodies of the acquired company and the acquiring company have to be informed or consulted.
any event, be informed in writing of the reasons for the mass layoff, the number of dismissals, the number of employees normally employed, and the period in which the notices of termination will be given.

- The representative body has participation rights in the designation of the occupational benefit fund.

The employees’ representatives are allowed to pursue their activity during working hours if their work allows it. The employer has to support the representative body and provide space, appliances, and administrative backup if necessary.

The members of the representative body should keep company affairs that have come to their attention in their capacity as representatives confidential from outsiders as long as they are not entrusted with safeguarding the employees’ interests (e.g., lawyers or unions).

Personal issues of individual employees and issues expressly indicated for good reasons by the employer or the representative body have to kept confidential from all persons, including the employees.

Employees’ participation rights can be voluntarily strengthened by the employer or amended by collective labor agreements. Deviating from the provisions of the Participation Act is principally only allowed in favor of employees. If an enterprise does not have an employee representative body, all participation rights are accorded to the employees themselves.

**Health and Safety Protection in the Workplace**

Article 328, Paragraph 2, of the Code of Obligations requires an employer to take all measures necessary for the protection of the safety, health, and integrity of his employees as far as may be reasonably expected of him in light of each employment relationship and the nature of the work.

The Labor Act and the Accident Insurance Act contain very detailed provisions on health and security measures in the workplace, and provide for criminal sanctions in case of violations. For instance, the Labor Act requires that plans for construction or alteration of industrial facilities be submitted to the authorities for approval. A separate operating approval also is required before operating the facilities.

The Labor Act also contains special provisions for the protection of minors and pregnant women. For instance, minors may not work more than nine hours a day and, with few exceptions, not at night and on Sundays. Minors who are less than sixteen years of age may not work later than eight o’clock in the evening, while minors who are more than sixteen years of age may not work later than ten o’clock in the evening.
Pregnant and breastfeeding women may not be appointed to tasks that are hazardous to her or her child’s health. If the employer cannot provide such work, the mother is not required to work but is still entitled to eighty per cent of her wage.

Pregnant women may not be employed from eight o’clock in the evening to six o’clock in the morning for eight weeks prior to delivery. They also may be voluntarily absent from work without remuneration. A mother cannot work for eight weeks after delivery, and may only be employed with her consent for another eight weeks thereafter.

While the mother is absent from work, she receives payments from maternity insurance which may amount to CHF 7,350 a month for fourteen weeks after delivery. The employer is only required to pay the possible difference between the maternity insurance payments and eighty per cent of her regular wage during the first eight weeks after delivery.

The Accident Insurance Act primarily regulates insurance for work-related accidents and occupational diseases but also contains provisions regarding the prevention of work-related accidents and illnesses. Employees have to participate in safety prevention and would have to specifically use personal protective equipment and safety installations which they may not remove or alter without the employer’s permission.  

Insurance premiums for work-related accident insurance are borne by the employer and are related to the risk of accidents in the workplace. If safety prevention regulations are violated, the premiums can retroactively be increased.

Compliance with provisions pertaining to safety and health protection in the workplace is further secured by workplace inspections conducted by a special public officer. If violations are not remedied after admonitions, a directive may be issued under penalty for failure. Ignoring a directive may give rise to the shutting down of operations if the lives or health of employees or the environs of the enterprise are threatened.

The mandatory accident insurance principally covers the damage caused by an accident in the workplace. If the accident was caused by the employer’s fault, the accident insurance may take recourse. The employee is only entitled to claim compensation from the employer for the damage that is not covered by accident insurance.

35 Accident Insurance Act, art 82. It is actually a criminal offense under article 230 of the Penal Code to negligently or deliberately disable or render such safety installations unusable or to negligently or deliberately fail to install such safety installations against regulations.
Dispute Resolution

Individual Disputes

The new Code of Civil Procedure\textsuperscript{36} establishes particular venues for employment disputes which may not be explicitly or tacitly waived in advance by the jobseeker or the employee. Civil courts have jurisdiction over claims for performance of an obligation under public law if the obligation is susceptible to inclusion in an individual employment contract.\textsuperscript{37}

Conciliation should first be attempted before the courts deal with any employment dispute. Conciliation proceedings are mainly informal and free of court charges if the amount in dispute does not exceed CHF 30,000, and party costs cannot be awarded. The proceedings are confidential and the parties’ depositions may not be later used in court.

The parties may request that conciliation proceedings be replaced by mediation, where the organization and conduct of the proceedings is widely left to the parties. If the amount in dispute is at least CHF 100,000, the parties can decide to waive conciliation proceedings.

Disputes that cannot be settled by conciliation may be brought to court. Pecuniary disputes involving up to CHF 30,000 are decided in simplified proceedings where the court establishes the facts \textit{ex officio}. No court fees are charged, and party costs may be awarded.

Collective Disputes

Collective disputes may refer to differences regarding the conclusion of a new collective agreement or the amendment of an existing one (regulation disputes). They also may pertain to the interpretation, application, or consequences of a violation of a collective agreement (legal disputes).

Regulation disputes can be brought before the cantonal boards of conciliation or the federal Board of Conciliation depending on whether the matter concerns multiple cantons. The boards of conciliation cannot forcibly settle the dispute unless the parties agree to be bound in advance by any decision or after an award is rendered. The disputing parties may derogate from the competence of the boards of conciliation by agreeing on private conciliation bodies. Employers and employees should be equally represented in the public boards of conciliation and in private bodies of conciliation.

Legal disputes are settled through regular civil action before the courts so long as the disputing parties have not agreed to let the public boards of conciliation or any private arbitration board render final judgment.

\textsuperscript{36} This entered into force on 1 January 2011 and replaced twenty-six different cantonal laws on civil procedure.

\textsuperscript{37} Code of Obligations, art 342.
Termination of Employment

In General

An employment relationship agreed for a fixed period ends without notice of termination, but it cannot be unilaterally terminated in principle. If a fixed-term employment contract was entered into for a period longer than ten years, it may be terminated after ten years by either party giving six months’ notice effective at the end of a month.\(^{38}\)

An employment relationship that is entered into for an unlimited period may be terminated by either party and does not require any cause. The notice of termination may be given informally and does not have to be in writing. However, the party giving notice should state his reasons in writing if requested by the other party.\(^{39}\) A notice of termination is only valid if it has been received by the addressee.

The notice of termination may be given at any time, but there are notice periods to be observed. The notice periods should be the same for both parties. If an agreement provides for different notice periods, only the longer period is applicable.

Either party may terminate the contract at any time during the probation period, with seven days’ notice.\(^{40}\) If the probation period is interrupted by illness, accident, or fulfillment of a non-voluntary legal obligation, the probation period is extended accordingly.

After the probation period, the employment relationship may be terminated at the end of a month with one month’s notice during the first year of service, with two months’ notice in the second to ninth years of service, and with three months’ notice thereafter.\(^{41}\) These statutory notice periods may be amended by a collective agreement or a standard employment contract. However, they may only be reduced to less than one month by a collective agreement and only for the first year of service.

Particular procedural provisions apply in case of a mass layoff. Notices of termination are given to the employees within thirty days of each other for reasons not pertaining personally to them, and which affect at least ten employees in an enterprise normally employing more than twenty and fewer than 100 employees, at least ten per cent of the employees of an enterprise normally employing at least 100 and fewer than 300 employees, or at least thirty employees in an enterprise normally employing at least 300 employees.\(^{42}\)

\(^{38}\) Code of Obligations, art 334, para 3.
\(^{39}\) Code of Obligations, art 335, para 2.
\(^{40}\) Code of Obligations, art 335b, para 1.
\(^{41}\) Code of Obligations, art 335c, para 1.
\(^{42}\) Code of Obligations, art 335d.
The employees’ representative body (or the employees, if there is none) has to be adequately informed and consulted on how to avoid the layoff or mitigate its consequences. The employer also has to subsequently notify the cantonal employment office of the intended mass layoff. The employment office will then try to seek solutions to the problems created by the planned mass layoff.

An employment contract that has been terminated within the context of a mass layoff ends at least thirty days after the notice to the cantonal employment office. Under certain circumstances, notice periods may be prolonged. A notice of termination may not be subject to conditions, and the addressee has to be certain that the employment contract will continue to be effective.

A notice pending a change of contract is permitted in principle, and it is the addressee who decides whether the employment contract will continue with the proposed amendments or not. Such notice is permissible only if the proposed amendments come into effect after the lapse of the notice period and provided that the whole act is not an abuse of right.43

An employment relationship may be terminated by mutual agreement at any given time. The law forbids the employee to waive any claim that has already arisen from the employment relationship in the agreement to terminate the contract.

Reaching the proper retirement age does not automatically terminate the employment contract. It only ends without a notice of termination if it contains such a clause or refers to the regulations of the occupational benefit plan that stipulates a certain pension age. In any case, early retirement requires a proper notice of termination.

The death of the employee terminates the employment relationship, but the death of the employer merely transfers the employment relationship to the heirs, except if the employment relationship was essentially concluded with the person of the employer in mind. If the employer is insolvent, the employee may immediately terminate the employment relationship unless he is furnished with security for his claims within an appropriate period.

Termination with Immediate Effect

An employment contract may be terminated with immediate effect (“extraordinary termination”) at any time for valid reasons. The party doing so should give his reasons in writing if requested by the other party. The extraordinary notice of termination does not have to adhere to any formality.

A valid reason pertains to any circumstance that renders the continuation in good faith of the employment relationship unconscionable for the party giving

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43 The Federal Supreme Court has held that a notice pending a change of contract is abusive if the intention is to enforce an inequitable and unreasonable impairment of the contract without any business or economic reason.
The law enumerates valid reasons, which do not include an employee being prevented from performing work without his own fault. A severe violation of a contractual obligation constitutes a valid reason. Less severe violations may constitute a valid reason if they occur repeatedly despite warnings.

**Consequences of Termination in General**

All obligations generally fall away with the end of the employment relationship, but the employee’s duty of confidentiality remains to an extent to safeguard the employer’s legitimate interests. The employer also should continue to keep data concerning the employee confidential.

All claims arising from the employment relationship fall due at its end. Upon termination, each party should make restitution for everything he has received during the employment relationship from the other party or from third parties to their account. The employee may not waive claims arising from mandatory provisions of law or a collective agreement during the employment relationship and one month after its end.

If the employment relationship was immediately terminated for a violation of the employment contract by one party, the latter is fully liable for damages. In all other cases of extraordinary termination for valid reasons, the financial consequence of the termination is left to the discretion of the judge.

Severance allowance is only payable if an employee of at least fifty years of age is terminated after twenty or more years of service. The amount of the severance allowance should not be less than the employee’s wages for two months. A social compensation plan is often envisaged in the context of a mass layoff, but there is no legal obligation for the employer to provide for such a plan unless a collective agreement calls for one.

Where the employment relationship ends due to the death of the employee, the employer should pay his wage to his heirs (i.e., spouse, registered partner, minor children) for another month after his death or for two months if he had completed more than five years of service. If the employee does not have heirs, the amount should be paid to other persons to whom he had a duty to provide

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44 Code of Obligations, art 337, para 2.
45 Valid reasons for extraordinary termination by the employer include accepting bribes or forging documents, consistently refusing work, or taking a vacation without the permission of the employer. Valid reasons for extraordinary termination by the employee include heavy harassment at work or consistent neglect of necessary safety measures at work despite warnings.
46 Code of Obligations, art 339b, para 1.
47 However, art 339d, para 1 of the Code of Obligations stipulates that no severance allowance is due if the employee receives benefits from an occupational benefits scheme that has been funded by the employer based on the amount of the allowance otherwise due.
support. These persons also have a right to the severance allowance that would have been paid to the employee.

**Consequences of Unfair Termination**

A notice of termination is deemed unfair if given at an improper time (“blocking period” or a period when the employee may have difficulty finding a new job) and for illicit reasons. The blocking periods under Article 336c, Paragraph 1, of the Code of Obligations are the following:

- While the other party is performing compulsory Swiss military or civil defense service or alternative civilian service, and where such service lasts for more than eleven days, during the four weeks preceding or following it;
- While the employee, through no fault of his own, is partially or entirely prevented from working by illness or accident for thirty days in the first year of service, ninety days in the second to fifth years of service, and 180 days in the subsequent years of service;\(^{48}\)
- During the pregnancy of an employee and sixteen weeks following birth;\(^{49}\)
- While the employee is participating with the employer’s consent in an overseas aid project ordered by the competent federal authority.

The first three blocking periods are *mutatis mutandis* applicable for notices of termination given by the employee. Any notice of termination given during one of the blocking periods is null and void. If such notice is given and has not expired prior to the commencement of a blocking period, the notice period is suspended and will only resume after the blocking period. A notice of termination is wrongful and deemed abusive if it has been given for proscribed reasons, such as:

- Where given by one party on account of an attribute pertaining to the person of the other party, unless such attribute relates to the employment relationship or substantially impairs cooperation within the business. Such personal attributes may include illness, gender, religion, race, nationality, sexual orientation, age, looks, pregnancy, world views, or relations with certain persons.
- Where given due to the fact that the other party exercises a constitutional right, unless the exercise of such right breaches an obligation arising from the employment relationship or substantially impairs cooperation within the business.

\(^{48}\) These periods only present a maximum, such that if the employee is ill for only five days, the blocking period is five days.

\(^{49}\) This also applies in case of a yet unknown pregnancy or a stillbirth.
• If given solely to prevent claims under the employment relationship from accruing to the other party, or if due to the fact that the other party asserts claims under the employment relationship in good faith (revenge dismissal).

• Where given by one party because the other party is performing Swiss compulsory military or civil defense service, alternative civilian service, or a non-voluntary legal obligation.

• When given due to the fact that the employee is or is not a member of an employees’ organization, because he lawfully exercises a union activity, or while he is a member of the representative body or of another body linked to the business, unless the employer can prove that there was just cause for termination.

• If given by the employer in the context of a mass layoff without consulting the employees’ representative body (or the employees, where there is none).

An abusive notice of termination given for an illicit reason, any other reason, or no reason at all is valid but may be sanctioned by law. The party who abusively terminates the employment relationship should pay an indemnity which is determined under the circumstances. The indemnity is due even where the abusive termination did not cause damages. The maximum amount of the indemnity is equal to six months’ wages. However, a termination deemed abusive for failure to consult the employees or their representative body in the context of a mass layoff only has to be compensated with two months’ wages.

The party claiming an indemnity should file a written objection against the notice of termination no later than the end of the notice period. If the notice of termination is with immediate effect, the period for objection is the hypothetical ordinary notice period.

If the parties do not agree on continuing the employment relationship after the objection, the objecting party may assert his claim for compensation. However, the claim is forfeited if no legal action is taken within 180 days after the end of the employment relationship. The objecting party has to prove that the termination was based on an illicit reason under Article 336 of the Code of Obligations or abusive on other grounds.

Dismissal by an employer without notice and without a valid reason entitles the employee to damages in the amount he would have earned if the employment relationship was terminated by observing the notice period or if the fixed period expired. However, such damages are reduced by any amount that the employee saved as a result of the termination, by what he earned by performing other work, or by what he has intentionally failed to earn.

The judge also may order the employer to pay the employee a compensation determined at the judge’s discretion after considering all circumstances, but such compensation may not exceed the employee’s wages for six months.

50 Code of Obligations, art 337c.
Where the employee fails to take up his post or leaves it for good without notice, the employment relationship is terminated with immediate effect. The employer is then entitled to compensation in the amount of one-quarter of the employee’s monthly salary as well as to damages for further losses.

The judge may reduce the compensation at his discretion if the employer’s damage is lower than one quarter of the employee’s monthly salary. Where the claim for compensation has not been extinguished by setoff, it should be asserted through a legal action or debt enforcement proceedings within 30 days from the failure to take up the post or departure from it, otherwise such claim is forfeited.

**Prohibition of Competition**

In general, the employee is no longer prohibited from engaging in any activity that competes with the former employer upon termination of the employment relationship. However, the parties may agree in writing on a non-compete clause to extend the application of the prohibition of competition beyond the termination of the employment relationship.

Only an employee with capacity to act may agree to a non-compete clause. It is binding only where the employment relationship allowed the employee to have knowledge of the employer’s clientele or manufacturing and trade secrets, and where the use of such knowledge might cause the employer substantial harm.

The non-compete clause should be reasonably limited in terms of place, time, and subject so that it does not unfairly compromise the employee’s future economic prospects. It may exceed three years only in particular circumstances.

The prohibition of competition does not apply if the employer terminated the employment relationship without having been given a reason by the employee to do so, and if the employee terminated it for a justified reason attributable to the employer.

An employee who breaches the prohibition against competition should compensate the employer for damages arising from such breach. However, the employer may only insist that the situation be rectified if specifically agreed in writing, and solely to the extent justified by the injury or threat to his interests and by the conduct of the employee.

The non-compete clause usually provides for a contractual penalty in the event of breach. If nothing to the contrary has been agreed upon, the employee may

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51 Whether the prohibition is appropriately restricted depends on the scope of the employer’s interests and the constraint on the employee’s ability to earn a living. It also has to be considered whether the employee receives a compensation for the non-compete clause. A non-compete clause that is overly excessive in its coverage is not invalid, but may be restricted by a judge.
free himself from the non-compete clause by paying the penalty, but remains liable for any further damage.

The prohibition of competition ends upon its designated end, or once the employer no longer has a substantial interest in its continuation.

Social Security

Old Age and Survivors’ Insurance

The cornerstone of the social insurance system is the old age and survivors’ insurance, which basically grants old age pensions to people of retirement age (sixty-five years for men and sixty-four years for women) and survivors’ pensions to spouses or dependent children of a deceased insured person. The old age and survivors’ insurance is compulsory for all people living in Switzerland.

The benefits paid out are largely financed through contributions paid by the insured and, if he has one, his employer. An employee has to contribute 4.2 per cent of his gross wage, while the employer pays his own share of 4.2 per cent into the compensation fund.

Invalidity Insurance

Invalidity insurance intends to restore or improve the earning capacity of insured persons who are disabled due to a congenital or other illness, or as the result of an accident. Insured persons will only receive a pension if it is established that their professional (re)integration is impossible.

The invalidity insurance has a system of early recognition and intervention so as to intervene at the very beginning of a possible lasting invalidity and inability to work. A number of people (i.e., doctors, family members, employers) may notify the invalidity insurance offices of an insured person who was prevented from working for at least thirty consecutive days or who repeatedly had to abstain from work due to health issues within one year.

After receiving a notification, the invalidity insurance office should investigate the personal situation of the insured person and decide whether early intervention measures are in order. Early intervention measures include workspace adjustments, training courses, and placement service, among others.

Rehabilitation measures that are to be applied in an enterprise should be implemented in close cooperation with the employer. The invalidity insurance may grant the employer an allowance of up to CHF 60 a day, provided that the employee continues to work in the enterprise. Employers of insured persons that have been placed through invalidity insurance may receive an adjustment subsidy for the employee’s adjustment and familiarization period of up to 180 days.
To finance the invalidity insurance, the employee has to contribute 0.7 per cent of his gross wage, while the employer pays his own share of 0.7 per cent.

**Occupational Benefit Plan**

Payments of occupational benefit funds also are intended to allow pensioners to maintain the standard of living to which they are accustomed. An occupational benefit plan is only mandatory for employed persons who earn at least CHF 20,880 a year. Only a part of the annual wage is mandatorily insured. The upper limit of the annual wage that is mandatorily insured is currently CHF 83,520. However, pension funds may provide benefits beyond the statutory limit (“over-obligatory benefits”).

The employer who has employees who are mandatorily insured has to establish a pension fund or join one with the approval of the employees or their representative body. Pension funds may freely choose their preferred form of organization, design of benefits, and ways of financing them.

The occupational benefit plan is based on the principle of collective financing, such that the employer’s contribution should be at least equal to the sum of contributions paid by all the employees. The amount of contributions varies from one pension fund to the next and also between employees within the same pension fund.

The amount depends on the benefits paid out, the pension fund’s underfunding or overfunding, the insured salary, and the age of the insured person, among others. Around 17.4 per cent of the insured wage is being paid in contributions by the employer and the employee.

The occupational benefit plan primarily grants old age benefits including early retirement pensions, but also survivors’ benefits, invalidity benefits, and capital benefits. The employees’ accumulated savings in the pension fund can be transferred to another pension fund when the employee changes his employer and thus also the pension fund. The transfer of pension funds is separately regulated by the Federal Act on Vested Benefits.

**Income Compensation Insurance**

The income compensation insurance covers the loss of earned income for those serving in the military, civil defense service, alternative civilian service, and related activities as well as in case of maternity. It pays allowances during the period in which the person is carrying out service.

In case of maternity, allowances are paid after the birth of the child up to the date when the mother returns to work, but not longer than 14 weeks after birth. The income compensation insurance is largely funded by surcharges on the

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52 Code of Obligations, art 331, para 3.
contributions to old age and survivors’ insurance. The employee and the employer each pay 0.25 per cent.

**Accident and Occupational Diseases Insurance**

Accident insurance is compulsory for employees and covers the economic consequences of work and non-work accidents as well as occupational diseases. Part-time workers who work less than eight hours per week for one employer are not insured against non-work accidents, although accidents on the way to and from work are exceptionally considered as work accidents.

The employer has to pay the premiums for the mandatory insurance against work accidents and occupational diseases, while the employee has to pay for the mandatory insurance for non-work accidents if there is no agreement that the employer also has to pay for such.

The employer pays the total amount to the insurance carrier and deducts the employee’s contribution from his wage. Premiums for work accidents and occupational diseases insurance are expressed in a percentage of total insured wages, with the maximum insured wage currently at CHF 126,000.

The percentage that the employer has to pay depends on the risk category and level in which his business is placed. On average, employers pay 0.89 per cent of their insured payroll to accident insurance, while employees pay 1.56 per cent as contribution for non-work accident insurance.

**Family Allowances**

In every canton except for Vaud, it is solely the employer who has to pay a certain percentage (0.1 per cent to 4.2 per cent) of his total payroll to finance family allowances.

**Health Insurance**

The mandatory health insurance and additional voluntary health insurances are not linked to the employment relationship. Premiums for health insurance should be paid by the insured, with the help of government subsidies if necessary.

**Unemployment Insurance**

Although Switzerland enjoys comparatively low unemployment rates, unemployment insurance is mandatory for employees and provides benefits in case of loss of employment, shortened working hours, lack of employment due to weather conditions, and insolvency of the employer.

It is basically funded through equal contributions of the employer and the employee. For an employee’s wage of up to CHF 126,000, the employee and the employer each pay 1.1 per cent. For a wage of CHF 126,000 to CHF 315,000,
both have to pay 0.5 per cent each. Any part of the wage exceeding CHF 315,000 is not subject to premiums. Payout of unemployment allowances has the following prerequisites:

- The insured person is fully or partly unemployed;
- The insured person contributed to the unemployment insurance for at least twelve months in the reference period of two years prior to the application for unemployment insurance, except where he was in jail, served in the military, was being educated, or was parenting children;
- The insured person is able and willing to accept a job that he can be reasonably expected to take; and
- The insured person is able and willing to participate in measures that are intended to promote his employability.

Unemployment allowances are paid out after a general waiting period of five days. In principle, the allowances amount to eighty per cent of the insured salary for a maximum of CHF 126,000 per year. Social insurance contributions are collected from the allowances. The insured person is principally entitled to a maximum of 400 daily allowances, which may be increased or decreased under certain circumstances.

In any case, the payouts stop if the insured person is unemployed through his own fault, does not sufficiently try to attain reasonable work, does not follow instructions of the competent authority, or does not follow through with labor market measures.53

Unemployment insurance may temporarily help the employer pay a part of the wages so that the employees do not have to be laid off. With the approval of the concerned employees, the employer may temporarily reduce their working hours and their wage. The unemployment insurance will pay the employees eighty per cent of their loss of earnings for up to twelve months within two years.

The unemployment insurance will only pay reduced working hours allowance where the stoppage: (a) can be traced back to economic reasons; (b) is inevitable; (c) amounts to at least ten per cent of working hours within the enterprise; (d) is temporary; and (e) if it can be expected that jobs can be saved through the reduced working hours.

Should an employee lose his job through no fault of his own after having accepted reduced working hours and a reduced wage, he is retroactively entitled to receive the difference to his full wage. Unemployment insurance also assists where work and pay are reduced for meteorological reasons. It also ensures the

53 Labor market measures may include advancing the insured person’s professional skills through education courses and grants, providing opportunities to collect work experience through internships, granting adjustment subsidies for employers, paying commuting expenses to expand the possible places of work, or sponsoring self-employment.
payment of wages in case of insolvency of the employer under certain circumstances.

In order to receive such an allowance in case of the employer’s insolvency, the insured person should have wage claims against the employer when a bankruptcy procedure is opened. The insured person should claim the allowance within sixty days from the publication of the bankruptcy, otherwise the right to allowance is forfeited. The allowances amount to 100 per cent of the effective wage claims but are limited to CHF 10,500 a month for four months. No allowances are paid for wage claims of partners and proprietors of the bankrupt enterprise, members of the management, and contributing spouses.

**Conclusion**

There are currently no major legislative projects in Swiss employment law other than in social security, although small amendments to the Code of Obligations are in the works.

The project of increasing the maximum amount of compensation in case of abusive notices of termination and extraordinary terminations without valid reason from six months to 12 months is currently under consultation. Closely connected thereto is the project for the improvement of the protection against unfair dismissal in case of whistle-blowing.
Thailand

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Introduction

Labor and employment law is one of the most developed sectors of law in Thailand. For many years, labor standards existed in the form of regulations announced by the Ministry of the Interior, which handled (and still handles) a broad portfolio of issues, including labor matters, at that time. More recently, however, labor statutes have been enacted through parliamentary processes with the approval of the King. The Ministry of Labor has developed into a sizable regulator, and it has issued numerous labor regulations.

Labor law arises from the law of contract, which is based in the Civil and Commercial Code. While there is a general recognition of freedom to contract, it is not possible to contract around the minimum standards imposed by applicable Thai labor law. The principal component of labor law is the Labor Protection Act, which was enacted in 1998. Despite the Act’s relative youth, extensive employment laws had already developed in the form of ministerial regulations, and much of these regulations were simply codified and enhanced in the aforementioned Act. Since enactment, the Labor Protection Act has undergone amendment multiple times. Some of the revisions are substantive and raise employee protections or clarify ambiguities, while others are simply procedural provisions of greater relevance to the internal processes of the regulator.

Trade unions were subject to statute much earlier, with enactment of the Labor Relations Act in 1975. The Labor Relations Act sets the rules on how trade unions can be recognized and how employers may interact with them. The law also sets rules that trade unions themselves must follow.

In addition, a special court system for hearing labor matters was established by the enactment of the Labor Court Act (1979). The Act sets out procedures for use in the Labor Court, which give employees easy access to seek resolution of disputes. Over the years, the amount of employment and labor regulation has steadily increased.

Some of the most significant pieces of legislation that have been enacted are the Social Security Act (1990), the Workmen’s Compensation Act (1994) and, more recently, the Occupational Safety and Health Act and the Work from Home
Protection Act (2011). There also are extensive ministerial regulations issued under the various laws, all of which have the force and effect of law.

When considering the current laws that are in place, it is clear that Thailand’s policymakers have taken a pragmatic approach to the establishment of labor standards. Even though there appears to be a general policy of raising employment standards and improving employee protections, careful thought is given to the population’s level of social development. There is recognition that regulations have a cost.

If it becomes too expensive to employ people in Thailand, companies would simply choose to invest in other countries in the region, or shift their existing Thai operations to overseas jurisdictions with labor regimes that are more employer-friendly. With all of these considerations in mind, policymakers realize that full employment is good for social security, which in turn is good for national security and, ultimately, the overall stability of the Kingdom.

Like most developing markets, Thailand is reliant on expatriate staff. A study of Thai labor law would be incomplete without considering the additional restrictions that are applicable to foreign staff. Under the Foreign Employment Act (1978), a framework was established by which to reserve certain occupations for Thai nationals, and to impose additional regulatory obligations on employment relationships involving foreigners.

**Legal Definition of Employment**

**In General**

Employment is referred to as hire of service.¹ An employment relationship exists when an employer agrees to accept an employee to perform certain work in exchange for wages. On the other hand, independent contractor relationships are referred to as hire of work² and do not constitute employment.

A hire-of-work agreement is one whereby a service provider (perhaps an independent contractor) agrees to accomplish a certain defined work project for the hirer. The hirer agrees to pay the service provider a service fee for the result of the work, or the deliverable. To determinate if a particular arrangement constitutes hire of work or hire of service, attention is given to the issues of control and discipline.

If the relationship has the authority to control a person’s day-to-day workplace activities and/or has the authority to impose disciplinary measures on the person, it is likely that an employment relationship (hire of service) exists. On the other hand, if the relationship is geared around delivery of some end product, it is likely that a contractor relationship (hire of work) exists. To distinguish a hire-

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¹ Civil and Commercial Code, ss 575–578.
² Civil and Commercial Code, ss 587–607.

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of-work agreement from an employment agreement, a Thai court would typically look to the following four factors:

- **Purpose of the agreement** — A hire of work agreement would be primarily concerned with the completion of a final end product or service, whereas an employment agreement has the ongoing provision of services to an employer;
- **Method of work** — A genuine independent contractor would be able to exercise a significant degree of independence in completing the work. In such a relationship, the hirer may issue general rules or directions, but would not have control of the independent contractor’s daily activities or operations, such as determining working hours and training needs;
- **Level of independence** — An independent contractor would work principally for remuneration in return for work done, and would not be subject to disciplinary sanctions, as an employer may assess against an employee; and
- **Type of remuneration** — Service fees would be paid to an independent contractor on the basis of successful results of the work, perhaps in installments or a lump sum.\(^3\)

If the above requirements are not fulfilled, there is risk that a court may find that an employment relationship exists, thus subjecting the hirer to the applicable requirements of Thai labor law. If met with a claim, a Thai court would look to evidence of the actual relationship between the parties (regardless of the wording used in an agreement) to determine whether an employment relationship exists.

In this regard, Supreme Court decisions have held, after applying the analysis described above, that an independent contractor who was performing services within the scope of the hirer’s normal business activities was actually an employee. Thus, if a hirer wishes to engage someone as an independent contractor, and not as an employee, it is important to ensure that the relationship is consistent with the concept of hire of work.

In addition, agents, partners, or directors may or may not be found to have an employment relationship with their principals, partnerships, or companies. A relationship of agency, partnership, or directorship is not dispositive in determining whether there is an employment relationship. Making such a determination would require its own analysis, along the lines of that outlined above.

**Contract of Employment**

Although people often speak of employment contracts as paper documents, the reality is that an employment relationship also can be made orally, or by performance (implied). All that is needed is that the agreement specifies that a

\(^3\) If remuneration were paid without regard to completion or accomplishment of definite work, an independent contractor would be more likely to be seen as an employee.
person agrees to work for another who agrees to pay wages to the first, regardless of how the agreement arises. Of course, if there is no written (and executed) employment agreement, one may encounter difficulty in proving various asserted terms of the employment relationship, or even that the employment relationship exists.

As mentioned, employment arises from the law of contract. This means that a party’s capacity is determined in the same way as with respect to most any other contract. One becomes *sui juris* at age 20, or on valid marriage before such age. However, if a minor gets permission from his or her legal representative (usually a parent) to enter into an employment contract, the minor will have capacity to enter into the employment contract, the same as one who is *sui juris*. Of course, if one were found to not be of sound mind, acts made in such state would be voidable.

**Special Categories of Employees**

Certain special categories of employees warrant additional comment. First, it is important to be aware that part-time employees are entitled to the same minimum rights, benefits, and protections as their full-time colleagues. This does not necessarily mean that an employer must give identical benefits packages to their full- and part-time employees. Rather, it means that the minimums supplied under law are applicable to both full- and part-time employees. In this area, questions often arise with respect to annual leave.

The law provides that, after one year of work, an employee shall be entitled to six calendar days of leave per year. Of course, an employer may choose to provide additional leave days for full-time staff, but all employees, both full and part time, so long as they have been employed for at least a year, are entitled to the six days of leave. With respect to leased employees, the end-employer has an obligation to ensure that equitable benefits are provided to direct employees, as well as those in lease situations. The end-employer can be deemed the employer of the leased employees.

As mentioned, foreign employees are subject to additional restrictions. Subject to certain arcane exceptions, all foreign employees require work permits in order to legally work in Thailand. Moreover, by royal decree, 34 different occupations are reserved for Thai nationals. In addition to the work permit requirement, foreign employees must also have valid immigration approval, such as a substantive visa or permanent residence. Violations of the work permit and visa requirements can result in fines for an employer, and fines, imprisonment, and blacklisting for an employee. Additional penalties, including

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4 Labor Protection Act, s 30.
5 Labor Protection Act, s 11/1.
6 Foreign Employment Act.
7 Royal Decree Prohibiting Occupations-Foreigners.

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fines and imprisonment, apply to those who facilitate the illegal presence of the foreign workers, as well as those who conceal them.\(^8\)

Work permits are only valid for the place of work and geographic area listed.\(^9\) This means that if an employee is to be moved to work elsewhere in the Kingdom, it is usually necessary to file additional documents with the Ministry of Labor. Work permits also can be approved for work in multiple locations. Foreign employees will be required to leave the Kingdom every 90 days, unless they are granted extensions of stay by the Immigration Department of the Royal Thai Police. In this case, they will be required to file notification every time they remain in the Kingdom for more than 90 days.\(^10\)

To avoid any doubt, work permits also are required for employees who are based in other countries, and who come to Thailand to work for only a brief period of time. However, there is an exception for urgent and necessary work, which requires a simple filing of notification with the Ministry of Labor, and which would then be valid for 15 days.\(^11\) Apprentices benefit from the same employment protections as any other employee, except that the law sets a lower apprentice wage rate that is approximately half of the applicable minimum wage.\(^12\)

With respect to child labor, an employer may not employ a child under the age of 15 years. When a child under the age of eighteen years is employed, the employer has special reporting and record-keeping obligations to the regulator. A child is entitled to a rest period of at least one hour per day after four hours of work. Subject to narrow exceptions such as acting in movies, plays, and the like, an employer may not allow a child to work between 22:00 and 16:00, without the regulator’s permission.

When utilizing the exception for movies, plays, and the like, the employer remains obligated to provide the child with rest as appropriate. Employers may not permit children to work overtime or on holidays. Employers may not allow children to perform certain types of hazardous or dangerous work (the restrictions are broader than those applicable to “normal” employees’ performance of dangerous work). Employers also are prohibited from allowing children to work in slaughterhouses, places with gambling, recreational places in accordance with the law governing recreation places, or any other place as prescribed in the relevant Ministerial Regulations. An employer may not demand a security deposit from a child, and may not pay the child’s wages to any other person. In the interest of promoting children's quality of life and promoting their work performance, children also are entitled to 30 days of paid leave per year, for training, meetings, and similar such events organized by

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\(^8\) Immigration Act. 
\(^9\) Foreign Employment Act. 
\(^10\) Immigration Act. 
\(^12\) Announcement of Minimum Wage Rates.
educational organizations or other entities as may be approved by the regulator.\textsuperscript{13}

**Transfer of Business**

Events such as mergers and transfers of business units each require special attention. Transfers of employment from one employing entity to another require the consent of each employee to be transferred.\textsuperscript{14} This means that consent is not required in the event a company simply acquires all the shares in another, leaving the acquired entity intact and leaving the employment relationship untouched. However, if the acquired entity is dismantled or integrated into the acquiring entity, or if the target were acquired by way of a purchase of assets, this would result in a change of employer, thus triggering the consent requirement described above.

The Supreme Court has held multiple times that employee consent is required for transferring employees to another employer or changing the employer from one company to another, regardless of whether the employers are of the same group. In one example,\textsuperscript{15} the Supreme Court held that even though two companies had the same management and were within the same group, they were separate legal entities for the purposes of dealing with changes in employer.

When one company dissolved and ordered its employees to go to work with a separate company of the same group, the employees refused, and as a result the court found the employer had violated Civil and Commercial Code Section 577 because it did not obtain employee consent. The employees who refused consent to such transfer could then be terminated, which brought the usual requirements of Thai labor law when terminating employees, including severance pay. A similar outcome was reached in another Supreme Court case,\textsuperscript{16} involving the order of an employee of a Thai company to go to work for another company of the same group in Hong Kong, and to become its employee. In that case, the court held that it was a transfer of the employer’s right to a third person and that employee consent was required.

Amalgamation, as specifically filed with the Ministry of Commerce, does not result in any need for employee consent, as there is no transfer of employment. Rather, the legal entity continues to exist, in amalgamated form. In all cases, the new employer is required to accept all rights and benefits pertaining to the pre-existing employment relationship\textsuperscript{17} and employee benefits cannot be reduced without employee consent to that effect.

\textsuperscript{13} Labor Protection Act, Civil and Commercial Code, ss 44–52.
\textsuperscript{14} Civil and Commercial Code, s 577.
\textsuperscript{15} Supreme Court Case Number 671-675/2530.
\textsuperscript{16} Supreme Court Case Number 46/2537.
\textsuperscript{17} Labor Protection Act, s 13.

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Terms and Conditions of Employment

In General

As noted, law applicable to employment arises out of the law of contract. Though an employer and employee are free to agree on many terms applicable to their relationship, the law steps in to set certain conditions that cannot be varied and certain minimums that cannot be undercut.

Remuneration

Employees may be paid at any frequency, as long as it is at least monthly, unless otherwise agreed to the benefit of the employee. The Ministry of Labor periodically sets minimum wages (applicable on a daily basis), which differ depending on the geographic area. Notwithstanding the foregoing, compensation on the basis of piecework also is possible.

Work Hours

The law sets a limit of 8 hours per day and 48 hours per week for normal work, though flex time allows for an additional one hour per day (for a total of nine), with the weekly limit of 48 still applicable. Employers and employees of certain categories have the option to agree on any number of regular work hours in a day, as long as the total does not exceed 48. There is a limit of seven hours per day and 42 hours per week for dangerous work and a limit of 36 hours of overtime per week, applicable to both categories.

Health Care Coverage

Employers are obligated to register their employees for social security, to withhold and remit contributions from employees’ wages, and to make matching contributions to the social security fund. Among the benefits provided is health coverage. Despite the existence of this system, employers often provide private health coverage for their employees, as an additional benefit.

Vocational Training

Employees are entitled to take leave for training, as defined more specifically in ministerial regulations.

18 Labor Protection Act, s 70.
19 Labor Protection Act, ss 87–90.
20 Labor Protection Act, s 70.
21 Labor Protection Act, ss 23 and 26.
22 Ministerial Notification 1997, s 2.
23 Labor Protection Act, ss 23 and 26.
24 Social Security Act.
25 Labor Protection Act, s 36.
Discrimination

In General

Along with the rest of the world, Thailand recognizes the significance of discrimination. The Thai Constitution prohibits all forms of discrimination. Although the country has yet to develop several laws to comply with the discrimination provision of the Constitution, Thailand embeds the Labor Protection Act to address some of the fundamental issues concerning discrimination to protect employees from unfair and unequal treatment due to distinctive features. Such features include gender, age, physical or mental handicaps, race or national origin, and religion.

Gender

Gender is largely used as a basis of discrimination due to the outmoded belief that men are better workers than women. Thailand addresses this issue by essentially ensuring that males and females are subjected to equal treatment in areas such as benefits, welfare, and fair rights. Additionally, the law obligates the employer to treat both genders as equals, and this includes the recruitment and hiring stages of employment.

Thai law also continues to focus on certain situations where discrimination might arise. For example, female employees cannot be terminated due to pregnancy and must be reassigned if medically required. In addition, specific limits must be placed on their work periods. However, there are certain situations where gender discrimination is permitted, as set forth in the Labor Protection Act. Careers such as mining, construction, dangerous scaffolding work, and production or transportation of dangerous materials are areas where an employer cannot employ a female. Furthermore, other categories in which women cannot be employed may be prescribed in ministerial regulations.

Age

Discrimination on the basis of age is only permitted for protection of children. There are not many age discrimination occurrences in Thailand. As long as a child is over the age of 15, he is eligible for work. Children are prohibited from dangerous employment such as work involving toxic materials or work performed underground. The fact that no laws appear to restrain employer interaction with differently aged individuals suggests that such discrimination does not occur.

26 Constitution, s 30.
27 Labor Protection Act, s 15.
28 Labor Protection Act, s 42.
29 Labor Protection Act, s 43.
30 Labor Protection Act, s 38.
31 Labor Protection Act, s 44.
Physical or Mental Handicap

Individuals who possess handicaps of any kind are safeguarded through various legal provisions. The most prominent provision is the Act on Promotion of Quality of Life of Persons with Disabilities. This Act focuses on the rights to which people with disabilities are entitled, so that they are protected from any form of prejudice.

A noticeable initiative of this Act involves the requirement for employers to hire handicapped persons. A ministerial regulation has been issued under this Act requiring that for every 100 employees, there must be at least one disabled worker who is designated work within his or her skill range and capacity.

Race or National Origin and Religion

Aside from being addressed in the Thai Constitution, race, national origin, and religion are not specifically regulated through Thai labor laws due to the prevailing fact that they are not often used as a basis for discrimination. Thai workplaces recognize equality of all individuals of different race, origin, and religion as they support the concept of a “free community”.

National origin does, however, pose some exceptions to anti-discrimination laws. Pursuant to the Alien Employment Act, these exceptions involve restricting foreigners from working in 39 areas of employment. The areas of work range from construction to legal representation. Such prohibitions are employed to protect Thai individuals in said professions. Subject to these exceptions, foreigners are free to work in all other career paths.

Collective Bargaining and Worker Participation in Management

Collective bargaining is an essential process between the employees and the employers that negotiate the working conditions and provisions for employees. This process is very important to worker participation because it provides an incentive to maintain a stable and efficient workplace.

Labor unions play a proactive role in collective bargaining for the benefit of employees. All unions must be registered with the proper authority, and members must exclusively be a part of only one union. A proper union will possess the right to consult with the employer to gain better work rights for employees. It is important to note that to be a member of a specific labor union, the employees must be under the control of the same employer. Please refer to the section “Dispute Resolution” for details on how a labor union can push to alter working conditions in Thailand.

32 Labor Protection Act, s 87.
33 Labor Protection Act, s 98.
34 Labor Protection Act, s 95.
Health and Safety Protection in the Workplace

However, in July 2011, the Occupational Health and Safety Act has been regulated under a section of the Labor Protection Act. However, earlier this year, the Occupational Safety and Health Act became law and will be effective in July. This Act establishes a separate agency, the Occupational Safety and Health Bureau, within the Ministry of Labor.

Despite the recent passage of the law, extensive regulations on occupational safety and health were already in place, under the Labor Protection Act. As a general matter, these same regulations remain in effect under the Occupational Safety and Health Act, though efforts are, of course, under way to modernize them and to make improvements in the level of protection for workers.

For example, the Ministry of Interior has produced two important notifications: the Notification re: Working Safety Relating to Harmful Chemicals (1991) and the Notification re: Working Safety in Respect of Environmental Conditions (Chemicals) (1977). The 1991 Notification defines the term “Harmful Chemicals” as substances, compositions, or mixtures, in the form of solid or gas, including those that are:

- Poisonous, corrosive, volatile, allergenic, cancerous, or otherwise harmful to health;
- Explosive, seriously reactive, or highly flammable; or
- Radioactive.

In carrying this out, the Notification looks to an appended schedule for a listing of chemicals considered to be “Harmful Chemicals”. However, given the natural presence of various harmful substances in the environment, determining whether a substance is hazardous is more an issue of its concentration.\(^{35}\) More specifically, employers are to take action so that the concentration of a given harmful chemical does not exceed the limit set in the 1977 Notification, but that if the limit is exceeded, measures are to be taken as prescribed in the Notification.

The 1977 Notification sets a concentration limit for several substances. Otherwise, the Notification contains a requirement mirroring that, in the 1991 Notification, provides for employers to take action to reduce chemical concentrations that exceed the specified limit.

However, it also provides that when reduction is impossible, the employer is to have employees wear personal safety equipment according to standards prescribed in the Notification, whilst performing work in an environment with chemical concentrations exceeding the applicable limits.\(^{36}\)

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\(^{35}\) Ministerial Notification 1991, s 7.

\(^{36}\) Ministerial Notification 1991, s 7.
As a general matter, employers are subject to certain additional obligations to their employees, with respect to work categorized as “hazardous”. Employers are obligated to provide appropriate protective gear and to take other measures to minimize contact with hazardous substances and to minimize harm that may arise from these substances. As noted above, the law also provides shorter work hours for employees engaging in hazardous work.\(^{37}\)

Additionally, employers are responsible for sicknesses and/or injuries their employees incur due to work, including treatment, disability compensation, annuity to the family, and funeral expenses, as applicable.\(^{38}\) However, if the employer’s contributions to the Workmen’s Compensation Fund are current, the fund will provide such coverage directly. The employer remains obligated to bear initial expenses, for which reimbursement can be sought from the fund, pursuant to applicable regulations.\(^{39}\)

### Workers’ Compensation and Survivors’ Benefits

As mentioned above, employers have certain obligations to employees (or to their families) when their employees incur sickness or injury due to work, or who disappear or die in connection with work for the employer. In addition to actual expenses for treatment and rehabilitation, the employee is entitled to an annuity equivalent to 60 per cent of his or her normal wages, for up to eight years.\(^{40}\)

If the employee has passed away, the employee’s family is eligible to receive the annuity.\(^{41}\) In addition, if the employee dies due to injury at work, the employer is to bear funeral expenses.\(^{42}\) All of these obligations fall on the employer.\(^{43}\) However, employers also are obligated to register their employees for the Workmen’s Compensation Fund, and to make contributions accordingly.\(^{44}\)

If the employer is current with respect to contributions, the fund shall bear the aforementioned expenses, though the employer remains obligated to bear initial expenses, but can seek reimbursement from the fund for it. If the employer incurs expenses that are not covered by the fund, the employer is entitled to deduct such expenses from other payments that may be due the employee, subject to applicable limits.\(^{45}\) Coverage also is provided by the Social Security Fund, assuming the employee is registered for social security and that

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37 Labor Protection Act, s 23.
38 Workmen’s Compensation Act, ss 13 and 15–20.
39 Workmen’s Compensation Act, s 25.
40 Workmen’s Compensation Act, s 25.
41 Workmen’s Compensation Act, ss 19 and 20.
42 Workmen’s Compensation Act, ss 16 and 17.
43 Workmen’s Compensation Act, s 25.
44 Workmen’s Compensation Act, s 44.
45 Workmen’s Compensation Act, s 25.
contributions are current. In this case, however, the Social Security Fund would function as supplementary or secondary coverage to whatever other coverage might provide a benefit.

Dispute Resolution

The settlement of labor disputes in Thailand is governed by the Labor Relations Act (Labor Relations Act). Dispute resolution involves a number of options that differ in their application and nature. A labor dispute occurs when an employee and an employer disagree on the proposed working conditions.

Written working conditions are a necessary requirement for workplaces employing more than 20 employees. Terms of the agreement, such as working hours or wages, are open to amendment through labor demands. Initiation of a labor demand often marks the beginning of a labor dispute. A dispute only becomes a labor dispute when negotiation has not occurred or has failed to resolve the issues at hand. The Labor Relations Act offers a range of means to resolve such issues.

Negotiations represent the least formal procedure for dispute resolution. This process involves a simple consultation between employers and employees to try to reach a reasonable agreement before a labor dispute arises. Negotiations must begin within three days of receiving the demand. Negotiations represent the simpler aspects of settling labor disputes, as they involve mere consultation between the employer and employee to reach a compromise on work arrangements. However, if a mutual agreement cannot be reached, the disagreement is established as a labor dispute.

If the situation becomes more complex and intricate, mediation is available. Mediation is a more formal procedure because it introduces a third party that assists in drawing compromises between the opposing parties. The Labor Relations Act outlines the procedure for notifying a mediation officer.

The officer must be notified within 24 hours of either the expiration of the negotiation prescription period or the moment that negotiations have failed. Mediation also has a limiting period of five days after receiving notification to settle the dispute. The officer acts as an impartial, third-party mediator to help establish a fair compromise between the two parties. If the officer is unable to help foster a resolution to the labor dispute, it is deemed as an “unconcluded” dispute.

46 Social Security Act, ss 62–64.
47 Social Security Act, s 64.
48 Labor Relations Act, s 16.
49 Labor Relations Act, s 21.
50 Labor Relations Act, s 16.
51 Labor Relations Act, s 22.
Arbitration signifies the peak of dispute resolution outside of legal action, and as such it is regulated by the Ministry of Labor. Arbitration places the authority of resolving the arguments in the hands of an official. Unconcluded disputes can be taken either to the Labor Relations Committee or to a labor dispute arbitrator to order appropriate awards. The Committee will make an order within 30 days, with the decision being final and binding on both parties.

On the other hand, if arbitrators are the method for settlement, they will notify parties of a settlement date within seven days of receiving the demand. On this date, the arbitrators will hear statements from both parties and provide opportunities to hear their demands. Subsequently, their award is conclusive and must be complied with. Failure to comply will result in criminal punishments.

Dispute resolution processes differ — in terms of both the basis of representation and the nature of the proceeding — depending on whether employees are members of a labor union. If a group of employees who are not members of a labor union wish to submit a demand, the group must consist of at least 15 per cent of total employees of the company.52

The group also must be represented by not more than seven representatives for submitting their demands and conducting negotiation. As for employees who are members of a labor union, the union can play an active role in proceeding with an employee’s complaint.

A labor union can carry out the process of submitting demands for amending the employee’s work agreement.53 Furthermore, labor unions act on behalf of the employees during proceedings, which is advantageous to members who would otherwise have to dedicate significant time to the process. The Labor Relations Act fails to address how an individual employee can voice his or her grievance.

The threat of lockouts and strikes provides an incentive to follow proper dispute resolution procedures. A lockout refers to the situation where an employer physically restricts employees from carrying out their duties and takes away their capacity to earn income.

On the other hand, a strike involves an action in which the employees refuse to work until requested conditions are met, thus jeopardizing the employer’s operation. The Labor Relations Act plays an active role in controlling such overt behavior by restricting the basis on which lockouts and strikes can be carried out.54

Such conduct cannot lawfully occur if demands are not validly submitted, demands requested have already been met by the opposing party, or the matters at dispute are awaiting arbitralional judgment. Additionally, notice must be given 24 hours prior to any lockout or strike.

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52 Labor Relations Act, s 13.
53 Labor Relations Act, s 15.
54 Labor Relations Act, s 34.
Termination of Employment

Termination of employment often gives rise to legal action for unfair dismissal. Employers should be aware of the requirements to terminate an employment contract. Similarly, employees should recognize the mandatory steps to avoid conflict. Under Thai law, an employer cannot terminate an employee under the following circumstances:

- It is prohibited for an employer to terminate a female employee because of pregnancy;55
- Without a court’s permission, it is prohibited for an employer to terminate an employee who is on the Employees Committee;56 and
- While the matter is not yet concluded, it is prohibited for an employer to terminate an employee who is involved in making a demand for changing of working conditions.57

The above prohibitions are the only ones clearly set out in Thai labor laws. In case of violation, the employer is subject to criminal punishments ranging from imprisonment of one to six months and/or a fine of THB 1,000 to THB 100,000. The Labor Protection Act outlines the typical termination process and the circumstances that may arise.58 The employment contract is essential because it entails the termination date.

Once the date arrives, termination can occur without advanced notice. If no date is listed in the agreement, advanced notice must be given at or before any time of payment, to take effect as of the subsequent time of payment. In the absence of notice, employers may opt to pay several severance in lieu of advanced notice.59 This allows them to skip the requirement of issuing warning of termination and, as a result, compensate the employee for the lack of warning.

Pursuant to Section 118 of the Labor Protection Act, upon termination, the employer is required to pay severance which varies according to the employee’s period of service as indicated below:

- One-hundred-twenty days but less than one year, 30 days;
- One year but less than three years, 90 days;
- Three years but less than six years, 180 days;
- Six years but less than 10 years, 240 days; and
- Ten years or more, 300 days.

55 Labor Protection Act, s 43.
56 Labor Protection Act, s 52.
57 Labor Protection Act, s 31.
58 Labor Protection Act, s 17.
59 Labor Protection Act, s 120.
For each respective period of service, the employee will be additionally paid for the outlined amount of days according to their most recent wage. The period of service must be an unbroken, consecutive phase of work. Furthermore, if a situation arises where business reorganization or improvement is the justification for employment termination, notification must be issued at least 60 days prior to termination.\(^{60}\) The notification must include details such as termination date, reasons for termination, and the name of the employee.

Failure to give advanced notice can be reconciled by a payment in lieu of advanced notice, which differs from ordinary payments, as it equals 60 days’ pay at the latest wage rate. This protocol attempts to compensate the employee for abrupt circumstances. Alternatively, an employer is not required to pay compensation nor give ample notice if an employee acts in a deplorable manner.\(^{61}\) This includes acts of negligence causing severe losses to the employer and undertaking in criminal activity against the employer.

Finally, the Act on Establishment of Labor Courts and Proceedings states that “in the trial of a case of dismissal of an employee by an employer, if the Labor Court is of the opinion that such a dismissal is not fair to the employee, the Labor Court may order the employer to accept the said employee back to work at the rate of wage existing at the time of dismissal. If the Labor Court is of the opinion that the employer and the employee cannot work together any more, the Labor Court shall fix the amount of damages as compensation to be paid by the employer by taking into consideration the age of the employee, the length of service, the hardship of the employee at the time of dismissal, cause of the dismissal and the compensation the employee is entitled to receive”.\(^{62}\)

This provision ensures that employees receive justice when terminated by permitting the court to impose remedies. As a result, the court can order the employee back into their pre-termination position or appropriately compensate them according to the facts of their service. Therefore, it is imperative for employers to terminate employees under the proper protocol to avoid uncertain outcomes that could be imposed by the court. Similarly, employees should be aware that there are methods of seeking redress if they feel they have been treated inappropriately.

With respect to unemployment insurance programs, Thailand provides worker benefits and security for the unemployed through the National Social Security Fund Program. This Program receives contributions of funds from employers, employees, and the government. Aside from the unemployment benefit, the Program also provides other benefits such as healthcare, child birth assistance, disabilities, death, child support, and retirement. In case of termination, an employee under the Program will be entitled to 50 per cent of the wage for a maximum of 180 days.

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60 Labor Protection Act, s 121.
61 Labor Protection Act, s 119.
62 Act on Establishment of Labor Courts and Proceedings, s 49.
After termination, an unemployed person can choose to participate in various training programs provided by the Department of Skill Development at low cost. The Department of Employment also can assist in job placement. However, these programs are not mandatory.

Retirement, Social Security and Health Care, Old-Age Pensions

Thailand offers a variety of retirement funding sources. These can be divided into government-source benefits and private source benefits. Government-source benefits include social security and a basic age pension. Private sources include provident funds and retirement funds. In addition, an employee who retires under a mandatory retirement policy at his or her workplace (i.e., not resigning voluntarily) would be entitled to severance, depending on his or her tenure with the employer.

To be eligible for Social Security retirement benefits, contributions must have been made to the fund for at least 180 months, although such contributions do not need to be consecutive.63 Such employees can receive benefits after they reach age 55.64

However, Thailand has not entered into any Social Security tantalization agreements with any other states. This means that work performed overseas for which no contributions are made to the Thai Social Security Fund will not count toward the 180-month requirement, regardless of whether contributions were made to the social security system in the foreign jurisdiction, in respect of that work. For employees who do not qualify for Social Security retirement payments, the age pension is available and offers a lower payment each month. The only requirement is reaching age 60.65

Several employers have established provident funds. If a provident fund is established, it must be jointly set up by the employer and the employees.66 Establishing such a fund is an additional benefit for employees and is not mandatory under Thai law. Contributions by the employer and the employees are based on a specified percentage of the employee's wages in accordance with the fund’s regulations.67 Provident funds must be managed by a professional manager licensed for this purpose.68 Upon termination of employment or membership in the fund, employees shall receive their contributions and a percentage of the employer’s contribution according to such terms and conditions as stated in the relevant fund’s regulations.69

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63 Social Security Act, s 76.
64 Social Security Act, s 77.
65 Ministerial Regulations on Age Pension, Senior Citizens Act.
66 Provident Fund Act, s 5.
67 Provident Fund Act, s 10.
68 Provident Fund Act, s 11.
In addition, the law has described a scheme called the Employee Welfare Fund (EWF), which is to be established and managed by the Employee Welfare Fund Committee upon enactment of a Royal Decree. The Royal Decree has not yet been issued, and thus the EWF is not yet effective. Pursuant to the Labor Protection Act, employers with 10 or more employees would have to be members of the EWF, though this may change before the requirement becomes effective, assuming that it becomes effective at all.

Generally, the EWF would have the same objective as a provident fund. It is to provide financial security for employees, should they resign or retire from work. It would also provide for their beneficiaries in case they should die, or in other cases as prescribed by regulations. In a sense, it would be a public version of a provident fund. The law states that, if an employer has already registered a provident fund or provides welfare for its employees in case of resignation or death in accordance with the rules and procedures prescribed in Ministerial Regulations, the employer will not be required by law to register its employees with the EWF.

Finally, employees who are terminated without cause are entitled to severance. Mandatory retirement under an employer’s retirement policy is included within the concept of termination without cause. As such, severance would be payable at the same rates as indicated in the “Termination of Employment” section, above. Social security and age pensions are fully portable within Thailand. Provident funds are employer specific and may or may not be portable, depending on individual fund regulations and employer policies. If a provident fund is not transferable to the provident fund of a new employer, the fund will pay a benefit to eligible departing employees, subject to fund regulations; an employee could then join the new employer’s provident fund, if the new employer offered such a benefit. It remains to be seen whether the EWF would provide for portability.

Retirement funds (RTF) are financed personally by the employee, and are thus fully portable. Severance is not a retirement benefit, even though it is viewed as one by many employees. As noted above, an employee’s statutory entitlement to severance rises dramatically depending on the employee’s tenure with an individual employer. As such, when an employee resigns from one employer before starting a job with another, the severance benefit would be lost and the tenure clock would begin running again, starting with the period of employment with the new employer.

Transfers of employment (e.g., in conjunction with an acquisition of assets, as discussed above) would be handled differently—typically, the ‘new’ employer would agree to credit the employee for tenure with the ‘old’ employer, as part of a package agreed with the employee, in order for the employee to consent to the

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70 Labor Protection Act, ss 126–138.
71 Labor Protection Act, s 130.
72 Labor Protection Act, s 118.
transfer. This is consistent with the new employer’s obligation to accept all rights and benefits when accepting transferred employees.  

### Summary of Social Costs

Social costs are summarized in the following table:

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<tr>
<th>Benefit</th>
<th>Employer</th>
<th>Employee</th>
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<tr>
<td>Social Security Fund</td>
<td>Five per cent of an employee’s salary (maximum salary used as a basis for calculation of contribution is THB 15,000. Thus, the maximum monthly employer contribution is THB 750)</td>
<td>Five per cent of an employee’s salary (maximum salary used as a basis for calculation of contribution is THB 15,000. Thus, the maximum monthly employee contribution is THB 750)</td>
</tr>
<tr>
<td>Workmen’s Compensation Fund</td>
<td>As set by the Ministry of Labor (typically two to five per cent of wages)</td>
<td>Null</td>
</tr>
<tr>
<td>Provident Fund</td>
<td>May not be less than employee contribution</td>
<td>Two to 15 per cent of wages, as set by fund regulations</td>
</tr>
<tr>
<td>Employee Welfare Fund</td>
<td>Not yet established</td>
<td>Not yet established</td>
</tr>
<tr>
<td>Severance</td>
<td>100 per cent (benefit calculated according to table above)</td>
<td>Null</td>
</tr>
<tr>
<td>Retirement Fund (RTF)</td>
<td>Null</td>
<td>100 per cent (employee may choose to purchase from a bank)</td>
</tr>
</tbody>
</table>

### Conclusion

Thailand benefits from pragmatic policymakers. Those in power, while seeking to improve employment terms for Thai employees, are not activists. The development of employment and labor policy, while under the purview of the Parliament or the Ministry of Labor (as applicable), is usually assigned down to representative committees, each appointed for the specific purpose of developing an individual law. The result has been labor policy that is balanced and fair, with the ultimate goal of furthering Thailand’s economic development.

To date, labor policy has formed around the assumption that an employee would remain with one employer for much of his or her working life. However, the

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73 Labor Protection Act, s 13.

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labor market in Thailand is now undergoing dramatic change, as has been observed in other jurisdictions as well. The rapid rise in wages is fuelling significant movement among employers, as employees seek the best compensation package, benefits, work environment, and possibility for career advancement. This change has two main effects. First, higher wages make severance benefits far more expensive because severance is based on an employee’s wages, particularly when considering employees who have long tenure. Second, employees who have shorter tenure with several employers may suffer some gaps with respect to their retirement readiness, as many benefits are tied to tenure with a single employer.

Given current birth rates and lengthening life expectancies, it is likely that some policy changes will need to be made in order to maintain a sufficiently large workforce and to provide adequate benefits to those who genuinely need them. This will likely take the form of encouraging employees to work for a longer period of their lives, as well as encouraging them to take greater personal responsibility for their retirement preparations.

The other major source of change will likely come from the ASEAN framework. As ASEAN member states move toward further integration, there will likely be greater convergence among the member countries’ labor laws, as well as greater ability for employees to move to positions throughout the region. Realistically, however, full liberalization in movement of natural persons is still some time away.
# Trinidad and Tobago

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Introduction

Legal System

The Republic of Trinidad and Tobago is a former colony of the United Kingdom and its legal system is largely a product of this colonial experience. Trinidad and Tobago has a traditional Common Law legal system modeled after that of the United Kingdom. The main sources of law are the Constitution, legislation, Common Law and judicial precedent.

The Judicial Committee of the Privy Council in the United Kingdom remains the final court of appeal in Trinidad and Tobago.¹ Judgments of the Trinidad and Tobago Court of Appeal and the Privy Council are generally considered binding on lower courts, while those of the United Kingdom and other Commonwealth jurisdictions are highly persuasive.

Historical Context of Employment Law

The present employment law landscape in Trinidad and Tobago has been heavily influenced by social, political, and economic factors that are in turn rooted in its history of slavery and colonialism. After the abolition of slavery in Trinidad and Tobago, social, political and economic power remained concentrated in the hands of the erstwhile plantation class and employment laws heavily favored employers.

In the 1930s, high unemployment, low wages and the rising cost of living caused by the great depression triggered widespread labor unrest, strikes and riots which, in turn, spurred the development of organized trade unions and labor groups which pressed for reform to existing labor laws. Many of these groups also took an active role in local politics and in particular the push towards national political independence. Legislative reform was slow in coming

¹ At the date of writing, the Government of Trinidad and Tobago had recently announced plans to adopt the Caribbean Court of Justice as the final court of appeal for criminal matters.
and labor unrest continued during the following decades culminating in a series of strikes and lockouts during the period 1960–1964.

In 1965, three years after Trinidad and Tobago attained national political independence, the government introduced the Industrial Stabilization Act. This Act introduced a mechanism for the recognition of trade unions and collective bargaining and a specialist Industrial Court for the compulsory arbitration of trade disputes between unions and employers. The Act was subsequently repealed and replaced by the Industrial Relations Act, Chapter 88:01 of the Revised Laws of Trinidad and Tobago, which governs collective bargaining and the jurisdiction of the Industrial Court.

Today, trade unions continue to play a vital role in the social and political culture of Trinidad and Tobago. The system of collective bargaining and establishment of the Industrial Court first introduced under the Industrial Stabilization Act remain perhaps the most significant features of the employment law landscape.

**Collective Bargaining**

The Industrial Relations Act sets out the legislative framework for collective bargaining in Trinidad and Tobago. It establishes a Recognition, Registration, and Certification Board that is responsible for the recognition of bargaining units within a workforce and the certification of trade unions. A trade union that represents more than 50 per cent of the workers in a given bargaining unit is entitled to be certified as the recognized majority trade union for that bargaining unit.

Under the Industrial Relations Act, the employer and the recognized majority trade union are required in good faith to treat and enter into negotiations with each other for the purposes of collective bargaining for its workforce. Failure to do so amounts to an industrial relations offence punishable by a fine of TT $4,000. The Industrial Relations Act also provides a mechanism for the registration of collective agreements. A registered collective agreement is binding and directly enforceable, but only by the Industrial Court.

**Industrial Court**

The Industrial Court has jurisdiction to:

- Hear and determine “trade disputes” between employers and employees;
- Register collective agreements and hear and determine matters relating to the registration of such agreements;
- Enjoin a trade union or other parties from taking or continuing industrial action; and
- Hear and determine proceedings for “industrial relations offences” specified under the Industrial Relations Act.

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Additionally, the Industrial Court is required to deal with matters under:

- The Minimum Wages Act, Chapter 88:04;
- The Retrenchment and Severance Benefits Act, Chapter 88:13;
- The Maternity Protection Act, Chapter 45:57; and
- The Occupational Health and Safety Act, Chapter 88:08, including the power to hear and determine proceedings relating to “health and safety offences” specified under that Act.

Under the Industrial Relations Act, the Industrial Court has jurisdiction to hear and determine “trade disputes”. Trade disputes are defined as disputes between an employer and its workers connected with the dismissal, employment, non-employment, suspension, refusal to employ, re-employment or reinstatement of any such workers and includes disputes connected with the terms and conditions of employment.

This jurisdiction does not replace the ordinary jurisdiction of the High Court to hear and determine claims for breach of an employment contract and/or wrongful dismissal. Rather, there are two parallel regimes for the determination of employment disputes in Trinidad and Tobago, the “ordinary” High Court regime and the specialist Industrial Court regime.

The High Court exercises its jurisdiction in accordance with the terms of the employment contract and Common Law principles. On the other hand, the Industrial Court, which is mandated to dispense social justice, exercises its jurisdiction in accordance with the wider principles of equity, good conscience and good industrial relations practice. So that, for example, even where an employer’s actions are in accordance with the provisions of the employment contract and/or Common Law principles, they may nevertheless be challenged at the Industrial Court on the basis that they are contrary to good industrial relations practice.

The remedies available at the High Court and Industrial Court also differ. The High Court may award damages for breach of contract or wrongful dismissal, including exemplary damages where it considers that an employer’s conduct in carrying out termination was so outrageous or high handed that exemplary damages are necessary in order to do justice between the parties. The Industrial Court is empowered to order compensation or damages, the payment of exemplary damages and/or (in cases where a worker successfully challenges his termination) the re-employment or re-instatement of the worker. The Industrial Court is not bound to follow any rule of law for the assessment of compensation or damages but instead may make an assessment that is in its opinion fair and reasonable.

An award or finding of the Industrial Court can only be challenged on grounds that the Industrial Court lacked or exceeded its jurisdiction, that the order was obtained by fraud, that it was erroneous in point of law or that there was some
specific illegality in the course of the proceedings. A finding by the Industrial Court that a worker has been dismissed in circumstances that are harsh and oppressive or not in keeping with the principles of good industrial relations practice is not open to appeal.

For these reasons, the Industrial Court regime is generally considered to be a more attractive option than the High Court for employees seeking redress relating to termination or breach of the employment contract. However, in order to access the Industrial Court’s jurisdiction to hear and determine trade disputes, an employee must in general:

- Fall within the definition of “worker” contained in the Industrial Relations Act — This definition excludes several categories of individuals, for example, those who might be described as part of management; and
- Be a member in good standing of a trade union — Under the Industrial Relations Act, a trade dispute can only be initiated by the employer, the recognized majority trade union for the bargaining unit to which the worker belongs or, where there is no recognized majority trade union, any trade union in which the worker or workers who are parties to the dispute are members of good standing.

Where an employee is precluded from accessing the Industrial Court regime, his scope for redress is limited to the High Court.

**Legal Relationship of Employer and Employee**

**Employment Relationship**

*In General*

Employment relationships are, in general, governed by the provisions of the employment contract and/or collective agreement where applicable, Common law principles, and legislative provisions governing specific situations.

*Contract of Employment*

As a general rule, an employment contract need not be in writing. It may be express or implied, oral or written, or partly oral and partly in writing. In practice, the main terms and conditions of employment are generally set out in a letter of appointment, which may specifically incorporate employment policies. Where an employee is part of a bargaining unit for which there is a registered collective agreement, the terms of that collective agreement also may, in so far as is material, govern the employment relationship.

As a general rule, the terms of an employment contract can only be varied by mutual agreement between both employer and employee. Where an employer unilaterally varies an essential or material term of the contract, such as reducing
an employee’s hours of work or salary, this may amount to a repudiatory breach of the employment contract entitling the employee to treat the employment contract as terminated and claim constructive dismissal (under the High Court regime) and/or conduct that is harsh, oppressive or contrary to good industrial relations practice (at the Industrial Court regime).

Common Law

Certain terms may be implied under the Common Law. For example, it is generally accepted that it is an implied term of the employment contract that:

- The employee will serve the employer with fidelity and in good faith;
- The employee will not disclose or make public any confidential information which he learns by reason of his employment; and/or
- An employer will take reasonable care for the safety of its employees.

Legislation

Certain terms of employment and/or duties and rights of the employer and employee also may be prescribed by statute, for example, the Minimum Wages Act, which prescribes wage rates and working hours applicable to certain employees; the Retrenchment and Severance Benefits Act, which prescribes the procedure to be followed in the event of redundancy and the payment of minimum severance payments to retrenched workers; the Maternity Protection Act and the Occupational Health and Safety Act.

Additionally, the employment relationship between the State and certain categories of its employees is governed by specific legislation setting out the terms and conditions of employment including the Civil Service Act, the Police Service Act and the Education Act.

Parties to Employment Contract

Child Labor

The Children Act, Chapter 46:01, prohibits the employment of children under the age of 16 years, save in family businesses. The Industrial Training Act, Chapter 39:54, allows for the apprenticeship of children less than eighteen years for the purpose of learning specified trades with the approval of the Board of Industrial Training of Trinidad and Tobago.

Foreign Employees

Under the Immigration Act, Chapter 18:01, foreigners may enter Trinidad and Tobago without a work permit either as a tourist or visitor or to engage in a legitimate profession, trade or occupation for a single period not exceeding 30 days in every 12 consecutive months. Entry is on the basis of a “certificate” stamped in the passport allowing entry for a specified period. A person who
wishes to remain for a longer period as a tourist or visitor is required to submit to an examination and an Immigration Officer may extend, limit, or vary the time or conditions of the entry stated on the certificate.

If a person wishes to stay in Trinidad and Tobago for a period exceeding 30 days to engage in a legitimate profession, he must obtain a work permit which may be sought by the prospective employer and which is issued for a fixed period. Generally, work permits will not be granted to non-residents unless there are no locals who are capable of filling the specified post. Work permits are issued for a specific time frame during which a local resident will be expected to be trained to assume the post held by a foreign employee.

The Immigration Act provides that any company which has in its employment in Trinidad and Tobago any person who does not have a work permit, though being required to do so, is guilty of an offence and is liable in the first instance to a fine of TT $1,000 and, for a subsequent offence, to a fine of TT $2000.

Trinidad and Tobago is a member of the Caribbean Community² (CARICOM). The Caribbean Single Market and Economy (CSME) is an arrangement between CARICOM member states geared towards the free movement of people, goods, services, capital and technology within the region.

To this end, the Immigration (Caribbean Community Skilled Nationals) Act allows for the entry, without work permit requirements, of CARICOM nationals falling within certain categories of skilled labor, including university graduates, media workers, artistes, musicians and sportspersons. Such nationals must obtain a Certificate of Recognition of CARICOM Skills Qualification from their home state.

**Part-Time Employees**

There is no specific legislation in Trinidad and Tobago dealing with “part time” employees. The definition of “workers” under the Industrial Relations Act does not draw any distinction between part-time and permanent employees and, in fact, expressly includes any person who by trade usage or custom or as a result of any established pattern of employment and recruitment of labor in any business or industry is usually employed or usually offers himself for and accepts employment accordingly.

The Retrenchment and Severance Benefits Act, on the other hand, expressly excludes:

- “Casual workers”, defined as persons employed on a temporary, irregular, or intermittent basis;

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² The Caribbean Community includes Antigua and Barbuda, Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname, and Trinidad and Tobago.
“Seasonal workers”, defined as persons regularly employed each year, but not throughout the year, to perform work which is limited to a certain time or certain times of the year because of the seasonal nature of the work involved, unless such workers are employed as part of the regular work force for at least three consecutive seasons with the same employer and for at least one hundred days each season; and

- Workers employed on a specified fixed-term basis or workers engaged to perform a specific task over an estimated period of time where these conditions are made known to the worker at the time of engagement.

As such, the principal distinction between “part time” and other employees is the entitlement to severance under the Retrenchment and Severance Benefits Act. From a practical perspective, in determining whether a contract of employment is for a fixed or determinate period, the description contained in the contract itself is not conclusive. Rather, the Court will examine the practical reality of the relationship.

Where a worker is employed on consecutive fixed-term contracts for a continuous period, the court may find that he was employed on a continuous basis as opposed to a “part time” basis.

**Jurisdiction of Industrial Court to Hear Trade Disputes**

As noted above, the Industrial Court has jurisdiction to hear and determine trade disputes between employers and employees relating to employment. The Industrial Court comprises:

- The Essential Services Division, which has jurisdiction over “essential services” including the electricity, water and sewerage, communications, fire, health, hospital, sanitation, civil aviation, and public school bus services;
- Special Tribunals (consisting of the Chairman of the Essential Services Division and two other members of that Division selected by him) established under the Civil Service Act, the Police Service Act, the Fire Service Act, the Prison Service Act, the Education Act, the Supplemental Police Service Act and the Central Bank Act, which hear and determine disputes arising in these services; and
- The General Services Division that has jurisdiction over services that are not “essential services”.

As indicated above, the jurisdiction of the Industrial Court to hear and determine trade disputes generally applies only to “workers” as defined under the Industrial Relations Act. This definition excludes individuals who are responsible for the formulation of policy in any undertaking or business, are responsible for the effective control of the whole or any department of any undertaking or business, or have an effective voice in the formulation of policy in any undertaking or business.
The definition also excludes public officers, members of the protective services, members of the teaching service, employees of the Central Bank, domestic employees employed by private households, and apprentices within the meaning of the Industrial Training Act. However, as noted above, the Essential Services Division and/or the relevant Special Tribunal of the Industrial Court does have jurisdiction to hear and determine employment disputes involving several of these services. Disputes as to whether a particular individual falls within the definition of “worker” are determined by the Registration, Recognition and Certification Board.

Employees and Independent Contractors

The legal distinction between employee and an independent contractor is governed by Common Law principles. The way in which the parties have chosen to classify their relationship, while relevant, is not conclusive. Instead, the Court3 will assess the practical reality of the relationship by reference to a range of multiple factors, including:

- The terms of the agreement between the parties;
- The intention of the parties and their own view of the relationship;
- Whether the worker was part of the organization;
- Whether the worker was carrying on business on his own account or carrying on the business of the employer;
- The entitlement to exclusive service;
- The degree of control exercised by the employer;
- The nature and regularity of the work;
- Whether the worker’s interest in the relationship involved any prospect of profit or risk of loss;
- The payment of wages, sickness pay and holiday pay, by whom and by what method the payment is made;
- The incidence of income tax and other mandatory statutory deductions from income;
- The ownership and provision of equipment, material, plant and machinery;
- The power of selection and appointment;
- The power to suspend and dismiss;
- The power to fix the place, time of work and the times at which holidays are taken;
- The traditional structure of the trade or profession concerned and the arrangement within it; and
- The view of the ordinary person.

3 This includes both the Industrial Court and the High Court.
Transfers of Business

Termination

It is possible, in cases where the reorganization or restructuring of a business results in a surplus of labor for its undertakings, for “surplus” employees to be terminated on the basis of redundancy. However, such termination may be challenged at the Industrial Court. The Industrial Court will be vigilant in determining whether a genuine situation of surplus labor existed or whether it was merely a “ruse” to terminate the employee.

While the Industrial Court recognizes an employer’s general entitlement to restructure its business as it sees fit, the onus will be on the employer to present clear and cogent evidence that it embarked on a genuine restructuring exercise prior to termination.

The Retrenchment and Severance Benefits Act sets out the minimum severance benefits payable to employees terminated on the basis of redundancy. However, where the employer contemplates absorption of retrenched workers into another undertaking of the same employer or its assignee or successor, it may withhold severance benefits and instead pay to the worker a “relief payment” of 50 per cent of his basic salary.

This payment is payable on regular pay days from the date of retrenchment to the date of absorption or until the worker finds alternative employment, whichever is earlier, up to a maximum period of three months. Where a worker unreasonably refuses an offer by his employer or employer’s successor of comparable and suitable employment without any break in service as an alternative to being retrenched, his severance benefits may be withheld.

Pension Plans

Employer-sponsored pension plans are common in Trinidad and Tobago. Pension benefits are generally transferable upon termination of the employment relationship, provided that both plans in question have been duly approved by the Board of Inland Revenue and registered with the Central Bank.

Terms and Conditions of Employment

Remuneration

Minimum Wage

Wages and salaries vary considerably between industries. However, the Minimum Wages Act empowers the Minister responsible for labor matters to make Minimum Wage Orders in relation to specific trades. The current general minimum hourly wage (exclusive of gratuities, service charges, and commissions) is prescribed by the Minimum Wages Order 2010 and is TT $12.50.
Industry-specific Orders also have been issued under the Act including the Petrol Filling Stations Employees Order 1982, the Minimum Wages (Catering Industry) Order 1991, the Minimum Wages (Shop Assistants) Order 1991, the Minimum Wages (Security Industry Employees) Order 1995 and the Minimum Wages (Household Assistants) Order 1991. The Labor Market Inspectorate Division of the Ministry of Labor and Small and Micro Enterprise Development is responsible for the enforcement of minimum wages legislation and treats with employee complaints in this regard.

**Equitable Wage**

The Equal Opportunities Act prohibits employers from discrimination in the terms or conditions of employment afforded to employees on the basis of sex, race, ethnicity, geographical origin, religion, marital status, or disability.

**Hours of Work**

Under the Minimum Wages Act and Minimum Wages Order 2010, the normal working hours exclusive of meals and rest breaks are eight hours per day, 40 hours per week, and/or 173.3334 hours per month. Workers are entitled to a meal break and rest period during the day.

Workers who are required to work beyond the normal hours are entitled to overtime that is calculated in accordance with a prescribed statutory formula. However, the Order does not apply to employees who receive an hourly rate of at least 1.5 times the minimum wage.

**Health Care**

Trinidad and Tobago has a free public health care system, funded by the state and taxpayers. The state also operates a “Chronic Disease Assistance Program” which is intended to provide all citizens with free prescription drugs to combat certain chronic and/or endemic health conditions including diabetes, cardiac diseases, arthritis and high blood pressure.

All employed persons between the ages of 16 and 60 years are required to pay Health Surcharge tax that is applied toward the funding of public health care services. The amount of tax payable varies depending on the income of the payee, but generally does not exceed TT $8.25 weekly.

The National Insurance Board also operates a compulsory system of national insurance, known as the National Insurance Scheme or “NIS”. All employed persons between the ages of 16 and 65 are required to participate in this Scheme. Contributions are paid partly by employers and partly by employees.

In practice, many employers also offer voluntary group health insurance plans to employees as part of the terms and conditions of employment.
Vocational Training

The National Training Agency is the central coordinating agency for technical and vocational education and training in Trinidad and Tobago. It runs an “On the Job Training” program that places individuals between the ages of 16 to 35 in work-based training opportunities with private and public sector employers. Trainees receive a stipend that is funded by the state.

Discrimination

The Equal Opportunity Act prohibits discrimination in employment on the grounds of:

- **Sex** — An exception applies where being of a particular sex is a genuine occupational qualification for employment, promotion, transfer, or training, in that the duties relating to the employment can be performed only by a person having the physical attributes (excluding strength or stamina) of a particular sex; relate to a dramatic performance, entertainment, photographic, or exhibition modeling for which a person of a particular sex is required for authenticity; need to be performed by a person of a particular sex to preserve decency or privacy; involve the provision of personal services to a particular sex concerning welfare, education or health which can most effectively be provided by a person of that sex or, due to the nature of the establishment, require employment to be held by a person of a particular sex.4

- **Race** — An exception applies where the duties relating to employment relate to a dramatic performance, entertainment, photographic or exhibition modeling for which a person of a particular race is required for authenticity.

- **Ethnicity.**

- **Origin (including Geographical Origin).**

- **Religion** — An exception applies where being of a particular religion is a necessary qualification for employment in a religious shop.

- **Marital status.**

- **Disability** — In particular, an employer may not treat a disabled employee less favorably than other employees in the terms and conditions of employment, access to opportunities for promotion, transfer, training and/or other benefits or by dismissing him or subjecting him to any other detriment. The Act does make provision for several exceptions, including situations where (i) the disability makes the employee unable to carry out the inherent requirements of his employment (ii) the employee requires special services and facilities, the provision of which would cause undue hardship to the employer and/or (iii) where the employee is likely to be a risk to himself or others.

4 Sexual preference or orientation is expressly excluded from the meaning of “sex” under the Act.
Age is not a protected category under the Equal Opportunity Act. As noted above, the Children Act prohibits the employment of children under 16 years. Complaints made under this Act are heard and determined by the Equal Opportunity Tribunal, a superior court of record with the power to make such declarations, orders and awards of compensation as it thinks fit.

Under the Maternity Protection Act, a qualifying employee is entitled to paid maternity leave and to resume work after such leave on terms no less favorable than were enjoyed immediately prior to her leave. Non-compliance with this requirement entitles an employee to bring a claim under the Industrial Relations Act.

**Collective Bargaining and Worker Participation in Management**

As noted above, the Industrial Court Act sets out the legislative framework for collective bargaining in Trinidad and Tobago. The collective bargaining regime is premised on the recognition and certification of recognized majority trade unions. A trade union that represents more than 50 per cent of the workers in a given bargaining unit within a workforce is entitled to be certified as the recognized majority trade union for that bargaining unit.

The employer and the recognized majority trade union are required in good faith to treat and enter into negotiations with each other for the purposes of collective bargaining and failure to do so amounts to an industrial relations offence punishable by a fine of TT $4000.

The Industrial Relations Act also provides a mechanism for the registration of collective agreements. A registered collective agreement is binding and directly enforceable by the Industrial Court. Employees are not entitled to representation on an employer’s Board of Directors unless this is specifically provided for in a collective agreement.

**Health and Safety Protection in Workplace**

**In General**

An employer has a general Common Law duty to take reasonable care for the safety of his employees during the course of their employment, including a duty to provide competent staff, proper plant and equipment, a safe work place and a safe system of work.

In addition to this general Common Law duty, the Occupational Safety and Health Act (OSHA) sets out a legislative framework governing health and safety in the workplace. The purview of the Act extends beyond traditional industrial establishments, and includes shops, offices and other places of work.
Employers’ Duties

The Act imposes a duty on employers to ensure the safety and health of their employees as well as persons not in their employment but who nevertheless may be affected by their business undertaking. Aside from imposing this general duty, the Act lays down a series of regulations in five main areas, namely:

- Safety, which includes regulations relating to the provision of protective clothing and devices, removal of dust and fumes, and safeguarding of machinery;
- Fire, which includes regulations relating to the provision of a means of escape in case of fire;
- Health, which includes provisions relating to cleanliness, lighting, overcrowding, noise and vibration and the medical examination of employees;
- Welfare, which includes provisions relating to drinking water, washing facilities, canteens, restrooms and first aid appliances; and
- Employment of young persons.

Compliance with these regulations is critical as, aside from carrying certain criminal penalties, the Act bestows upon workers the right to refuse to work where there is a safety or health danger. Along with prescribing a general code for health and safety, the Act also imposes an obligation on every employer to make a suitable and sufficient annual assessment of the risks to the safety and health of his employees to which they are exposed whilst they are at work and the risks to the safety and health of persons not in his employment arising out of or in connection with the environmental impact of his undertaking for the purpose of identifying what measures are necessary for compliance. In addition, the Act imposes reporting obligations on employers to give notice of accidents and occupational diseases to the OSH Agency established under the Act.

Employees’ Duties

Under the Act, every employee has a duty while at work to:

- Take reasonable care for the safety and health of himself and other persons who may be affected by his acts or omissions at work;
- As regards any duty or requirement imposed on his employer, cooperate with him so far as necessary to ensure that that duty or requirement is performed or complied with;
- Report any contravention of the Act to his employer;
- Correctly use the personal protective clothing or devices provided for his use;
- Exercise his discretion under the Act to refuse to work in a responsible manner; and
• Ensure that he is not under the influence of an intoxicant to the extent that he is in such a state as to endanger his own safety, health or welfare at work or that of any other person.

With the exception of certain specified breaches that are considered summary offences and are dealt with at the Magistrates’ Court, breaches of OSHA or any Regulations or directives made under it are deemed “safety and health offences” and are subject to the jurisdiction of the Industrial Court.

Workers’ Compensation and Survivors’ Benefits

In General

An employee and/or his family may be entitled to compensation or benefits in the event of injury or death under several different mechanisms. It is important to note that these entitlements are in general not mutually exclusive but rather operate parallel to each other.

National Insurance

As noted above, there is a compulsory system of national insurance in Trinidad and Tobago, to which both employers and employees are required to contribute. Benefits payable under this scheme include sickness and invalidity benefits for employees rendered incapable of working, funeral grants payable upon the death of an employee and survivor’s benefits payable to a deceased employee’s spouse, child or parents as applicable.

Workmen’s Compensation

Under the Workmen’s Compensation Act, an employer is liable to pay compensation for injury or death of an employee arising from a workplace accident. The value of such compensation is calculated using a prescribed formula and depends in part on a medical assessment of the employee’s permanent partial disability.

Where death or serious and permanent disablement occurs, the employer remains liable even though the accident may have been caused by the employee’s own serious and willful misconduct. The Act requires employers to take out insurance to cover workmen’s compensation claims. Failure to do so is an offence under the Act.

Breaches of OSHA resulting in death, critical injury, or occupational disease are punishable by a maximum fine of TT $100,000 or an amount equivalent to three years’ pay of the injured or deceased person, which may be paid to the aggrieved person or his estate. An aggrieved person also can apply to the Industrial Court for redress, in which case the Court is empowered to make an award in that person’s favor.
Where an employee is injured or killed as a result of an employer’s failure to discharge its Common Law duty to take reasonable care for the safety of his employees during the course of their employment, a claim may be brought against the employer for damages at the High Court. Damages are generally awarded for:

Pain and suffering — The employee’s physical pain and emotional distress caused by the injury;

Loss of amenity — The extent to which the injury has affected the employee’s ability to function;

Loss of pecuniary prospects — The extent to which the employee’s income or earning capacity has been affected;

Special damages — Medical and other incidental expenses reasonably incurred as a result of the injury; and

Dependency — Damages for the loss of the financial support that he would have provided to them.5

The damages awarded to an employee or his dependants will be reduced by the extent to which he may have caused or contributed to the injury by his own negligence.

**Employer-Sponsored Pension Plans**

Employer-sponsored voluntary pension schemes are common in practice. Where a worker is no longer able to perform his job and reasonable attempts to reassign alternative work to him prove unsuccessful, the Industrial Court has suggested that the more humane practice of terminating the employment relationship by compulsory retirement with pension benefits (commonly known as “medical boarding”) is to be preferred to simply terminating the worker.

**Dispute Resolution**

**In General**

As indicated above, the two parallel regimes for the determination of employment disputes in Trinidad and Tobago are the High Court regime and the specialist Industrial Court regime. At the High Court, employees may bring claims for breach of the employment contract or wrongful dismissal. Union membership is not a pre-requisite for bringing such a claim.

The Industrial Court has jurisdiction to hear and determine “trade disputes” between an employer and its workers connected with the dismissal,

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5 In order to qualify as a “dependant”, a claimant must fall within one of the categories in the Compensation for Injuries Act and prove actual dependency on the deceased.
employment, non-employment, suspension, refusal to employ, re-employment or reinstatement of any such workers and includes disputes connected with the terms and conditions of employment.

However, a trade dispute can only be initiated by the employer, the recognized majority trade union for the bargaining unit to which the worker belongs or, where there is no recognized majority trade union, any trade union in which the worker or workers who are parties to the dispute are members of good standing. An individual worker must accordingly be a member in good standing of a trade union in order to access the jurisdiction of the Industrial Court. A worker may, however, join a union subsequent to the facts giving rise to the dispute.

The dispute resolution process has several stages culminating in compulsory arbitration by the Industrial Court. In practice, in cases where there is a recognized majority union for the workforce, the collective agreement may provide for grievance procedures to be followed as a preliminary dispute resolution mechanism prior to the commencement of any formal legal action. The Industrial Relations Act requires that a party reporting a trade dispute state what steps, if any, have been taken for the settlement of the dispute.

The first stage of the “formal” dispute resolution process under the Industrial Relations Act is reporting the dispute to the Ministry of Labor. The Minister is empowered under the Industrial Relations Act to take such steps as he may consider advisable to secure a settlement of the dispute by means of conciliation. If such conciliation is not successful, the Minister must issue a certificate of unresolved dispute that entitles either party to proceed with the matter at the Industrial Court.

At the Industrial Court, the parties may attempt further conciliation or proceed to a Trial of the dispute. Decisions of the Court are binding and can only be challenged on grounds that the Court lacked or exceeded its jurisdiction, that the order was obtained by fraud, that it was erroneous in point of law or that there was some specific illegality in the course of the proceedings. A finding by the Industrial Court that a worker has been dismissed in circumstances that are harsh and oppressive or not in keeping with the principles of good industrial relations practice is not open to appeal.

**Termination of Employment**

*In General*

An employee who alleges that he has been unfairly terminated may, depending on the circumstances, challenge his termination at the High Court or the Industrial Court. The degree of an employer’s potential exposure varies considerably under the different regimes — both in terms of the available grounds on which his actions can be challenged as well as the penalties that may be imposed.

(Release 1 – 2012)
The High Court is governed by Common Law principles, which generally allow an employer to terminate an employee provided that it is done in compliance with the employee’s terms and conditions of employment under the employment contract. As a general rule under the Common Law, an employment contract is terminable on the provision of Notice. Where the notice period is not stipulated in the contract, “reasonable” Notice must be given.

The High Court is generally empowered to order damages, including exemplary damages in certain circumstances. The general measure of damages in a claim for wrongful dismissal at the High Court is the amount the employee would have been entitled to had the employment been properly terminated according to the terms of the employment contract, subject to the employee’s duty to mitigate his loss by acting reasonably in attempting to find alternative employment.

In practice, the measure of damages is usually based on what would have been considered “reasonable” Notice of termination under the circumstances of the case. Where the employment contract specifies a Notice period, the Court will take it into account, but it is not necessarily conclusive.

The Industrial Court, on the other hand, exercises its jurisdiction in accordance with the wider principles of equity, good conscience and good industrial relations practice. Thus, even where an employer complies with the legal requirements for termination under the employment contract and/or the Common Law, his actions may nevertheless be challenged at the Industrial Court on the grounds that they were harsh, oppressive, or contrary to the principles of good industrial relations practice. Good industrial relations practice is concerned both with the reasons for a worker’s termination and the manner in which termination is carried out. Generally, good industrial relations practice requires that:

- A worker’s employment may not be terminated except for a valid reason connected with his capacity to perform the work for which he was employed or founded on the operational requirements of his employer’s business; and
- The employer must inform a worker of the reason or reasons for his proposed termination and, save in exceptional circumstances, give the worker a fair opportunity to be heard before proceeding with the proposed termination.

As a general principle, good industrial relations practice also requires that employers (save in exceptional circumstances) consider and adopt progressive disciplinary action. In particular, employers are required to consider whether a lesser penalty than termination would adequately meet the objectives of discipline and deterrence. Termination is viewed as the ultimate sanction that an employer can impose and is only justifiable where an employer is satisfied that progressive disciplinary measures are inappropriate or have failed to yield acceptable results. Termination is generally only justifiable where it is for:

- Cause, where the worker commits an act of misconduct that goes to the root of the contract;
• Poor performance, where the employer has a total and complete loss of confidence in the worker’s ability to perform due to the worker consistently performing in an unsatisfactory manner; and/or
• Redundancy, where there is a surplus of labor for business operations.

The Industrial Court can make a wide range of orders, including the payment of compensation or damages, exemplary damages and even the re-employment or re-instatement of the employee to his former position or a similar position, subject to any conditions that it thinks fit to impose. The Industrial Court is not bound to follow any rule of law for the assessment of compensation or damages but instead may make an assessment that is in its opinion fair and reasonable.

Redundancy

In addition to the general principles of good industrial relations practice, redundancy, retrenchment, and severance are governed by the provisions of the Retrenchment and Severance Benefits Act. Under the Act, “redundancy” is defined as “the existence of surplus labor in an undertaking for whatever cause”. The Act outlines a specific process that an employer should utilize when it proposes to terminate five or more employees on the grounds of redundancy, including the provision (save in exceptional circumstances) of 45 days’ notice in writing to each of the workers, the recognized majority union and the Minister with responsibility for Labor. Although the Act does not expressly stipulate that this process should be followed where less than five workers are terminated, in determining whether the employer acted fairly and/or in accordance with good industrial relations practices, the Court may (and has in previous cases) take into account whether it complied with the procedure specified in the Act.

Additionally, where termination of fewer than five workers is followed, within the notice period, by termination of additional workers, all such workers are counted together in determining the number of workers terminated.

What is fair and reasonable would depend on each particular case. However, some of the factors that the Court may consider are the process used for selection of which worker(s) would be terminated, the selection criteria, the extent to which the employer explored options for averting, reducing or mitigating the effects of the proposed termination (including retraining and redeployment) and whether it had any consultation or discussion with the worker prior to termination.

As a general principle, good industrial relations practice requires that, all things being equal, selection for termination on the grounds of redundancy be based on the “Last In, First Out” basis.

Under the Act, minimum severance benefits are payable for each qualifying worker with over one year’s continuous service and are calculated on the basis of the basic wage paid at the time of termination as follows:

(Release 1 – 2012)
• For employees with more than one but less than five years’ continuous service, two weeks’ pay at the basic rate for each year of continuous service; and
• For five or more years’ service, three weeks’ pay at the basic rate for each year of service.

Where the retrenched worker is covered by a registered collective agreement that prescribes severance benefits that are no less favorable than the minimum standards set out in the Act, the provisions of the collective agreement would apply. Payment of severance applies only in the case of termination on the grounds of redundancy. Trinidad and Tobago does not have a national unemployment insurance program or mandatory job-retraining programs and/or placement programs.

Retirement, Social Security, Health Care, Old-Age Pensions

In General

Trinidad and Tobago has a free public health care system, funded by the state and taxpayers. The state also operates a “Chronic Disease Assistance Program” which is intended to provide all citizens with free prescription drugs to combat certain chronic and/or endemic health conditions including diabetes, cardiac diseases, arthritis and high blood pressure.

As stated above, there is a compulsory system of national insurance in Trinidad and Tobago, to which both employers and employees are required to contribute. Benefits payable under this scheme include sickness and invalidity benefits for employees rendered incapable of work as well as retirement benefits. The state also provides an “old age pension” grant to citizens 65 years of age and older whose monthly income is less than TT $1000.

Many employers also operate voluntary pension plans. If approved by the Board of Inland Revenue and registered with the Central Bank, these plans attract tax-exempt status.

Social Costs

There is no blanket “employer’s tax” in Trinidad and Tobago. Public health care services are funded by the state and taxpayers via a Health Surcharge Tax. While the incidence of the Health Surcharge tax falls on the employee, the onus of deducting it from the employee’s income and remitting it to the Board of Inland Revenue rests with the employer. Failure to do so amounts to an offence.

Both employers and employees are required to contribute to the compulsory National Insurance Scheme. The amount payable depends on the level of income earned by the employee. However, the maximum payable by the employer currently stands at about TT $145.54 weekly.
Under the Workmen’s Compensation Act, an employer is liable to pay compensation for injury or death of an employee arising from a workplace accident. The Act also requires that employers take out insurance to cover workmen’s compensation claims. Employee-operated pension and group health insurance plans are common in practice, though not required by law.

Conclusion

Trinidad and Tobago is relatively young and evolving jurisdiction. The establishment of its specialist Industrial Court, mandated to dispense “social justice”, remains the most significant feature of its employment law landscape. More recently, Trinidad and Tobago has introduced Equal Opportunity and Occupational Health and Safety legislation.
United Kingdom

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Introduction

In General

The United Kingdom has no single labor code or comprehensive consolidating Act. For instance, it operated under nine principal statutes and about 100 subsidiary sets of rules and regulations governing unlawful discrimination in the workplace prior to the implementation of the Equality Act of 2010 (the “Equality Act”).

Many provisions also can be found in Codes of Practice without strict legal force, but complied with largely because of the use of those Codes by courts and Employment Tribunals as evidence of the reasonableness or propriety of an employer’s acts in any particular context.

Technically, Scotland and Northern Ireland have their own legal systems and some of their own statutes and regulations, but differences are generally limited to procedural, administrative, or descriptive matters.

Trade Unions

The United Kingdom's regulatory framework concerning trade unions has developed piecemeal over hundreds of years in a series of reactions to specific issues that were prominent at the time. As a result, it is idiosyncratic, non-cohesive, and markedly different from that in other European jurisdictions.

The European Union (EU) has until recently had relatively little influence on the relationship between employers and trade unions in the United Kingdom, although this is starting to change with the increasing impact of the European Convention on Human Rights and the principle of “freedom of association”.

The relationship between employer and trade union has political connotations within the United Kingdom; thus, the legal framework and the relative power of trade unions can be significantly affected by the government of the day.

The Conservative party, particularly the Thatcherite government of the 1980s, imposed considerable restrictions on trade unions in a bid to free businesses
from trade union interference. In contrast, the Labor Party has typically reduced restrictions and given greater rights to trade unions and their members.

One of the most important measures introduced by the New Labor government of the late 1990s and early 2000s was legislation that took the decision as to collective bargaining with trade union(s) away from the employer and put it into the hands of the employees. A trade union can now initiate a statutory procedure which is operated by the Central Arbitration Committee and can lead to recognition being imposed on the employer regardless of its wishes.

Legal Relationship of Employer and Employee

In General

Historically, only employees qualify for many of the statutory employment rights and protections in the United Kingdom. Different tax and National Insurance regimes will apply to non-employees in some cases. Some rights also extend to workers.¹

Section 230(1) of the Employment Rights Act of 1996 (the “Employment Rights Act”) defines an “employee” as an individual who has entered into or works under a contract of employment. A “contract of employment” is defined as a contract of service or apprenticeship, whether express or implied, and (if express) whether it is oral or in writing. Despite the importance of distinguishing a contract of service (employee) from a contract for services (contractor), there is no definite test. However, the following matters will be taken into account:

- The degree of control exercised over the individual;
- The extent to which the function being performed is an integral part of the business or a temporary adjunct to it;
- The degree of financial risk on the part of the individual, i.e., the extent to which he is financially liable for defects in his performance of the role;
- The label the parties attach to the relationship (which is not conclusive);
- The ownership of working equipment; and
- The extent of the individual’s obligation to do the work given.

Where the individual can decline work without penalty or can legitimately subcontract it to someone else, then he is unlikely to be an employee. The same may be true where the employer is under no obligation to provide work, as “mutuality of obligation” carries considerable weight in this assessment.

¹ Section 230 of the Employment Rights Act defines a “worker” as someone who works under a contract of employment or any other contract where the individual commits to work personally for another party to the contract whose status is not (by virtue of that contract) a client or customer of the individual.
Although rare, it is possible for a person to count as an employee for unfair dismissal purposes but nonetheless as an independent contractor for tax purposes. Workers and contractors may nonetheless fall within the Working Time Regulations of 1998 to the same extent as employees.

A person holding office (e.g., company directorship, official position in a trade union, or trustee) without more is not generally regarded as an employee. However, the majority of office holders generally also are employees, and much of the legislation dealing with company directors recognizes that removing a person as director may give rise to separate liabilities under the employment contract.

Partners, including limited-liability partnership members, are not employees, but self-employed. A series of decided cases suggests that because majority shareholders in the employing company can effectively prevent or even procure their own dismissal, they will often not count as employees. However, they may still fall under the employment tax rules by virtue of IR35, which is designed to minimize tax evasion through the use of individual service companies to supply people who would otherwise be deemed employees of the end-user.

Other cases where care needs to be paid to the precise status of the employee include members of workers’ cooperatives, trainees on some government-sponsored training schemes, business owners, volunteers, and employment agency workers.

Contract of Employment

In General

There is no general legal requirement for a contract of employment to be in writing. Still, employers are required by Section 1 of the Employment Rights Act to provide an employee with a written statement (“Section 1 statement”) of certain terms of his contract, usually within eight weeks after the commencement of employment. Any later changes to these details should be notified in writing within one month of the change. Such details include:

- The identity of the parties;
- The date of commencement of employment;
- The date of commencement of any previous employment counting as continuous;
- Rate and intervals of remuneration;
- Hours of work;

2 Her Majesty’s Revenue and Customs has issued leaflet Number IR56 “Employed or Self-Employed?” for guidance. The burden is on the employer to get it right, and a belief that the individual is not a pay-as-you-earn employee and so can be paid without tax deduction will be no excuse.
• Holiday entitlement, including rights as to pay for holidays not taken upon termination of employment;
• Sick pay entitlement;
• Pension;
• Notice entitlement;
• Job title and description;
• Place of work;
• Any applicable grievance and disciplinary procedures;
• The date of expiration of any fixed-term contract;
• Details of the length of posting and remuneration of employees being transferred overseas; and
• Whether any collective (i.e., union-negotiated) agreement forms part of the contract of employment.

An aggrieved employee may apply to the Employment Tribunal where the employer has provided no Section 1 statement, where it is provided but incomplete, or where it is provided but arguably inaccurate.

Employment Tribunals have limited powers to make a declaration of what the Section 1 statement ought to have recorded, and this will be binding on the employer. An employee may not apply for a declaration in respect of any term of his employment other than those required to be provided in writing under Section 1, and any claim should be made within three months of the end of the employment.

The Section 1 statement is not the contract of employment itself (unless agreed otherwise), but merely evidence of the terms of that contract. It is more often than not supplemented by terms from other sources, express, oral, or implied.

In addition to the express terms in the written statement, the contract of employment also will contain a variety of implied terms and possibly terms incorporated by reference from other documents. Implied terms may arise by the operation of statute, by custom and practice, or by the ordinary rules of the law of the contract.

Among these implied terms are the following common law provisions deemed to be present in all employment contracts: (a) neither party should act so as to breach the mutual relationship of trust and confidence; and (b) the employee should serve the employer faithfully, take reasonable care of his property, obey reasonable orders, and respect his secrets. The main reciprocal obligations on the part of the employer are to pay wages, to sometimes provide work, and to take reasonable care of the employee’s safety.

**Form of the Contract**

Except for the Section 1 requirement, there are no generally applicable rules about the form of employment contract, but certain well-developed practices can
be observed. The more senior the employee, the greater the likelihood of a comprehensive stand-alone service agreement, which will often restate some generally implied terms. Lower-level employees may have a statement containing little more than the basic Section 1 details.

Employees in respect of whom a collective agreement has been negotiated often will have little more than a letter referring them to particular parts of that collective agreement for details of their terms of employment, or there may be a central staff handbook supplemented by a letter containing the terms personal to such employee.

However, not all details of a collective agreement can be incorporated in an individual’s contract of employment. Purely collective matters, such as negotiation or dispute resolution mechanisms, will generally remain as between the employer and the trade union, and thus are not strictly enforceable.

**Parties to the Contract**

The general law places certain restrictions on the ability of minors, the mentally ill, and the drunken to enter into contracts enforceable against them. Generally, the employment of anyone under the age of 15 is unlawful, while employment of those between the ages of 15 and 16 is strictly limited as to the type of work to be done and the hours involved.

There are few total restrictions in place on the employment of those between the ages of 16 and 18, although certain types of factory work are regulated or prohibited. The general rule is that those under the age of 18 may only validly enter into contracts which are necessary or beneficial to them.

An employer who employs a person over the age of 16 who is subject to immigration control and not entitled to undertake the work in question will be liable to a civil penalty of up to GBP 10,000 per illegal employee under the Immigration, Asylum, and Nationality Act of 2006.

However, the employer may be excused from liability if he has first seen and retained a copy of specified original documents in relation to the new employee which allowed him to reasonably draw the conclusion that the employee is lawfully able to work in the United Kingdom.

As regards employees with a time limit on their permitted stay in the United Kingdom, the employer also should carry out checks on their right-to-work documentation at least once every 12 months to be able to retain the statutory excuse,³ but this is not necessary for persons employed prior to 29 February 2008.

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³ A full list of the documents which demonstrate that the holder is entitled to work in the United Kingdom can be found at http://www.ukba.homeoffice.gov.uk/sitecontent/documents/employersandsponsors/preventingillegalworking/.

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An employer who knowingly employs a person who is not permitted to work in the United Kingdom cannot rely on the statutory excuse even if the required document checks have been carried out. The only lawful citizenship requirements apply to positions in the Armed Services and much of the Civil Service, where the job holder generally should be a citizen of the United Kingdom or a Commonwealth country.

**Transfer of Business**

A share transfer does not affect the identity of an individual’s employer and leaves the employment relationship unaltered. The effect of a transfer of the business or part thereof on the employment relationship is generally governed by the Transfer of Undertakings (Protection of Employment) Regulations of 2006 (TUPE).⁴

An employee of the transferor will be treated as if his contract of employment had originally been made with the acquirer. He will retain all the existing terms and conditions of employment and his employment continuity. The TUPE protects employees against transfer-related dismissals and requires the transfer to be the subject of prior consultation with representatives of the affected staff of the transferor and transferee.

As a rule, any activity or function capable of definition which has employees assigned to it (other than on a temporary basis) is likely to be deemed an undertaking or part thereof. It is immaterial whether that activity does or is intended to make a profit or is of a commercial nature. It may cover the business’ main purpose as well as its ancillary parts, such as catering, cleaning, or security.

An employee is not required to transfer to the new employer against his will, but he also will not be required to stay with the transferor. He will cease to be employed by either and will then, depending on the reason for his refusal, have either an unfair dismissal claim against either or both, or no claim at all. The rights and duties arising under a collective bargaining agreement should be transferred to the transferee, but without prejudice to the usually non-binding nature of such agreements.

The effect of TUPE on pension rights in an individual’s contract remains unclear to some extent. It excludes rights and benefits for old age, invalidity, or survivors under an occupational pension scheme from the scope of rights and benefits transferred. However, this exclusion does not extend to additional

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⁴ On its face, the TUPE only covers employees of the transferor. This creates difficulties in applying it to cases where the employees work in a business but are employed by a separate company. Case law increasingly suggests that the relevant issue is not by which legal entity the relevant employee is strictly employed but to what activity he is actually assigned. Thus, the fact that an employee may not be employed by the transferor does not mean that he is not covered by TUPE.
components of the scheme, e.g., life assurance or rights to early retirement on enhanced terms in the event of redundancy. The TUPE also imposes an obligation on the transferee to match the transferor’s pension contributions on the employees’ behalf up to six per cent.

In general, a dismissal of an employee in connection with a business transfer will automatically be unfair. The employer may escape such a finding if he can show that the dismissal, while in connection with the transfer, was for a genuine economic, technical, or organizational reason entailing changes in the workforce. The fact that the dismissal may be unfair under TUPE does not alter the compensation which may be awarded or the minimum qualifying service requirements for an unfair dismissal claim.

The transferee and the transferor should inform and consult elected employee representatives or recognized union representatives of affected staff in relation to business transfers, specifically as regards: (a) the fact, date, and justification for the business transfer; (b) its legal, economic, and social implications for affected staff; and (c) any measure which may impact on the affected staff as a consequence of the transfer.

The transferor should provide the transferee with certain Employee Liability Information around two weeks before the transfer, including the employees’ ages, their Section 1 information, details of any disciplinary or grievance issues in the past two years, and any actual or likely litigation by that employee. A penalty of up to GBP 75,000 may be levied for failure to provide such information and the transferee may separately take Employment Tribunal proceedings against the transferor to recover consequential losses.

The consultation and information should begin long enough before the transfer to be meaningful, but there is no minimum period for this purpose. Failure to inform and consult properly can make the responsible employer liable for compensation of up to three months’ pay per affected employee. However, a failure to inform and consult does not make the transfer void, unlike in some European jurisdictions.

Terms and Conditions of Employment

In General

Except for a few statutory restrictions and protections, much of the content of a contract of employment is a matter of agreement between the parties. However,

5 “Entailing changes in the workforce” usually means a variation in employee numbers or functions, not merely a dismissal following an unsuccessful attempt to harmonize terms of employment between the acquired and existing staff.

6 This is not just those who transfer but any of the remaining staff of the transferor or transferee whose terms of employment or other working conditions may be affected by the transfer.
a contract of employment may not validly include any clause which requires the commission of an illegal act or which places the employee in unnecessary danger.

The fixing of terms and conditions of employment is normally a function of collective negotiation by trade unions and/or (outside the unionized environment) of market norms and competitive pressures.

**Remuneration**

The National Minimum Wage Act of 1998 establishes minimum hourly rates. These are currently GBP 3.64 for employees who are 15 to 18 years of age, GBP 4.92 for those up to 21 years of age, and GBP 5.93 for those who are above 21 years of age.

Employers should provide each employee a pay statement stipulating the gross amount of wages or salary, any deductions, and the net figure. An employer may not make any deduction from an employee’s wages unless required or authorized by statute, provided for in the employment contract, or made with the employee’s written consent.

For instance, he should deduct income tax and social security contributions (National Insurance) payable by his employees and also is liable to make his own social security contributions for each employee. Unauthorized deductions are unlawful and a claim may be made to an Employment Tribunal within three months of the deduction or non-payment complained of.

Employees are entitled to minimum guarantee payments for brief periods in the event that they are not provided with work by their employers by reason of some matter temporarily affecting the employer’s needs for that kind of work.

**Hours of Work**

Other than special cases relating to specific professions and the youngest employees, the main statutory restrictions on hours of work appear in the Working Time Regulations of 1998 (“Working Time Regulations”). Key provisions include the following:

- Daily rest period of 11 consecutive hours in any 24 hours;
- A 20-minute break in any working day longer than six hours;
- A weekly uninterrupted rest period of at least 35 hours;
- A maximum average compulsory working week of 48 hours (averaged over 17 weeks); and
- Paid holidays of at least 5.6 weeks, including bank holidays.  

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7 A “week” is the week worked by the employee, so if he does a three-day week, his paid entitlement will be 5.6 multiplied by three days, including any bank holidays falling on days he would otherwise have worked.
An employee may agree to terms different from these provisions, particularly as regards the maximum 48-hour week, or he is of such a seniority that his time is in effect unmeasured or his to control. There are detailed record-keeping obligations for employers under the Working Time Regulations, but these are widely ignored and enforcement is patchy at best.

Night and Weekend Work

Save in relation to pregnant women, children, and young persons, the only legislation of significance governing employment at night or over weekends are the Working Time Regulations. Night workers should not work more than eight hours on average in any 24 hours.

Many contracts of employment require an employee to occasionally work in excess of the basic contractual hours, and some contracts provide for payment for this while others do not. It is usually a function of seniority and the extent to which the employee determines his own hours of work. Extra money is not required to be paid for extra hours, whether or not worked at night, over weekends, or on public holidays but, where overtime is paid, these will generally count as “unsocial hours” and attract a higher rate of pay than usual.

The Working Time Regulations make no specific provision for Sundays or other religious days, but requiring an employee to work on such a day contrary to his religious beliefs where it could have been avoided may place the employer at risk of a claim of indirect religious discrimination.

Sick Leave

Most employees absent from work because of illness or injury have a statutory right to receive a minimum payment from their employer, known as Statutory Sick Pay (SSP). There is no entitlement in respect of the first three days of absence, and there is a maximum entitlement of 28 weeks during any single period of absence from work.

The parties cannot contract out of SSP. Entitlement is terminable on certain grounds, and there is an upper limit on the weekly sum payable, although this may be supplemented by contractual sick pay if the employer so wishes.

Although not required, employers usually agree to pay employees an amount equal to their full salary for a limited period of absence (including the SSP entitlement), which will depend on the custom of the industry and the status of the employee.

The employer should pay SSP to qualified employees where he reasonably believes them to be incapacitated, and thus may not withhold it for minor

8 This is revised periodically by the government, and the current figure is GBP 79.15 per week.
noncompliance with illness reporting or evidencing procedures. However, he may attach whatever conditions he wishes to any contractual or discretionary “top-up” figure paid.

There is no sickness absence legislation specifically requiring any special pay treatment for those suffering from particular conditions, although those with statutory disabilities should not be treated less favorably than those without.

**Holidays and Other Absences**

Other than the 5.6 weeks’ paid minimum (including bank holidays) under the Working Time Regulations, there is no minimum holiday entitlement established by law, nor any requirement that holiday granted should be paid. The United Kingdom does not operate the thirteenth month holiday payment scheme seen in some other EU Member States.

Statutory minimum holiday may not be carried over from one year to the next except where untaken due to long-term illness, and unused holidays may not be “bought out” other than upon termination of employment.

There are no statutory rules concerning holiday allowances or when holidays may be taken. Matters such as an employee’s ability to carry unused holiday from one year to the next, or to receive payment for holiday not yet taken upon termination, are (subject to the Working Time Regulations) a matter for agreement in the employment contract. Employment contracts usually entitle an employee to pay in relation to any holiday above the statutory minimum.

Holders of certain public offices (e.g., magistrates, members of local authorities, or governing bodies of an educational establishment) are entitled to reasonable time off with pay for the performance of their civic duties. There is no right to time off for Territorial Army training, but it is usually given anyway.

Union officials, elected employee representatives, pension scheme trustees, those under notice of redundancy, and pregnant women also have certain statutory rights to paid time off, but these rights are rarely referred to expressly in the contract of employment. There is no obligation on an employer to pay an employee called to do jury service, although almost all do so, sometimes minus the amount of any allowance claimable by the employee from the courts.

**Maternity Leave**

The majority of rules relating to maternity leave are found in the Maternity and Parental Leave Regulations of 1999. Pregnant employees who are incapable of performing their normal job duties due to their pregnancy have a right to be suspended with pay pending the start of their maternity leave if no other alternative employment can be found. All pregnant employees, irrespective of length of service, have a statutory right to a reasonable amount of time off for antenatal care. Maternity leave can start after the eleventh week before the birth. The two weeks immediately after the birth are compulsory.
All employees may return to work at any time within 12 months after the birth in (broad terms) the same job and on the same terms and conditions of employment as if they had not been away, except if there is redundancy of the position during the maternity leave or if it is not possible to offer the returning employee the same position for some other reason.

In such case, there is an effective obligation to offer any available alternative employment to the employee, failing which not to permit the return will count as an unfair dismissal. A woman who is absent on maternity leave or pregnant when dismissed has a right to be provided with written reasons for her dismissal without having to ask.

Employees on maternity leave are entitled to statutory maternity pay (SMP) under the Social Security Contributions and Benefits Act of 1992, as amended. Higher rate SMP is equivalent to 90 percent of an employee’s normal weekly earnings and is payable for the first six weeks of maternity leave. Lower rate SMP is fixed annually by the State, currently the lower of 90 per cent of earnings or GBP 124.88, payable for a further 33 weeks. SMP can be lost if the woman works for any other employer or is imprisoned during the SMP period.

Employees also are entitled to the maintenance of non-cash benefits during the first 39 weeks of absence. There is no statutory maternity pay entitlement on the part of an employee with less than six months’ service 15 weeks before the birth. Instead, she will receive a maternity allowance from the State at the same rate as lower rate SMP for 39 weeks.

Parental Leave

Each birth attracts a parental leave period of 13 weeks, which can be divided between the parents and taken in blocks of one and four weeks per year. The leave should be taken before the child’s fifth birthday, and it is unpaid.

Employers may refuse to grant parental leave requests (other than at the point of the birth) where such would cause undue disruption to the business. The employer is entitled to require evidence of the employee’s responsibility for the child, but this is rarely insisted upon in practice. Special provisions apply to the parents of disabled children.

Flexible Working

Carers and parents of children under 18 years of age have the right to request for a variation of their hours or place of work for the purposes of their caring or childcare responsibilities.

The employer should consider a properly submitted request and follow a fixed timetable of consultation and decision or appeal. While he is not required to

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9 Employment Rights Act, s 66.

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grant the request, he can only lawfully refuse for set reasons; otherwise, he may be exposed to an award of up to eight weeks’ pay as well as to claims for indirect sex discrimination.

**Paternity Leave**

Under the Paternity and Adoption Leave Regulations of 2002, the spouse or civil partner of a woman giving birth to a child may take parental leave of up to two weeks within 56 days of the birth. Notification and evidencing requirements apply. The leave is unpaid but does not interrupt continuity of employment.

**Protections**

An employer is not required to provide an employee with insurance cover for medical or dental expenses, long-term disability insurance cover, or life insurance cover.

Such benefits are generally provided as a result of competitive pressures in the employment marketplace, and the majority of employers provide at least one of these benefits.

**Vocational Training**

Save in contracts specifically for training purposes, there is no general requirement of law that an employer provide his employees with any form of vocational training over and above that implicit in the Health and Safety at Work Act of 1974 (HSWA), i.e., that the employee will be trained to the extent needed to ensure that he can perform his duties without unreasonable risk to himself or others.

The Employee Study and Training Regulations of 2010 give employees a right to request time off to undertake training, and employers are required to consider that request. Such training should be for the benefit of both the employer and the employee, and the request can only be refused for specified business reasons, mostly relating to the difficulties which the employee’s absence would pose for the employer.

There is no requirement that any time off granted for this purpose should be paid, although the employer would probably do so if the training is for his benefit. The employer’s failure to comply with procedures may lead to an award by an Employment Tribunal of up to around GBP 2800.

**Notice of Termination**

Section 86 of the Employment Rights Act establishes minimum periods of notice which each party to the contract is required to give to terminate it.

The employee is required to give one week’s notice to the employer, irrespective of the length of service, while the employer is required to give the employee at least one week’s notice per year of service (with a maximum of 12 weeks).
These periods of notice are often supplemented by longer contractually agreed periods and will take priority over any agreed periods shorter than the statutory minimum. Many contracts include an initial probationary period of three to six months during which shorter notice periods apply pending a decision by both parties to continue the relationship on a longer-notice basis. A notice of termination is not required by law to be in writing, but this is an almost invariable provision in contracts of employment.

No prior notice of termination is required where the dismissal is for gross misconduct, i.e., conduct by the employee so serious as to amount to a repudiatory breach by him of the employment contract. Similarly, an employee may resign without prior notice, statutory or contractual, where the employer is guilty of such a breach and may in those circumstances treat himself as dismissed.

**Retiring Age**

With limited health and safety exceptions, there is no statutory upper age limit for employees. An age-related compulsory retirement has been substantially abolished from October 2011.

Compulsory retirement as a proportionate means of achieving a legitimate aim is possible only where the employer can justify it.

** Discrimination**

**In General**

An employer may be guilty of unlawful discrimination if he treats a person less favorably than another on the grounds of sex (including pregnancy), race, disability, religion, sexual orientation, age, or transgender status. Separate rules cover less favorable treatment of people holding particular roles or carrying out particular acts.

The Equality Act is replacing previous statutes concerning discrimination on the grounds of sex, race, and disability, together with more recent regulations relating to discrimination on the grounds of age, religious belief, and sexual orientation.

Under the Equality Act, each of the former bases for discrimination plus pregnancy and transgender status is treated as a “protected characteristic”. Discrimination on the grounds of any such characteristic or any combination thereof may be:

- Direct, or less favorable treatment on the grounds that the victim has that protected characteristic. It includes discrimination by association and by perception. Direct discrimination on the grounds of disability is lawful where it can be justified, and on other grounds where having the protected characteristic is a genuine occupational requirement.
• Indirect, where the employer applies a provision, criterion, or practice which is equally applied to people without that protected characteristic, but which puts people with it at a particular disadvantage, puts the victim specifically at that disadvantage, and which cannot be shown by the employer to be a proportionate means of achieving a legitimate aim.

• Victimization, where the employer treats a person less favorably than he would treat other people because that person has brought a discrimination claim, given evidence or information in relation to such a claim brought by another, made an allegation of discrimination by the employer, or where the employer knows or believes that he has done or intends to do any of those things. This is permitted where the allegation of discrimination made by the individual was false and not made in good faith.

• Harassment, where for reasons related to the protected characteristic, the employer engages in any form of unwanted verbal, non-verbal, or physical conduct which has the purpose or effect of violating the individual’s dignity or creating an intimidating, hostile, degrading, humiliating, or offensive environment for him.

It also takes place where the individual is treated less favorably by the employer on the basis of his rejection of or submission to unwanted conduct. Conduct will only be regarded as having that effect if, having regard to all the circumstances, it should reasonably be considered as doing so.

An employee who is dismissed or subjected to any other detriment for exercising or seeking to exercise any rights under the “family friendly” laws may bring a claim for compensation in the Employment Tribunal, usually within three months of the act complained of. An unjustifiable refusal to allow a woman to return to work part-time after the birth of her child is likely to constitute indirect sexual discrimination.

Whatever the particular protected characteristic forming the basis of the discrimination, the employer may be liable for the actions of one of his employees toward another or toward a job candidate, even where the employer is not involved in, aware of, or condoning of the treatment in question.

Employers may escape vicarious liability for the discriminatory acts of their employees only if they are found to have taken reasonable steps ahead of the discriminatory act to prevent such or acts like it from occurring. This will involve at least the issue of equal opportunities policies and some form of equal opportunities training.

Employers also may become liable for the discriminatory acts of third parties toward their staff unless reasonable steps are taken in advance to prevent it. Liability does not arise until the employer is aware of those acts and they have been repeated.

Claims for discrimination in relation to any of the protected characteristics may be made not just against the employer but also the individuals deemed
responsible for the discrimination. They may face personal financial exposure, although most awards against individuals are relatively limited, seldom exceeding GBP 2000.

**Trade Union Membership and Other Protected Activities**

In general, dismissal of an employee due to trade union membership or carrying out trade union activities will be automatically unfair. In such a case, the employee may apply for “interim relief”, i.e., an order by the Employment Tribunal that the contract of employment is to be treated as continuing in force until the question of what was really the ground for the dismissal can be fully decided.

Refusal to employ on the grounds of actual or intended trade union membership or non-membership may give rise to a claim against the employer or a culpable employment agency under Sections 137 and 138 of the Trade Union and Labor Relations (Consolidation) Act of 1992 (the “Trade Union and Labor Relations Act”).

Discriminatory action short of dismissal taken against such an employee is unlawful under Section 146 of the Trade Union and Labor Relations Act, the remedy being an application to the Employment Tribunal. Similar protections exist for elected employee representatives appointed for the purpose of collective consultation in respect of redundancies or business transfers.

**Disability Discrimination**

The nature of disability is such that it does not always fit easily within the “standard” discrimination regime introduced by the Equality Act. In particular, discrimination on disability grounds is permissible where such is justified, i.e., where the employer has a legitimate purpose in taking that discriminatory step, and that purpose cannot be achieved by any less or non-discriminatory means.

In addition, an employer or prospective employer is required to make reasonable adjustments in any provision, criterion, or practice in employment or recruitment procedures which creates particular hardship for disabled people. If the disadvantage for the employee or candidate could have been reduced or removed by the making of that reasonable adjustment but it is not made, then this also will constitute unlawful discrimination.

What counts as “reasonable” for these purposes will depend on the cost of the step, the extent to which it would alleviate the employee’s disadvantage, the certainty that it would do so, and the extent and frequency of that disadvantage. Cost alone will generally not be sufficient.

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10 Trade Union and Labor Relations Act, ss 152 and 153.
11 Trade Union and Labor Relations Act, s 161.
The disability discrimination legislation only applies to employees or candidates who are disabled in the statutory sense. Under the Disability Discrimination Act of 1995, a person has a statutory disability if he has a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities.

**Compensation for Discrimination**

Compensation for unlawful discrimination is not subject to any statutory cap, but most awards are still short of the unfair dismissal maximum of approximately GBP 68,400.

Compensation may be awarded for financial loss, injury to feelings (including personal injury), and aggravated damages. Financial loss is the product of the employee’s loss of earnings and future prospects, while injury to feelings will generally fall between GBP 750 to GBP 30,000. The usual issues of duties to mitigate interest and tax all apply to discrimination awards.

**Collective Bargaining and Worker Participation in Management**

**Collective Bargaining**

The Social Charter regards as fundamental the following social rights of workers: (a) the right of association in trade unions; (b) the freedom to join or not to join such organizations; (c) the right for those organizations to negotiate and conclude collective agreements; and (d) the right to resort to collective action in the event of a conflict of interest (including the right to strike).

“Collective bargain” is defined in Section 178(1) of the Trade Union and Labor Relations Act as any agreement or arrangement made by or on behalf of one or more trade unions and one or more employers. It should be in respect of at least one of a list of matters, including terms and conditions of employment, appointment and dismissal, allocation of work, disciplinary matters, union membership, and negotiation and consultation procedures.

Collective agreements are enforceable only by the employer or an employee covered by the agreement to the extent that the terms in the collective bargain can be said to have formed part of the individual’s contract of employment.

The lack of legal enforceability of the remainder of the collective agreement leads to there being no effective sanction against the union or the employer acting in breach of it. The position of the individual employee is a little stronger because dismissal for any reason in breach of a collective agreement is likely to make the dismissal statutorily unfair.

Before a collective agreement is likely to arise, the employer should recognize an independent trade union. “Recognition” is defined in Section 126 of the Employment Protection Act of 1975 (“Employment Protection Act”) as recognition of the union by an employer to any extent for the purpose of
collective bargaining, which is likewise defined as negotiations relating to or connected with one or more of the matters listed as the possible subject of a collective agreement.

The weakness of employment law from the trade unions’ point of view has been that no employer can be forced to recognize or to reach agreements with any trade union, irrespective of the strength of membership within its operation. Where recognition has been afforded, it can be terminated by the employer more or less at will.

Trade Disputes

In many circumstances, unions and their members may enjoy immunity from legal action in respect of the consequences of striking or other industrial action carried out in contemplation or furtherance of a trade dispute.\(^\text{12}\)

A trade dispute should be a dispute between workers and their employer over one or more of a set list of matters, including employment terms and conditions (physical and contractual), appointments and dismissals, work allocation, union membership, and collective bargaining or other negotiating machinery.\(^\text{13}\)

However, there is no legal protection against dismissal of the individual whatever the strike is about. Thus, there is no valid “right to strike” in the United Kingdom.

The union itself also should comply with the applicable procedure before it will benefit from these immunities. Detailed rules exist in the Trade Union and Labor Relations Act as to matters such as the timing and conduct of strike ballots and the form of the ballot paper.

Section 22 of the Trade Union Reform and Employment Rights Act of 1993 (“Trade Union Reform Act”) adds requirements of prior notice to the employer of strike action, independent scrutiny of the ballot, and a right on the part of individuals deprived of goods or services by an industrial action which has not been called by the proper procedures to take action against the union.

Consultation Requirements

The recognition of a trade union brings with it certain statutory obligations of consultation and information on the part of the employer. These usually are tightly defined as to scope and content and arise in particular in relation to health and safety matters under the HSWA, pension matters under the Social Security Act of 1985, redundancies under the Trade Union Reform Act, and business transfers under the Transfer of Employment (Protection of Employment) Regulations of 1981.

\(^{12}\) Trade Union and Labor Relations Act, s 219.

\(^{13}\) Trade Union and Labor Relations Act, s 244.
Financial penalties may be imposed by the Employment Tribunal against an employer who does not consult in accordance with the law. Up to 90 days’ pay per person affected may be awarded against the employer for failure to consult on a business transfer or collective redundancies.

However, failure to consult in either respect does not render the transfer or redundancies invalid. Failure by an employer to provide recognized unions with information necessary for collective bargaining, as required by Section 181 of the Trade Union Reform and Labor Relations (Consolidation) Act of 1992, can lead to improved terms and conditions.

Very little, if any, EU-wide collective bargaining is seen in the United Kingdom. Little change in this is likely until there is greater similarity in circumstances between the United Kingdom and its European partners. However, some multinationals with European branches do operate European Works Councils in the United Kingdom.

**Worker Participation**

There is currently no domestic legislation compelling any degree of worker participation in the decision-making process of management.

**Health and Safety Protection in Workplace**

The HSWA establishes general duties for employers, suppliers, manufacturers, and employees which apply irrespective of the industry concerned. Employers should ensure so far as is reasonably practicable the health, safety, and welfare of their employees and other people.\(^{14}\)

Regulations made under the HSWA replaced a large quantity of industry and hazard-specific legislation, which covered matters such as protective clothing and equipment, use of display screens, manual handling of loads, and the use and maintenance of work equipment.

The employer should identify and assess the risks of his business and match them with appropriate protective measures. In broad terms, an assessment of what is “reasonably practicable” involves balancing the degree of risk to the employees against the money, time, and trouble it would take to minimize the risk. Employees are under a statutory duty to take reasonable care of their own health and safety and that of others who may be affected.\(^ {15} \)

The HSWA provides for the appointment of safety representatives from among the unionized or non-unionized workforce, and who are specifically protected against dismissal or detriment for carrying out their duties. Appointed safety

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\(^{14}\) HSWA, ss 2 and 3.  
\(^{15}\) HSWA, s 7.
representatives are entitled to reasonable paid time off work as necessary for the performance of their functions.

These functions include investigation of hazards and employee complaints, and making representations to management on health and safety matters. Only safety representatives appointed by recognized trade unions have this right, but the employer has minor obligations as to information to be provided to the employees even where no union is recognized.

Section 44 of the Employment Rights Act provides protection against detriment to employees in general. If an employee is dismissed for leaving the place of work and/or taking steps to protect himself or other persons from danger which he reasonably believed to be serious and imminent, his dismissal will automatically be unfair.

The Health and Safety Executive has overall responsibility for enforcing health and safety legislation. It does so, *inter alia*, through the Health and Safety Inspector, which has the power to serve improvement and/or prohibition notices on an employer, requiring him to remedy or desist from a particular activity.

Continuing to act in breach of an improvement or prohibition notice is a criminal offense, as is a breach of most of the health and safety laws. Minor cases generally will attract a fine of up to GBP 5,000, but more serious cases can result in an unlimited fine on the company and/or the directors themselves and/or imprisonment for the members of management involved in the offense.

In addition, directors may be disqualified from holding office pursuant to the Company Directors Disqualification Act of 1986. Personal liability on a responsible manager or director requires consent, connivance, or negligence on his part in relation to an offense committed by the company. 16 In theory, life imprisonment can follow a serious offense by an individual director, although the degree of personal culpability would have to be wholly extreme to get close to this.

The HSWA is supplemented by the Corporate Manslaughter and Corporate Homicide Act of 2007 in cases where the employer’s default leads to the death of an employee or other person. There is no criminal liability for individual directors or managers, but there may be significant fines and adverse publicity where the death is caused by the employer’s gross breach of a relevant duty of care owed to the deceased, and where the way activities are managed or organized by senior management is a substantial element in that breach.

A “gross breach” occurs where the conduct alleged falls far below what can reasonably be expected of the organization in the circumstances. An employer’s failure to take reasonable steps to ensure the health and safety of his staff also is very likely to amount to a common law tort and/or to a repudiatory breach of

16 HSWA, s 37.
contract, allowing the employee to give notice but claim that he has been constructively dismissed. Health and safety issues also may form a legitimate basis for strike action.

**Workers’ Compensation and Survivors’ Benefits**

Other than through the ordinary system of National Insurance contributions, employers are not under any blanket obligation to contribute to schemes to compensate or benefit employees who may become disabled or suffer injury while at work. The National Insurance contributions payable are instead redistributed by the State in different forms of benefit.

However, obligations on employers do arise where employees become injured or disabled at work through some fault of the employer, whether it be breach of some statutory enactment in relation to the health and safety of his employees, or through his vicarious liability for the negligence of another employee.

To ensure that employers are in a position to meet such claims, the Employers’ Liability (Compulsory Insurance) Act of 1969 requires every employer carrying on business in the United Kingdom to maintain insurance against liability for bodily injury or disease sustained by his employees arising out of and in the course of their employment.

The required amount of cover is GBP 5-million for one or more employees and for each occurrence. Copies of the Certificate of Insurance should be displayed at the place of business. Insurers may argue that the employee accepted certain risks and/or that he was guilty of contributory negligence to reduce any damages awardable.

Where an employer’s fault has led to the death of an employee, the deceased’s dependents or estate may sue the employer under common law or the Fatal Accidents Act of 1976 ("Fatal Accidents Act") and/or the Law Reform (Miscellaneous Provisions) Act of 1934 ("Law Reform Act").

Under the Fatal Accidents Act, damages are assessed according to the financial loss suffered by each of the dependents of the deceased, while under the Law Reform Act, claim is made by the estate and is based on the suffering of the deceased through his injury and accelerated death.

Except in cases where the employer was at fault, employers are not under any obligation to make any payment to the spouse or family of an employee killed at work, though in many cases, any occupational pension scheme maintained by the employer for his employees will provide a lump sum and/or continuing spouse’s pension in those circumstances.

Many employers also choose to provide as a benefit insurance policies under which the employee will receive continuing payments if permanently disabled (whether as a consequence of the job or not) and/or the cost of private medical
treatment. The existence of the National Health Service is a cushion for those who do not have additional benefits in this respect provided by their employer.

The Industrial Injuries Scheme has offered benefits specifically applying to injuries suffered at work and the contracting of certain diseases which are attributable to working conditions. A minimum level of National Insurance contributions should have been made by the employee as a condition of entitlement under this scheme.

The scheme provides for payment to an employee of Industrial Disablement Benefit, provided that the effect of the injury lasts for more than 15 weeks. The amount of the benefit varies with the degree of severity of the disability.

The State also funds a number of benefits aimed at the disabled, irrespective of whether the disability arose in the course of employment. These may be in the form of services or other assistance by the State, tax concessions, and financial allowances to increase mobility, supplement low earnings potential of some disabled people, and facilitate employment rehabilitation.

Dispute Resolution

In General

The mechanism for dispute resolution in employment depends entirely on the nature of the dispute. The traditional presumption in individual and collective disputes is that the matter will be settled by formal legal action only, and although some collective agreements provide for settlement of disputes by an agreed grievance procedure, this cannot be guaranteed to produce a settlement, especially since non-individual terms of a collective agreement are not binding on either party.

Only the Advisory, Conciliation, and Arbitration Service (ACAS) is a genuine dispute resolution mechanism, the other forums being entirely litigious.

Arbitration, Conciliation, and Advisory Service

ACAS was introduced by the Employment Protection Act, partly to promote the settlement of individual and collective employment disputes.

ACAS’ sphere of activity is limited to the subject matters listed in Section 213 of the Trade Union Reform Act. It has issued guidance notes and codes of practice on various aspects of the employer-employee relationship which do not carry statutory force (although mostly approved by Parliament), and breach of them, although persuasive against a party before a court or Employment Tribunal, is not an offense.\(^{17}\)

\(^{17}\) Trade Union and Labor Relations Act, s 207.
The code most often referred to is that relating to disciplinary and grievance matters. It refers to the desirability of seeking to resolve employment disputes via mediation, although this does not form part of the formal code and is not binding on the parties.

Mediation may take place using internal or external facilitators, and external facilitators (usually the more effective) are available from a variety of sources, including major law firms, Counsel’s Chambers, and commercial organizations. The Employment Tribunal also operates a judicial mediation scheme for certain sorts of claim.

ACAS is not permitted to advise the disputing parties as to how to conduct their dispute, but is limited to discussing how it can be resolved. A reference to ACAS for a non-binding determination is a last resort in many collective agreement dispute procedures when the union and the employer have failed internally to reach an answer.

In the individual employment context, ACAS’ powers of conciliation are strictly limited to those which may be brought before an Employment Tribunal. Section 203 of the Employment Rights Act prevents employees from contracting out of rights to make certain statutory claims, e.g., unfair dismissal.

An agreement overseen and conciliated through ACAS will be exempt from this prohibition, as will compromise agreements concluded in writing with an employee using an insured legal adviser.

**High Court**

The High Court is used in individual and collective disputes for resolving major contractual matters. These include claims for damages where a dismissal takes place in breach of contract, and claims for injunctions to prevent dismissals in breach of agreed procedures or to prevent solicitation of the ex-employer’s clients in breach of an agreed non-competition or non-solicitation provision in the contract of employment.

Actions by employees against their employer in consequence of injuries suffered at work also will generally be begun in the High Court. High Court procedures are governed by the Rules of the Supreme Court and updated regularly. Appeals from the High Court lie with the Court of Appeal and then the House of Lords.

**County Court**

Employment matters previously commenced in the High Court are increasingly being moved to the County Court. Procedures in both High Court and County Court are lengthy, formal, complex (the County Court marginally less so), and expensive.
Employment Tribunal

Most employment disputes are considered in the Employment Tribunal. Almost all statutory rights granted to employees are enforceable only in the Employment Tribunal, including claims for unfair dismissal, discrimination, breach of contract (up to GBP 25,000), maternity and parental rights, unlawful deduction from wages, failure to provide a Section 1 statement, and failure to allow time off in appropriate circumstances.

Most Employment Tribunal claims should be brought within three months of the claim arising. The compensation awardable by the Employment Tribunal and its other powers, such as declarations and recommendations (particularly in discrimination cases), are closely circumscribed by various statutes.

The limits on the financial awards possible in the Employment Tribunal are reviewed each year and periodically increased. As matters stand, the maximum award obtainable in the Employment Tribunal for an ordinary unfair dismissal is approximately GBP 80,000, although this depends on the employee’s financial loss, age, salary, culpability in the dismissal, and length of service. Most awards are much smaller.

In some circumstances, the Employment Tribunal may order that an employee be reappointed after dismissal, but such orders are rare and are even more rarely complied with. Additional compensation is payable in such event.

The rules of procedure of the Employment Tribunal are established by law and give it considerable flexibility in the conduct of proceedings. Normal High Court and County Court rules as to evidence which may be heard do not apply.

The Employment Tribunal usually consists of a senior qualified lawyer, an employers’ representative, and an employees’ representative. It is designed to be a form of “industrial jury”, approximating the requirements of law with what is periodically regarded as good industrial relations practice.

In the High Court or County Court, the loser pays a proportion of the winner’s costs but, in all normal cases, costs incurred in contesting Employment Tribunal proceedings are irrecoverable. Legal representation therein is not compulsory, although statistically it does increase a party’s chances of success.

However, limited costs may be awarded where a party conducts or brings proceedings frivolously, vexatiously, abusively, disruptively, or otherwise unreasonably. In normal circumstances, it is not possible to obtain legal aid from the State to bring proceedings in the Employment Tribunal. Like the County Court, the Employment Tribunal has a number of local offices around the country.

The Employment Tribunal system also provides a free mediation service for certain claims, using specially trained Employment Judges as mediators. Judicial mediation of this sort can represent a relatively swift, economical, and discreet means of resolving many employment disputes.
Employment Appeal Tribunal

Appeals from the Employment Tribunal lie with the Employment Appeal Tribunal. The grounds on which appeals may be brought are limited and exclude simple disagreement with the factual findings of the Employment Tribunal. An error of law or evidence of bias or perversity is generally required.

The Employment Appeal Tribunal retains the non-lawyer majority of the Employment Tribunal but is chaired by a professional judge. Appeals from the Employment Appeal Tribunal lie with the Court of Appeal and then the House of Lords.

Central Arbitration Committee

The Central Arbitration Committee is primarily used for solving a particular form of collective dispute, i.e., whether an employer has complied with the obligation to disclose information to recognized trade unions upon request, where such information is necessary for meaningful collective bargaining.

The Central Arbitration Committee’s powers of remedy are initially limited to ordering that the employer disclose the relevant information. If this is not complied with, the Central Arbitration Committee may award improved terms and conditions to the employees in respect of whom the union had been seeking to make the collective bargain.

Termination of Employment

In General

Dismissal is defined in Section 95 of the Employment Rights Act as including (in addition to the express termination by the employer of an employee’s service) the expiration of a fixed-term contract without its being renewed, and “constructive dismissal”, i.e., where the employee is entitled to resign by reason of the employer’s conduct.

There usually are no devices by which an employee can prevent the employer from implementing the termination of his employment. While temporary delays can sometimes be achieved through injunctions or a contract continuation order from the Employment Tribunal, the courts will not order specific performance of an employment contract.

Consequently, the employee’s remedy usually lies not in the continuation of the employment relationship but in claiming compensation for its termination. Compensation generally will be claimed in respect of wrongful and/or unfair dismissal.
Wrongful Dismissal

An employee is wrongfully dismissed in circumstances where he is not given the appropriate period of advance notice of the termination of his employment. Such notice is not required to be made in writing, unless the parties agree otherwise.

The period of notice to which the employee is entitled will generally be the greater of the statutory minimum notice periods under Section 86 of the Employment Rights Act and any contractual entitlement. Where no notice period is agreed by contract, “reasonable notice” will apply, which is often in excess of the statutory minimum figure.

Unless the employer was entitled to terminate the employment summarily (e.g., in the case of gross misconduct), the employee’s remedy for a wrongful termination will be a claim in the High Court, County Court, or Employment Tribunal for an amount equal to the value of the net salary and benefits he would have earned had he been permitted to work out his notice period.

This may be subject to reduction for “accelerated receipt” if the notice period is extended (generally more than six months), or for mitigation if the employee has reasonable prospects of obtaining alternative employment during that period or if he actually does so.

Unfair Dismissal

Unfair dismissal is a statutory claim arising under Section 94 of the Employment Rights Act, and revolves around the reason for the termination of employment and the procedures used in carrying it out.

With limited exceptions (i.e., elected employee representatives and health and safety representatives in the exercise of their duties), unfair dismissal rights are open only to those with at least one year’s service. There is no requirement for a minimum number of hours worked per week for an unfair dismissal claim.

The employer should show that the dismissal was for any of the following reasons so as not to be unfair: (a) redundancy;\(^ {18}\) (b) misconduct; (c) incapability (sickness or competence); (d) illegality; or (e) some other substantial reason justifying the dismissal.

Although the Employment Rights Act does not establish any statutory procedures which should be followed to make a dismissal fair, guidance can be derived from the ACAS codes of practice and publications and from case law on the subject.

In broad terms, the employee should be notified in writing of the proposal to dismiss and the reason for it, be allowed to make any points he wishes on his own behalf before any final decision is made, and be allowed to appeal. It is best

\(^ {18}\) Employment Rights Act, s 139.
practice (and in some cases, a legal requirement) to allow the employee to be accompanied at any meeting for this process by a colleague or relevant trade union representative.

A fair procedure is vital if the dismissal is to be statutorily fair. However, the compensation awarded for an unfair dismissal generally will be reduced where the Employment Tribunal finds that the employee caused or contributed to his dismissal, or where the procedural failing would probably not have made any ultimate difference to the decision to dismiss had that failing not taken place.

The precise procedure to be adopted will vary, depending on the reason for the proposed dismissal. However, no final decision to dismiss should be taken until the employee has had an opportunity to make representations on his behalf and that, in all cases (except probably serious misconduct), consideration should be given to the question of whether the dismissal could reasonably be averted by finding the employee some form of alternative employment within the organization.

In redundancy cases, the employer also will be required to show that he has a good and objective reason for selecting the employee to be made redundant. Selection for redundancy in breach of any agreed procedure probably will make the dismissal unfair.

Where 20 or more employees are to be made redundant within 90 days, the employer is required to give certain periods of advance warning of the dismissals to the State. Failure to give such notice does not affect the fairness of the dismissals but may lead to a fine of up to GBP 5,000.

As regards a case of long-term sickness, the employer is required to have made inquiries as to the employee’s medical position generally by obtaining medical reports. He also will have to show the difficulties which the absence causes to the business, bearing in mind the possible application of disability discrimination laws.

In a case involving lack of competence, consideration should be given to possible remedial training and/or a move to other easier duties. In disciplinary cases, the relevant ACAS code of practice requires at least one prior written warning to the employee about his conduct, if such conduct or poor performance is not so serious as to warrant summary termination.

An employer proposing to dismiss an employee for an alleged offense does need to prove beyond doubt that the employee was guilty. The applicable standard is “reasonable belief”. The right of appeal to a senior and previously uninvolved manager is strongly recommended in all cases, and a failure to provide such an appeal avenue may make the dismissal unfair.

In all cases, the Employment Tribunal will expect the employer to have made a reasonable investigation into the facts of the case. What is reasonable for these purposes will vary in every case, depending on a multitude of factors such as the size of the employer, the urgency of the matter, and the nature of the complaint.

(Release 1 – 2012)
Certain dismissals will automatically be unfair, particularly those in connection with pregnancy, in some cases in connection with a business transfer, and with the carrying out of health and safety duties.

Dismissal as a result of doing jury service, taking parental leave, declining to work in breach of the Working Time Regulations, participating in education or training, being a pension scheme trustee, whistleblowing, pursuing National Minimum Wage Act rights, or seeking to work flexibly also will count as unfair dismissal in general. If an employee is not wrongfully or unfairly dismissed, he is generally not entitled to severance benefit beyond accrued entitlements, such as salary and holiday pay to date of termination.

Other Payments

In dismissals by reason of redundancy, the employee is entitled to a statutory redundancy payment calculated according to a statutory formula dependent on age, salary, and length of service. The maximum is GBP 12,000, but most redundancy payments are much smaller. This figure will be included in any unfair dismissal award made if the redundancy was unfair.

Additionally, an employee may be entitled to a further award of two weeks’ pay under Section 92 of the Employment Rights Act if he has more than two years’ service at the date of his dismissal and his employer unreasonably refuses to provide a written statement of the reasons for dismissal.

Unemployment Benefits

Employers are not required to make any specific contribution to national unemployment benefit programs, as these programs are funded from National Insurance contributions paid by and on behalf of workers.

The level of unemployment benefit payment (“jobseekers’ allowance”) which an individual may receive from the State depends on a certain minimum level of National Insurance contributions on the part of the employee and varies inter alia with age and the number of dependent family members.

The claimant also should be unemployed, fit, and available for work and should show that he is actively seeking it. The allowance is payable only for the first 182 days of any spell of unemployment, although entitlement may be reduced if the unemployment was the employee’s “fault” (i.e., dismissal by reason of misconduct or voluntary resignation).

19 Employment Rights Act, s 162.
20 Many employers offer some enhancement of the statutory figure, especially for senior and/or professional staff. Some collective agreements in unionized environments also provide for enhancement.
Those who are not fit to work or are full-time carers may qualify for Income Support instead, which is supposed to make up for any shortfall between a person’s weekly income and the costs required to meet his assessed needs. It is non-contributory and depends solely on a person’s means. Consequently, savings over a certain amount disqualify entitlement.

Some employers offer in-house or external counseling to assist the employee in finding another job upon termination of employment, but this is strictly optional. Compulsory job training is funded by the State out of National Insurance contributions and is only “compulsory” in the sense that failure to attend job training courses as required may lead to a determination that the individual is not actively seeking work, and hence to a withdrawal of unemployment and/or Income Support benefit.

Special courses exist for those less than 18 years of age who have discontinued full-time education. The State may provide financial assistance to individuals seeking employment in the form of travel expenses, childcare expenses, payments for special clothing, or tools required for the job being trained for. The government operates a low-interest career development loan program to assist in the cost of financing training.

**Retirement, Social Security, Health Care, and Old Age Pensions**

**In General**

In addition to compulsory National Insurance Contributions to the State out of which State pension benefits are funded, employers have certain minimum obligations to provide for retiring employees.

Employers should provide their employees with access to a “stakeholder scheme”, which was introduced in 2001 to provide a standardized and cost-effective pension arrangement and to further encourage employees to save for their retirement. Employers are not required to contribute to such schemes, although they should provide a system for deducting contributions from an employee’s salary where requested to do so.

In addition, the Government is in the process of implementing a national pension savings scheme (National Employment Savings Trust or NEST) into which employers will be required to automatically enroll eligible jobholders, unless they provide an alternative pension scheme which meets certain minimum requirements. This initiative is known as automatic enrolment (auto enrolment) and will commence on 1 October 2012. The purpose of auto enrolment is to encourage pension saving through workplace pension schemes and to reduce the burden on State pension arrangements.

Employers will be required to automatically enroll eligible jobholders into a suitable pension arrangement and deduct contributions from their salary automatically, without the jobholder taking any action. However, the jobholder is entitled to opt out of the pension arrangement and can stop contributing at any
time. The Government has emphasized that an employer must not provide any incentive or inducement to employees to opt out of the scheme and must not discriminate against those who decide to remain in the scheme. There will be penalties for those that do so.

It is planned that auto enrolment will be staged in from October 2012 with employers being able to opt into an arrangement from July 2012. Employers with the greatest number of employees will be required to auto enroll their employees first and those with fewer employees will be gradually phased in by 2018.

Scheme employers will also need to provide contributions in respect of each employee who is auto enrolled and does not opt out of the pension arrangement. Employer contributions will be gradually increased on an annual basis from their staging date until October 2017.

Many employers already operate their own occupational pension schemes. Previously, where these schemes met certain minimum requirements, they were able to “contract out” of that portion of the State pension scheme which is related to earnings (State Second Pension or S2P). In doing this, the employer was able to deduct and remit to the State only the lower level of National Insurance Contributions. The contributions saved by contracting out of the S2P were then paid into the relevant pension scheme. Until 6 April, schemes could contract out on a salary-related basis providing defined benefits which met a minimum prescribed level or on a money purchase basis by providing prescribed defined contribution rights.

However, the option to contract out on a money purchase basis was abolished on and from 6 April 2012 and it is now only possible to contract out on a salary-related basis. Furthermore, the Government indicated in 2012 that in the future, contracting out is likely to be abolished altogether.

All other benefits provided to the elderly are State-funded. Historically, the State pension age at which these benefits are payable has been 60 for women and 65 for men. However, these ages are gradually being equalized in response to anti-discriminatory pressure from the EU and increased in line with life expectancy. Under current legislation, the State pension age for women is in the process of increasing from 60 to 65 years to equalize with men.

Furthermore, the implementation of the Pensions Act 2011 will continue to accelerate the rise of the State pension age to age 66; this will occur in two stages. Women’s State pension age will increase in line with men’s to age 65 by November 2018. Over the subsequent two years a further increase in State pension age will occur increasing the age from 65 to 66, and this will be phased in so that State pension age for both men and women will be age 66 by October 2020. Further increases are proposed with State pension age indicated as reaching age 67 between 2026 and 2028 and age 68 between 2044 and 2046. This timetable indicates that the State pension age is due to increase quicker than had been previously set out under the Pensions Act 1995.
State Pension

The State pension is payable from the point at which an individual reaches State pension age for the remainder of their life. To date, the State pension has been split into two tiers, consisting of a basic pension plus an additional earnings-related component (S2P).

The basic element of the pension required a minimum level of National Insurance Contributions and would be reduced if an individual had not satisfied the required number of “qualifying years”.

The entitlement to the basic element is not affected by other sources of income or capital which the pensioner may have. In relation to the S2P component of the State pension an individual is permitted to contract out of this if they so wished.

Following the 2012 budget, the State pension is set to change for all new pensioners. The Government announced that they plan to reform the State pension into a single tier, flat-rate pension.

It is not yet known how individuals who have contracted out of the State pension will be treated under this new proposal, however, further information regarding this reform is expected to be available later this year.

Private Pensions

Private pension schemes are normally of the defined contribution variety (i.e., the contributions are known, but the final result is not) or the defined benefit variety (i.e., contributions will vary as necessary to obtain a defined benefit on retirement).

They can be occupational (i.e., the employer provides the pension arrangement for the benefit of his employees who can become members) or personal (i.e., an arrangement set up by an individual, usually with an insurance company, for his own retirement savings).

Currently, employers can choose whether or not to contribute to an occupational or personal pension scheme, but the introduction of NEST may require employers to make contributions to a pension scheme in certain circumstances.

Private pension schemes are designed to be a tax-efficient means of saving. In order to avail of tax savings, a pension scheme should meet certain requirements set by Her Majesty’s Revenue and Customs and thereby become a registered pension scheme.21

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21 Currently, tax relief can be obtained on contributions into any number of registered pension schemes of up to the lower of (a) 100 per cent of a person’s earnings (salary and other earned income) each year and (b) the “annual allowance”, provided such contributions are paid before age 75.
Change of Job

The employee’s entitlements under the State pension schemes are not affected by a change in job provided the minimum level of contributions continue to be made. However, leaving employment in respect of which there is an occupational pension scheme may cause a loss to the employee. The general entitlement of an employee leaving their job is set out below:

- If he has less than three months’ service in the scheme, the member has no statutory right to benefits, although many schemes will allow the member to take a refund of contributions, less tax;
- If he has between three months' and two years' pensionable service, the member is entitled to choose whether to take a refund of contributions or request a cash transfer sum to be paid to another registered pension scheme; or
- If he has at least two years’ service in the scheme or has transferred in benefits from a personal pension scheme, he is entitled to leave accrued rights in the former employer’s pension scheme and receive a deferred pension payable from his or her normal pension age (or earlier if the scheme’s rules permit and he or she chooses to retire before then).

A personal pension scheme could be maintained in the United Kingdom, notwithstanding that the employee may be serving in an EU Member State or elsewhere. In certain circumstances, occupational pension schemes can operate cross-border so that if an employee is required to work overseas, his membership in the United Kingdom occupational pension scheme will not be affected. In any event, the transfer out of an occupational pension scheme of an accrued transfer value would give the employee a capital sum to put into an overseas employer’s fund.

Other Benefits

Other services provided for the retired and elderly vary from region to region and are not dependent on any past employment or National Insurance Contributions record. These facilities often include residential accommodation, day centers, and home assistance.

All pensioners automatically receive free National Health Service prescriptions and assistance with dental treatment, eye tests, and spectacles.

Summary of Taxation and Social Costs

Employees generally pay income tax on their employment income at rates of 20 per cent, 40 per cent, or 50 per cent depending on their level of income although, following the 2012 budget, the 50 per cent tax rate will be reduced to 45 per cent from April 2013. Responsibility for collecting that tax normally rests with the employer.
Under the Pay-as-You-Earn system, the employer is required to deduct the tax from payments made to employees and pay that tax over to Her Majesty’s Revenue and Customs, in addition to completing a variety of monthly and annual returns. Onerous penalties are charged for late and incorrect returns.

In addition to tax, Class 1 National Insurance Contributions (NICs) also are generally payable. Such contributions are used to fund the National Health Service and the National Insurance Fund, which is used to pay the majority of state pensions and contributory benefits. Employers and employees both pay Class 1 NICs, with employer contributions at 12.8 per cent of the employee’s earnings and employee contributions at 11 per cent up to the upper earnings limit and two per cent above. Like the employee’s income tax, Class 1 NICs are collected by the employer via the Pay-As-You-Earn system.

Self-employed persons are required to pay Class 2 NIC at a fixed weekly rate and Class 4 NIC as a proportion of their business profits. The bulk of the costs of the National Health Service and of most noncontributory benefits is borne by the State out of general taxation. "General taxation" for these purposes means corporation tax on an employer’s profits (at 26 per cent or 20 per cent, depending on the level of profits), value added tax on goods and services (20 per cent from 4 January 2011), and income tax on employee’s income and the profits of unincorporated businesses.
United States of America

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Introduction

In General

The United States maintains a robust body of labor and employment law endlessly refined and redefined by successive generations of business leaders, politicians, laborers, and union organizers. Governments, employers, and employees form a trinity of stakeholders, each defined by unique interests, perspectives, rights, and duties. Thus, the character of United States labor and employment law in the twenty-first century is pockmarked by two centuries of conflict and compromise, economic development and recession, causing pendulum-like shifts in public policy and politics and a complex matrix of laws and practices.¹

Generally, the employment relationship in the United States is significantly less regulated than in other industrialized countries. A number of factors influence this unique regulation of employment and labor law.

Employment Law and Labor Law

In the United States, labor law and employment law refer to closely related yet distinct areas of law. Labor law generally applies to situations in which employees act collectively to provide mutual aid or protection when dealing with their employer over the terms and conditions of employment.² This is typically done in connection with an organized union, but unionization is not a prerequisite to the protections afforded to collective action by workers. The seminal statute in this area, the National Labor Relations Act (NLRA),³ applies to collective action by union and non-union workers.⁴

¹ Unfortunately, there are very few absolutes in the labor and employment law of the US. Exceptions are present to nearly every rule. Thus, this chapter should be seen as an overview and not a definitive guide to a final legal opinion.
² 29 US Code, Section 157.
³ 29 US Code, Sections 151—169. The NLRA regulates the relationship of employers, employees, and unions by prohibiting employers from engaging in unfair labor practices, and protecting employees who engage in concerted activities to improve working terms and conditions regardless of the workplace’s union status. In 1947, the
The declining rate of unionization and a small but growing number of regulatory protections has made labor law more a subset of employment law today than in the past. Employment law encompasses the entire body of federal, state, and local law as well as judicial determinations interpreting statutory law that regulates the specific terms and conditions of the employment relationship.5

Sources of Employment Law

The basic sources of employment law are (a) federal law and regulation, (b) state and local law and regulation, (c) and common or judge-made law.

Federal employment law consists of statutes and regulations. Various federal agencies, such as the Department of Labor, command significant power in the workplace. The interpretations, enforcement, and activity of these agencies shape the effectiveness of underlying employment legislation.

States retain all powers not specifically granted to the federal government and that are not prohibited by the Constitution or state constitution. If the federal government prefers to exclusively regulate an area of employment law, it may elect to preempt state power, thus foreclosing the right of lower government bodies to promulgate statutes or regulations pertaining to that area.6

However, states still retain significant control over employers and employees in their jurisdictions by establishing their own licensing standards and sometimes going beyond regulations promulgated by the federal government. Codification of laws by federal and state governments thus produces somewhat uneven regulation of the employment relationship, with politically liberal states typically playing a more active role in workplace regulation.

Legal Relationship between Employer and Employee

The United States labor market includes part-time employees, leased employees, foreign employees, and apprentices. However, while each class is somewhat unique, most employment situations apply the legal standard applicable to full-time employees.

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4 Labor Board vs. Washington Aluminum Co., 370 U.S. 9 (1962). The court held that the National Labor Relations Act applied to the collective action of eight employees who were not part of a union but who staged a walk-out to compel their employer to improve working conditions in their factory.
6 Altria Group vs. Good, 555 U.S. 10 (2008), holding that the laws of the US are the supreme law of the land and that state laws in conflict with federal law are “without effect”; citing Maryland vs. Louisiana, 451 U.S. 725, 746 (1981).
Private employment relationships may be at-will\textsuperscript{7} or by contract.\textsuperscript{8} All employment relationships are at-will unless a specific contract applies.\textsuperscript{9} The majority of private sector workers are at-will employees.

In an at-will employment relationship, the employer or employee may terminate the relationship “for good cause, bad cause, or no cause at all.” Although contract employees have more individual bargaining power, at-will employees can organize and gain collective rights and bargaining power by negotiating a collective bargaining agreement\textsuperscript{10} with the employer. Employees with the largest spectrum of protections are those in labor unions, as union contracts limit the applicability of the employment at-will doctrine.

A private employer and a non-union employee may specify the exact conditions of employment\textsuperscript{11} in an individual contract, although this arrangement usually applies to management employees. Implied or oral contracts are recognized by law, but the legal standard of proof is high and their enforcement is difficult for an aggrieved employee.

Public sector employees are not classified as at-will or contractual employees, but generally do have a kind of contractual agreement with the government. They tend to have certain rights and restrictions that do not apply to private sector employees. Furthermore, there is little commonality in the employment situations of federal government employees and employees of small political subdivisions.

Labor and employment laws generally, although unevenly, protect undocumented workers, yet few undocumented workers enforce their rights due to fear of retaliation from their employer or deportation by the government.

A large and complex body of law exists as to the rights and obligations of employers who wish to transfer, sell, or contract out their businesses. The effect on unionized facilities is especially contested, and the rights of employers and employees seesaw depending on the political fortunes of each group. Generally,

\begin{itemize}
  \item \textsuperscript{7} The doctrine of employment at will prescribes that an employee without a contract for a fixed term could be hired or fired for any reason or no reason at all. Such employees have no job security, unless the law explicitly provides one.
  \item \textsuperscript{8} Contract employment normally stipulates the terms in advance and vests an employee with certain rights. Compared to those employed at-will, contract employees typically have more job security and avenues for recourse should the employer violate any of the contract terms.
  \item \textsuperscript{9} The State of Montana is an exception to this rule; Montana Code Annotated, Section 39-2-904.
  \item \textsuperscript{10} Collective bargaining agreements set the conditions of employment, such as wages, hours, discipline, and fringe benefits.
  \item \textsuperscript{11} Common terms include a job description, the duties and authority of the employee, the length of employment and its starting date, the employee’s wage and benefits, specific grounds for termination, and a required method to resolve legal disputes over the meaning of the contract.
\end{itemize}
an employer who wishes to close a facility need only bargain with the union over the “effects” of the closing.

Terms and Conditions of Employment

In General

While there is a slowly growing body of legally required employment protections in the United States, the employer still generally sets the terms and conditions of the employment relationship, subject only to the economic power of the employee.

Wage and Hour

The first minimum wage law was passed by the Commonwealth of Massachusetts in 1912, followed by a statute in the District of Columbia in 1918 which applied only to female workers. However, these original minimum wage laws were short-lived. In 1925, the Supreme Court ruled that minimum wage laws violated the Fifth Amendment of the Constitution because they infringed on the freedom to contract in business settings.

Legal support for wage and hour regulation was later clarified. The Fair Labor Standards Act of 1938 (FLSA) established the first nationwide minimum wage and defined working hours for the purposes of calculating pay, among others.

Wage and hour laws generally provide a floor for levels of remuneration, but usually do not cover benefits. Federal minimum wage rules apply to most workers. State minimum wage laws vary, but usually apply to the smallest employers or to certain types of employment not covered by the federal law.

Certain employment, such as work on federal projects, may require a “prevailing” wage or a wage that is tied to wage rates in the geographic area. A number of localities have enacted living wage laws to force employers to raise wages for lower level employees, while some states have enacted significant additional protections for employees.

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14 United States v. Darby Lumber Co., 312 U.S. 100 (1941).
15 29 US Code, Section 201.
18 Living wage laws set wages based on the needs of the employee and not the market-based value of labor.
Wage and hour law is a vibrant area of litigation today. Lawyers for aggrieved employees have achieved significant settlements in recent years to secure wages for overtime, accrued vacation, or unpaid wages.19

There are scant governmental requirements for mandatory paid vacation and holiday or other benefits. However, the Family and Medical Leave Act of 1993 (FMLA)20 requires certain wage protection for those suffering a medical issue or family matter which keeps them away from work.

At present, healthcare coverage is not mandated or required for private workers. The implementation of the Affordable Health Care Act of 2010 in 2014 will alter the current healthcare landscape, ideally securing some type of coverage for all people living in the United States.

Vocational training is spotty as well. Certain state and local programs exist, and unions, mainly in the construction industry, maintain excellent programs for workers in their particular building crafts. In addition, certain professions (e.g., lawyer, doctor) mandate a particular level of continuing training to maintain a required license.

**Discrimination**

Due to the reigning employment at-will doctrine, employment discrimination is generally legal, unless a specific type of discrimination is prohibited by law. Discrimination based on gender, age, physical or mental handicap, and race or national origin is clearly prohibited. Other types of discrimination are banned, depending on the employment situation and jurisdiction.

Initial efforts to root out discrimination in employment began after the end of slavery and the Civil War with the Civil Rights Act of 1866 and its subsequent amendments. However, it was not until the Civil Rights Act of 1964 that the federal government committed to end discrimination in the workplace by recognizing the need to confront workplace prejudice. 21

Title VII of the Civil Rights Act prohibits discrimination on the basis of race, color, religion, gender, or national origin in every aspect of employment. Employers and labor unions that have 15 or more employees are subject to the provisions of Title VII, but federal, state, and local governments, as well as

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19 A recent class action case against Wal-Mart secured a US $86-million settlement for employees who were terminated and denied payments for their accrued vacation time, overtime, and unpaid wages.

20 29 US Code, Section 2601; 29 Code of Federal Regulations, Section 825. It requires employers with 50 or more employees to provide the latter with up to 12 weeks of unpaid leave per year, with continued health benefits, if the employee is unable to work due to a serious health condition, or due to a serious health condition of a family member.

American Indian tribes, certain voluntary organizations, and most religious entities are exempt.


²² Public Law 95-555. This law prohibits discrimination on the basis of pregnancy or childbirth in every aspect of employment, and requires employers with 15 or more employees to provide pregnant women with the same benefits and pay provided to temporarily disabled employees.

²³ 29 US Code, Section 206(d); 29 Code of Federal Regulations, Sections 516, 1620, and 1621. It requires employers to pay male and female employees equal wages for equal work. The two jobs do not have to be identical, but the employer should be the same and the jobs should be substantially similar based on the required skill, effort, and applicable responsibilities. Employers are not restricted from imposing merit-based, production-based, seniority-based, or “any factor other than sex” incentives (i.e., night shift versus day shift), but they should be at the same rate for male and female employees. If an employee believes his employer is violating the EPA, he may file a complaint with the EEOC.

²⁴ 29 US Code, Sections 621–634; 29 Code of Federal Regulations, Sections 1625–1627. It regulates age discrimination in all aspects of employment, and prohibits age discrimination against employees and applicants over 40. All employers engaged in commerce with at least 20 employees are subject to the provisions of the ADEA, even if their employees work in another country. Federal employers were originally exempt, but an amendment in 1974 made it illegal for the federal government to discriminate on the basis of age, except as regards the mandatory retirement age for firefighters, law enforcement, and military personnel. Other exceptions allow private employers to require a high-ranking employee to retire or step down if the employee is at least 65 years old, has held his position for at least two years, and is entitled to certain retirement benefits.

In 1967, the ADEA was amended by the Older Worker Benefits Protection Act to cover age discrimination relating to benefits due to concerns that employers were not hiring older employees because their benefits were more costly. The amendment also defines the circumstances under which an employee may waive his right to sue for age discrimination.

²⁵ 42 US Code, Sections 1201 et seq; 20 Code of Federal Regulations, Sections 1630 et seq. It prohibits discrimination against qualified employees with disabilities in all aspects of employment, and requires employers to make reasonable accommodations. Employees are covered by the ADA only if they are within its definition of a qualified individual with a disability, i.e., a person who has a long-lasting impairment that substantially limits a major life, and who can perform the essential functions of employment with or without reasonable accommodations. A private employer is subject to the provisions of the ADA if he has 15 or more employees. State governments should comply with the ADA, but an employee may only sue for
A strict process is required for an employee who believes discrimination has occurred, and time limits are short for filing under the Civil Rights Act. If, after being presented with a claim of discrimination, the EEOC decides not to initiate litigation, it will allow an employee to initiate suit against the employer without its involvement.

Possible remedies in a successful employment discrimination action may include injunctive relief, back pay, affirmative relief (including reinstatement to a former position and receipt of lost promotions), orders directing employers to change or abolish employment practices, as well as compensatory and punitive damages. Courts also often require discriminating employers to pay the legal fees and costs of successful employee litigants.

Given its limited resources, the EEOC focuses on pervasive and reoccurring discrimination instead of isolated or unique violations. The EEOC also runs a program that reaches out to young professionals to educate them on employment discrimination and how they are protected.

Each area of potential discrimination carries with it particular attributes that should be clearly understood. Litigation is currently extremely active in the area of sexual harassment. Protection against age discrimination generally applies only to employees who are 40 to 70 years old. With regard to recognized physical or mental disability, “reasonable accommodation” by the employer is required. Each case involves a unique set of issues and requires a highly fact-based inquiry. Finally, issues of religious discrimination are front and center, especially for Muslim workers.

**Collective Bargaining and Worker Participation in Management**

The industrial revolution in the last half of the 19th century yielded economic benefits that came with a serious downside for workers. Job-related injuries and deaths skyrocketed. In protest, workers began striking and forming unions, but the movement was fractured and faced a judiciary generally hostile to labor rights. The federal Norris-LaGuardia Act of 1932 attempted to change the trend of court-issued injunctions by prohibiting federal judges from issuing labor injunctions and not for monetary damages. A similar law, the Rehabilitation Act, governs employees of the federal government. Employees working outside the country may invoke the ADA, as long as the company is incorporated in the United States.

ADA claims are highly fact-specific and the courts should determine if the claim falls under the ADA based on the type of disability, the scope of the reasonable accommodations given or requested, the essential job functions, and the existence of hardship on the employer.

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injunctions. However, it did not include any right for employees to organize unions or to bargain collectively.\textsuperscript{28}

The passage of the Wagner Act (now amended and known as the National Labor Relations Act or NLRA) in 1935 profoundly changed this landscape. It was the federal government’s first affirmative support of unionization and collective bargaining.\textsuperscript{29}

The National Labor Relations Board (NLRB)\textsuperscript{30} enforces the rights and duties in the NLRA. Claims by aggrieved parties are brought to the General Counsel of the NLRB, who acts as the prosecutor in all labor hearings before the NLRB. The General Counsel has the right, subject to appeal, to accept or reject a claim. Cases begin in an administrative court of the NLRB and are heard by the full board only upon appeal. Decisions of the NLRB may be appealed to federal appellate courts.

An employer may not interfere with the exercise of the rights to organize, or try to restrain or coerce an employee due to the exercise of protected rights.

A unionization election is held only after authorization by the NLRB. Authorization is given for an election if more than 30 per cent of employees sign authorization cards or a petition in support of a particular union’s representation.\textsuperscript{31} The NLRB sets the date and place of the balloting and defines the group of employees who would form the “bargaining unit”.

Generally, elections are held during work time at the workplace. The employer and the employees are allowed observers, and strict procedures for challenging an election after it has occurred exist in the NLRA and NLRB jurisprudence. Interference in the election process is forbidden if the NLRB believes a violation taints the necessary “laboratory condition” of the election process. In practice, unions and employers are extremely active in the election process.

If a union receives over 50 per cent support from the employees in an election, and such support is upheld through a potentially lengthy legal appeals process (testing certification), the union will become the employees’ representative. The

\textsuperscript{29} 29 US Code, Sections 151−169. The first section of the NLRA sets forth goals and policies, such as industrial peace, macroeconomic stabilization, promotion of collective bargaining, freedom of association, equality of bargaining power, and the creation of an industrial democracy. Sections four through six pertain to the establishment and structure of the National Labor Relations Board, the NLRA’s enforcement and judicial body. The key content of the NLRA can be found in the seventh, eighth, and ninth sections which outline employee rights, prohibited labor practices, and exclusive representation.
\textsuperscript{30} The Board consists of five board members, appointed by the President to five-year terms, who make administrative determinations.
\textsuperscript{31} The NLRA also allows unionization through a “card check”. This form of unionization is currently the subject of a ferocious political battle and the results of its use in the future are uncertain.
employer should then bargain with the union as to the terms and conditions of employment specifically defined by law.

The employer is not required to agree to a contract or a particular provision, but complete inflexibility in bargaining is legally risky. If unsatisfied with the bargaining process, the union has the right to strike or protest to apply pressure and force the employer to renegotiate.

If a contract is negotiated, terms are memorialized in a collective bargaining agreement. Typical collective bargaining agreements include a “just cause” clause that allows discipline only with a proper reason, thus abrogating the normal at-will status. This fact alone gives the union employees substantially more rights than they had before union representation.

Worker participation in management does not exist in private workplaces in the United States as it does in some European countries. Employees are not entitled to a position on the board of directors, or to any say in management decisions. The only way for employees to participate thus is when they unite and invoke their right to representation and collective bargaining.

### Health and Safety Protections in the Workplace

Employers and employees were given very few health and safety guidelines until the passage of the Occupation Safety and Health Act of 1970 (OSHA).

During the late 19th century, more industrial accidents occurred in the United States than in any other country. In 1903, the Bureau of Labor began publishing statistics relating to occupational fatalities and illnesses due to poor working conditions. The public quickly became aware of the dangers facing employees and the apparent indifference of employers, and support for safety regulation grew.

Federal safety legislation was vigorously debated for years. Politicians with an interest in laissez faire economics argued that government intrusion into the workplace had already gone too far, that the new laws would financially cripple many businesses, and the businesses that survived would simply pass on the costs.

32 9 US Code, Sections 651 et seq; 29 Code of Federal Regulations, Sections 1900 et seq. A very small number of classes of employees, such as railroad workers, received protection earlier.

33 A particularly gruesome incident prompted public outrage when, in 1911, 146 women burned to death while working at the Triangle Shirtwaist Factory in Manhattan, New York. The managers of the factory had locked the doors to the stairwells and exits to keep the women from smoking cigarettes. Proper evacuation was thus impossible, and when a spark ignited a conflagration, many women were forced to jump from the factory’s ninth story or wait to be burned to death inside.
costs to consumers.34 Still, the federal government enacted the OSHA in 1970. To quell private business concerns, a 90-day grace period was granted to any employer who had no previous health and safety obligations.

Today, almost all private employers should comply with the central tenets of the OSHA.35 The OSHA regulates a wide range of standards that cover matters such as control of ventilation, temperature, and noise levels, emergency exits, and fire protection systems. It also regulates required available medical treatment, and the handling and storage of flammable, explosive, and toxic materials, among others.36 In the last 10 years, the OSHA has begun to regulate ergonomic injuries such as carpal tunnel syndrome.

States may regulate workplace health and safety in any area not covered by the OSHA, but they should first pass legislation adopting OSHA standards at their current or greater protective level.37

Workplaces also are generally covered by “right-to-know” laws that require employers in particularly toxic industries to provide certain information if the business uses, produces, or distributes hazardous chemicals.

Employees may file a confidential complaint if they think that their employer is violating any health and safety law. If the employer retaliates, the employee may seek legal remedy through the court system. If an employee is faced with an unsafe working environment or task that cannot be delayed, he may refuse to do the work, assuming he acts within certain mandated procedures. Monetary fines may be imposed on an employer found to have violated health and safety standards.38

34 These same arguments were made earlier by employers when wage and hour laws were proposed and subsequently passed. Carson et al (eds.), Gale Encyclopedia of US Economic History (1999), at p. 1128.
35 Employers are required to furnish a workplace that is free from recognized hazards that cause or are likely to cause death or serious physical harm to employees. They also should abide by all the health and safety standards promulgated by the regulatory authority. Employers with 11 or more employees also should keep a detailed log of all on-the-job illnesses and injuries. Fick, The American Bar Association Guide to Workplace Law (2006), at pp. 121–122.
38 The fines start small, with a maximum fine of US $7,000 for a violation that was not likely to cause serious harm or death. The fines increase if the violations have a high probability of causing serious harm or death, and fines can be 10 times this amount if the violation was willful or if there have been repeated violations in the last three years.
Workers’ Compensation and Survivors’ Benefits

Workers’ compensation laws are meant to balance the burden of costs incurred due to any accidental injury arising from and in the course of employment. These laws are usually found at the state level and include a measure of “no fault”. Except in cases of gross negligence or purposeful injury, an injured employee is entitled to medical coverage and some income support. These include disability benefits for lost wages or loss of earning capacity, medical benefits, and vocational rehabilitation. In the appropriate circumstances, state laws provide for death and funeral benefits.

Widespread adoption of workers’ compensation statutes began around the time of the Great Depression. Prior to the adoption of such laws, an employer was potentially vulnerable to large court judgments. However, employers were rarely found to be liable in practice because the law provided strong defenses. Still, employers were concerned with the potential of large court awards threatening the economic viability of the enterprise. Workers’ compensation laws thus set up an environment of strict liability.

Generally, any private sector employee who is not an independent contractor or a casual part-time employee is eligible for workers’ compensation benefits. Covered injuries include those caused by the willful or negligent act of a third person connected to the employment, diseases or infections resulting from an accidental injury such as frostbite, and occupation diseases. Injuries that are intentionally self-inflicted, those resulting from the employee’s attempt to injure or kill someone else, and those resulting from substance abuse or intoxication are not covered.

An injured employee seeking compensation should notify his employer and file a claim with the relevant state agency. The employer or the employer’s insurance company should then immediately provide compensation as required by law, or contest the claim.

The claims procedure includes strict deadlines for notification. Failure to meet a deadline could bar an employee from collecting any compensation.

Most private employers purchase insurance to cover their potential liability. Contested claims are investigated by a state government agency which may elect to hold administrative hearings before issuing a decision. Employees are allowed to have counsel present during their compensation hearing, but applicable attorney’s fees are subject to approval by the agency.

39 These include the fellow servant doctrine, which protected employers from injuries caused by the negligence of a fellow employee; the contributory negligence doctrine, which barred employees from collecting damages if they contributed to the cause of the injury in any way; and the doctrine of assumption of risk, which allowed employers to claim that the employee knew of and accepted the risks associated with their employment.
Calculation of benefits is based on the employee’s average weekly wage, subject to certain limits. Calculations and the schedule of accrual and conclusion of benefits differ slightly depending on the type of disability, which may be temporary partial, temporary total, permanent partial, or permanent total. For each of these categories, an employee typically may collect up to two-thirds of his lost earning capacity.

**Dispute Resolution**

The United States lags behind other industrialized countries in mandatory employment-based dispute resolution. Without a specific statutory or contractual right to dispute resolution, employees have few if any rights in the area. Employees covered by a union contract generally have access to a mandatory arbitration procedure, but individual employees do not.

However, individual arbitration clauses are becoming more common in American law, as, when properly drafted, they have the ability to foreclose access to the judicial system. Arbitration is considered by some to be preferable to litigation because it is generally faster and cheaper, the proceedings take place in private and are undisclosed, the results are usually not appealable to state or federal courts, and the discovery rules are limited.

The private American Arbitration Association (AAA) is the most important body that provides workplace-based arbitration services. While decisions from the AAA may be appealed to a governmental judicial court in rare instances, procedural precautions are taken to ensure that the arbitration decision will pass judicial muster if such an appeal occurs.

The AAA will only handle an arbitration case if it is based on a procedural agreement between the employer and employee that assures minimal standards of fairness to the employee, and appears to be a fair and impartial agreement. Normally present in an agreement are a clear waiver of the employee’s rights to go to court, and a provision that all arbitration agreements are final and binding. The document also will include a specific description of the types of claims that will be brought before the arbitrator.

**Termination**

Termination from employment covers four different areas of law: (a) legal and illegal termination; (b) required procedures for termination; (c) required notice periods for termination; and (d) severance packages.

The legal termination of an employee depends on whether he is an at-will or contract employee. An employer can fire an at-will employee and an at-will
employee can quit for any or no cause at all. Still, at-will employees are protected from wrongful termination in certain circumstances.  

Other public policy laws prevent an employer from terminating an employee when he is called to be on a jury or called to military duty. Complicated laws relate to employers who have implied or oral contracts with their employees, or owe a duty to their employees based on a long-term relationship where the employer implicitly undertook a higher level of duty based on a good faith relationship.

In contractual employment relationships, termination becomes much simpler because the terms of the contract usually govern how and when the employer may terminate an employee. A typical collective employment contract might contain a provision that the employer can only terminate an employee for good cause. Good cause for termination varies by employer, employee, and industry, but may include dishonesty, willful violation of company rules, insubordination, drug or alcohol abuse, and theft.

Unionized employees who believe that they have been unjustly discharged often have the right to go through a required contractually defined grievance procedure. If settlement is not achieved, mandatory arbitration often follows. A hearing is held in front of a neutral arbitrator who renders a decision after the union and employer have a chance to present arguments, witnesses, and evidence relating to the grievance or discharge. The costs of the proceeding are usually shared by the union and the employer.

Employers without a unionized workforce or individual contracts with their employees commonly have discipline and discharge procedures, but no specific procedures are required by law before terminating an employee. A typical discipline and discharge procedure involving an employee who does not belong to a union and who is believed to have committed a violation of workplace standards may entail several steps of “progressive” discipline.

40 For instance, an employer may not legally terminate an employee because he is a member of a protected class, for engaging in collective action or union organizing, or for any reason that falls under the protection of equal pay laws, workers’ compensation laws, disability laws, health and safety laws, and personal privacy laws. An employer also may not legally terminate an employee for invoking his right to free speech, unless the activity substantially interferes with job performance or the working relationship.

41 These steps often begin with a verbal warning to the employee coupled with a notation in his personnel file. If the action continues, a written warning with a detailed description of the nature of the employee’s violation may be issued. A probationary period may then be ordered. The employer may suspend an employee without pay as a heightened form of discipline and probation. Finally, if the employee continues to violate company policy or fails to meet company employment standards, the employer’s last option is termination.
Although employers are not required to maintain these pre-termination procedures, they are usually counseled to have such procedures to help protect them from liability, and to ensure that managers and human resources staff do not inadvertently break the law when terminating an employee. Such a structured procedure also helps to attract quality employees who wish to work in a modern workplace.

Some employers are required by federal law to give their employees notice before termination. Such regulations are set by the Worker Adjustment and Retraining Notification Act of 1989 (WARN).42

The WARN requires covered employers to give at least sixty days’ notice to employees who will lose their jobs through large layoffs or plant closings, with limited exceptions for unexpected or drastic changes in the business outlook or profitability.43 The employer also should notify the state dislocated worker unit, and the appropriate state or local agency that oversees mass terminations. Notification pursuant to the WARN is triggered in four circumstances:

- Where a covered employer closes one or more facilities which will result in the loss of employment for 50 or more employees during any 30-day period.
- Where a covered employer intends to lay off 500 or more employees for a period of 30 days or longer. Covered employers who lay off fewer than 500 employees also should give 60 days’ notice if they lay off 50 to 499 employees, and the number of employees laid off exceeds one-third of the employer’s active workforce.
- Where, within a 90-day period, the number of employment losses reaches the threshold level of either a plant closing or a mass layoff. However, if the covered employer can show that the employment losses were the result of distinct actions and causes, he is exempt from WARN regulations.
- Where a business is sold, such that the seller is responsible for providing notice up until the date of sale and then the burden shifts to the buyer.

Exceptions to this rule include cases where the employees are members of a union and are on strike at a time when notification would otherwise be required, or in case of faltering companies, unforeseeable business circumstances, and natural disasters.

The penalty for a violation of the WARN can be severe. If the employer fails to provide proper notice, he is liable to each aggrieved employee for up to 60 days

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43 A covered employer is one with over 100 employees and can be a private-for-profit or non-profit company. The WARN applies to public entities or quasi-public entities that operate in a commercial context, but not regular federal, state, and local government entities. For calculating covered employers and covered employment terminations, the WARN excludes employees who work less than 20 hours a week and employees who have been with the company for less than six months out of the last 12 months.
of back pay and benefits. Additional liability applies for failing to notify a unit of government in the amount of US $500 for each day of noncompliance with the WARN.

Another concern for employers who lay off or terminate a large number of employees is severance pay. Generally, severance pay is not required in the United States, absent a contract that states otherwise.

In every state, laid-off employees are eligible for unemployment compensation benefits which are meant to tide over workers who are out of a job and to encourage skilled workers to remain in their field of expertise. Unemployment compensation is limited to a portion of past wages earned, is capped at a certain amount, and lasts for a finite period of time. To fund these benefits, employers pay quarterly taxes to federal and state unemployment agencies, and the agencies set the rules for the distribution of such benefits.

Employees who leave their job voluntarily are not eligible, and workers should comply with standardized guidelines to remain eligible after termination. These include being ready and able to work, maintaining a log of jobs they have applied to, and periodically checking in with the unemployment office to report if they have earned any income that should be deducted from their weekly benefits.

Retirement, Social Security, Health Care, and Pension Plans

An employer’s obligation to his employees after they retire varies significantly from employer to employer, but there is currently no obligation to provide benefits under federal law. Social security benefits are paid by the federal government and are funded by a tax on the employee and the employer. However, many employers provide a pension system, often jointly funded with their employees. The result is a patchwork of pension plans that vary considerably.

Concerns about private pension plans and their regulation are exceedingly important in the United States due to the large concentration of employees who are nearing retirement age, and because life expectancy rates continue to rise. Further, a national debate about the federal social security plan is currently underway.

There are several types of pension plans. Some provide a defined benefit, but the current trend is to define the contribution of the employee and often the employer, but not to define the benefit to be received. The amount of money available to the employee will depend on the success of the investment of the
contributed funds. In addition, profit-sharing plans, stock option plans, stock option plans, stock option plans, and individual retirement accounts (IRAs) abound.

The Employee Retirement Income Security Act of 1974 (ERISA) regulates most employee pension and health plans. The ERISA’s language and meaning is seldom transparent, thus complicating its enforcement. However, there are several clear requirements. For instance, employers who provide benefits should supply their employees with plan information, including all the features of the plan and how it is funded. Further, the manager of the plan is a fiduciary and has a specific duty to all plan participants. The manager of the plan should normally maintain a grievance and appeals process for complaints.

The Consolidated Omnibus Budget Reconciliation Act (COBRA) ensures that an employee and his dependents do not suddenly lose their health coverage due to an involuntary termination of employment for reasons other than gross misconduct or due to a reduction in an employee’s hours. To be eligible, an employee should be enrolled in a health benefits plan, the health plan should not have been discontinued for all employees, and the employee should not have another source of health insurance such as Medicare.

There are separate eligibility triggers for dependents, such as divorce from the covered employee or death of the covered employee. COBRA coverage can be extremely expensive for an employee, as he will be responsible for up to 102 per cent of the premium payment.

44 Profit-sharing plans designate a percentage of company profits that are added to the employee’s own contributions into a retirement fund.
45 Stock option plans either give employees shares of the company stock or allow them to buy shares based on their wage, seniority, and time with the company.
46 401(k) plans allow employees to save a portion of their wages each year without paying taxes on that amount. Many employers will match the contribution or a percentage of it. This type of pension carries very little risk for the employer.
47 An IRA is similar to a 401(k) because they both shelter the employee from paying taxes until the money is removed from the account, at a time in which it is hoped that the retired employee will be in a lower tax bracket.
48 29 US Code, Sections 1001 et seq; 29 Code of Federal Regulations, Sections 2509 et seq.
49 29 US Code, Sections 1161–1169; 26 Code of Federal Regulations, Sections 54.4980B-0 et seq. It requires employers to provide continued group health insurance coverage for up to 36 months for employees who have lost coverage due to a qualifying event that changes eligibility status. In general, private employers with 20 or more employees should provide notice to employees eligible for COBRA within 90 days following a change in eligibility. If an employer fails to meet his obligations under the COBRA, an employee may file a cause of action subject to the same enforcement provisions of the ERISA.
50 “FAQs for Employees about COBRA Continuation Health Coverage”, Department of Labor website (1 September 2010), at http://www.dol.gov /ebsa/faqs/faq_consumer _cobra.html.
Social Costs

In the United States, employees and employers have very different ideas about the social costs of workplace mandates and regulations. Where one stands depends on one’s political persuasion. Many employees focus on wages while others are concerned with issues of safety, discrimination, health insurance, and retirement security. Employers wrestle with costs that affect their budgets, especially in times of economic uncertainty, but still strive to attract quality employees.

Generally, benefits and tax costs amount to at least a quarter to a third of the amount of the employee’s actual wage. This figure includes legally mandated social welfare costs such as unemployment insurance, workers’ compensation insurance, social security tax, and vacation time. Health insurance and retirement contributions can drastically increase this number. Combined with retirement contributions, some employers pay benefits of fifty percent of the wage costs of each employee per year.51

Other Laws Relevant to the Employment Relationship

Among the other laws relevant to the employment relationship are the following:

- The Employee Polygraph Protection Act (EPPA) of 1988, which prohibits private employers from requiring or asking employees to take a polygraph test, except under very limited circumstances. 52 Polygraph test results alone are not sufficient grounds for any adverse employment action. The employee is entitled to information before, during, and after the test and a trained professional should administer the test.53

- The Fair Credit Reporting Act (FCRA) of 1970, which requires employers to provide notice and receive an employee’s consent before retrieving credit reports or other background information used in employment decisions. 54 It also requires employers to give certain information to employees or applicants before taking negative action based on a report. It likewise establishes standards that employers should follow in destroying consumer records.

53 Exceptions include the administration of a test by law enforcement personnel in the normal course of an investigation; employers licensed by the Drug Enforcement Administration to manufacture, distribute, or dispense controlled substances; employers who provide security services; and in the extreme instance of an ongoing internal issue that causes the employer to suffer economic loss or injury, and the employer has a reasonable suspicion that the employee was involved in the incident under investigation.
54 15 US Code, Sections 1681 et seq.
• The Immigration Reform and Control Act (IRCA) of 1986, which requires employers to verify that all of their employees are authorized to work in the United States and to provide records to that effect. It also made it illegal for employers to knowingly hire immigrants who did not have permission to work in the United States.

• The Labor Management Reporting and Disclosure Act of 1959 (LMRA), which grants certain rights to union members and regulates internal procedures for electing union officials, filing grievances against the union, and maintaining financial integrity. It also imposed reporting of certain union activities and the bonding of union officials who handle funds or property.

• The Migrant and Seasonal Agricultural Protection Act (MSPA) of 1983, which was passed as an extension of the FLSA. To protect agricultural workers, the MSPA regulates working conditions and wages, and requires agricultural employers to register with the Department of Labor.

• The Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996, which was passed to limit access to welfare and supposedly to reaffirm the American work ethic. It required employers to report new hires to a state registry, which uses the information to enforce child support obligations, limited federal welfare to a lifetime maximum period of five years, and required that welfare recipients go no longer than two years without a job, among others.

• The Sarbanes-Oxley Act (SOX) of 2002, which was passed to protect shareholders by prohibiting publicly traded employers from retaliating against employees after they allege shareholder fraud, requiring companies to establish procedures allowing employees to submit anonymous complaints about accounting and auditing practices, and requiring companies to establish procedures for taking, handing, and retaining such complaints. Several accounting scandals in the United States involving large companies such as Enron and WorldCom prompted the writing and passage of the SOX. Just in the past year, the Supreme Court ruled that the SOX did not violate any Constitutional provisions.

55 Public Law 99-603, 100 Statutes at Large 3359.
56 29 US Code, Sections 401–531.
58 Public Law 104-193, Statutes at Large 2105.
59 Public Law 107-204, 116 Statutes at Large 745. Otherwise known as the Public Company Accounting Reform and Investor Protection Act or the Corporate Auditing and Accountability and Responsibility Act.
The Uniformed Services Employment and Reemployment Act (USERRA) of 1994, which prohibits discrimination against applicants and employees who take up to five years off to serve in the armed services. All employers, private and public, should restore employee benefits, seniority, status, and pay upon reinstatement of employment. Employees may be eligible for retraining if necessary.

Conclusion

There is no reason to believe that the continuous pendulum swings between rights for workers and employers will end in the United States in the near future. Unions today complain bitterly about a legal climate that makes unionization practically impossible. Employers argue that unions’ difficulties flow from the end of the need for collective bargaining.

Issues in the broader culture, such as movements to include sexual orientation as a class protected from workplace discrimination and a push by some to extend more employment protections to undocumented workers, will continue to play an important role in the workplace.

60 38 US Code, Sections 4301–4335.
61 In 2008, the Service Members Access to Justice Act was passed to strengthen the USERRA by prohibiting employers from requiring service members to waive their rights under the USERRA, and also provided for greater access to the complaint process administered by the Department of Labor through the Veterans Employment and Training Service.
Vietnam

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Vietnam

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Introduction

The Labor Code promises that the government will assist and facilitate any activity that will create jobs and promote employment.1 However, the complexities of Vietnamese history prove that it has often been difficult to regulate employment in Vietnam.

Vietnam’s Labor Code was originally created based on the foundations of the Constitution reflecting the many policies of a centrally planned economy. The first Labor Code was created in 1994, several years after Doi Moi economic reforms were introduced in the country. For example, the Social Insurance Law at that time only applied to state-owned enterprises and businesses that employed 10 or more employees.

In the early 1990s, the working population that fell under the scope of the social insurance law was only approximately 8 per cent.2 The insurance therefore excluded those working in private family businesses or agricultural workers, which represented a majority of the population at that time. The main focus of the employment law in the 1990s was on regulating state-controlled enterprises.3

Nearly two decades later, the Vietnamese economy has changed significantly. Accession to the World Trade Organization (WTO) in 2006 resulted in trade regulations loosening up and a sizable influx of foreign direct investment. By 2011, 3.4 per cent of the working population worked for foreign enterprises and 8.1 per cent worked for private domestic enterprises, making the private sector larger than the public sector.4 As these sectors grow year by year, employment law is becoming more relevant. The government must strive to strike a balance between protecting the basic rights of workers and ensuring stable economic growth through a flexible labor market.

1 Labor Code, art 4.
The government passed a new Labor Code in 18 June 2012 that provided a major overhaul of employment law.

**Legal Relationship of Employer and Employee**

**Employment**

Employment is broadly defined in the Labor Code as “any labor activity that creates a source of income and is not prohibited by law”. In Vietnam, it is difficult to draw a distinction between formal employment relationships and independent contracting relationships.

**Contract of Employment**

The Labor Code defines a labor contract as an agreement between the employer and employee on a paid job and on working conditions, and has terms, conditions, rights, and obligations of the parties to the labor relationship. A labor contract can be entered into directly between the employee and the employer or be signed by the employer and an employee who is legally authorized to represent a group of employees. The latter contract is enforceable and effective as if it were entered into with each employee.

**Parties**

*Capacity*

An employee must be a person of at least 15 years of age with the ability to work, who works pursuant to a labor contract, who is paid wages, and who is subject to management by the employer. An employer must be an enterprise, body, organization, co-operative, business household, or individual who has full legal capacity for civil acts.

**Special Categories**

**In general.** The law recognizes various types of employees and provides detailed regulations for each category. This includes junior employees, apprentices, senior employees, disabled employees, foreign employees, and domestic servants.

**Junior employees.** A junior employee is an employee under the age of 18. Employment of any person under the age of 13 is prohibited in Vietnam, with

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5 Labor Code, art 9 (1).
6 Labor Code, art. 15.
7 Labor Code, art 18.
8 Labor Code, art 3(1).
9 Labor Code, art 3(2).
10 Labor Code, art 161.

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exceptions listed by the Ministry of Labor, War Invalids, and Social Affairs (MOLISA).11

An employer is only permitted to employ a junior worker in jobs that are suitable for the health of the junior worker to ensure the development and growth of the worker’s body, mind, and personality.12 An employer has the responsibility of looking after the interests of the junior worker in respect of labor, wages, health, and training during the period of their work.13 It is prohibited to employ junior workers in heavy or dangerous work, work requiring contact with toxic substances, or in workplaces which have adverse effects on their personality.14 The normal working hours may not exceed 8 hours per day or 40 hours per week for a junior employee from the age of 15 to below 18; or 4 hours per day or 20 hours per week for a junior employee below 15.15

**Apprentices.** In order to work for an employer, apprentices and practice trainees must be at least 14 years of age and be in good health, sufficient to satisfy the requirements of the particular trade, except for a number of trades stipulated by the MOLISA.16

**Senior Employees.** Senior employees are employees who are over the age of 60 for male employees and over the age of 55 for female employees.17 Senior employees are entitled to negotiate with the employer to extend or to enter a new labor contract and are still entitled to enjoy the benefits under the retirement scheme.18

**Disabled Employees.** The government recognizes the right of disabled persons to employment and encourages business to employ disabled workers.19 The government may regulate the policy on providing low-interest loans from the Job Creation Fund to employers employing disabled employees.20

The Labor Code prohibits allowing a disabled person whose ability to work has been reduced by 51 per cent or more to work overtime or at night. In addition, an employer is prohibited from assigning disabled workers to heavy, toxic or dangerous work, or work requiring contact with toxic substances as stipulated by the MOLISA.21

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11 Labor Code, art 164 (3).
12 Labor Code, art 162 (1).
13 Labor Code, art 162 (1).
14 Labor Code, art 163(1).
15 Labor Code, art 163.2 & 3.
16 Labor Code, art 61.1
17 Labor Code, art 166 and 187(1).
18 Labor Code, art 167.
19 Labor Code, art 176(1).
20 Labor Code, art 176(2).
21 Labor Code, art 178.
Foreign Employees. The Labor Code does not provide any definition of a foreign employee. However, under a decree guiding the Labor Code, a foreign employee is defined as a person without Vietnamese nationality. A foreign employee (with the exception of some professionals) working in Vietnam for three months or more must obtain a work permit. Foreign employees must satisfy the following conditions:

- They must have full legal capacity for civil acts;
- They must possess specialized and technical skills, and have good health appropriate for the work requirements;
- They must not have been convicted for a crime or be subject to investigation for a criminal offense in accordance with the law of Vietnam and foreign laws.
- They must have a work permit issued by the competent Vietnamese authority, except in special cases.22

Transfers of Business. If organizational restructuring/technological changes or economic reasons adversely affect the jobs of many employees, the employer must formulate and implement a labor usage plan23 that contains the following basic details:

- List and number of employees who will continue to be employed, and of employees to undergo retraining for further employment;
- List and number of employees who will retire;
- List and number of employees who will be transferred to work part-time, and of employees whose labor contract will be terminated;
- Measures and financial funding for ensuring implementation of the plan.24

If the employer is unable to resolve new jobs but must retrench employees, the employer must pay an allowance for loss of work equivalent to the aggregate amount of one month’s wages for each year of employment, and no less than two months’ wages.25

In cases where an enterprise merges, consolidates, divides, or separates, the succeeding employer must continue to employ the current number of employees and amend and supplement their labor contracts.26 On transfer of ownership or right to use assets of an enterprise, the previous employer must prepare a labor usage plan with the foregoing particulars.27

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22 Labor Code, art 169.  
23 Labor Code, art 44.  
24 Labor Code, art 46.  
25 Labor Code, art 48 and art 49.  
26 Labor Code, art 45(1).  
27 Labor Code, art 45(2).
If the employer is unable to utilize all the available employees, there must be a plan for labor usage in accordance with the law. An employee whose labor contract is terminated under such circumstances is entitled to the same allowance for loss of work as outlined above.28

**Terms and Conditions of Employment**

**In General**

A labor contract must be written and made in two copies, with each party to retain one copy.29 Contracts for temporary jobs lasting less than three months can be oral.30 The Labor Code of Vietnam requires that a labor contract must include the following particulars:

- Name and address of the employer or the employer’s legal representative;
- Full name, date of birth, sex, residential address, and number of identity card or other legal document of the employee;
- Job description and workplace;
- Term of the labor contract;
- Wage rate, method and time of payment of wages, allowances and other additional payments;
- Regime for wage increases and promotion;
- Working hours and holidays;
- Personal protective equipment of the employee;
- Social insurance and health insurance;
- Training and skill improvement.31

In practice, statutory material terms are used for standard labor contracts for simple work only. Employers and employees are free to agree on any other terms in addition to the compulsory provisions, provided that these terms are not contrary to law, to the collective labor contract or to social morals.32

The Labor Code recognizes three types of labor contracts, namely:

- An indefinite-term labor contract;
- A fixed-term labor contract with duration of 12 to 36 months; and
- A labor contract for a specific or seasonal job of less than 12 months.33

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28 Labor Code, art 45(3).
29 Labor Code, art 16.
30 Labor Code, art 16.
31 Labor Code, art 23(1).
32 Labor Code, art 17(2).
33 Labor Code, art 22.
There is no compulsory obligation to provide trial periods (otherwise known as “probation periods”) when engaging new employees, but it is common in practice to do so. A probation period may not exceed 60 days for work that requires high-level specialized or highly technical skills or 30 days for intermediate-level specialized or technical expertise or 6 days for other types of work.\(^{34}\) There may only be probation on one occasion for one job and the wages of an employee who is on probation must be at least 85% of the wage for the relevant position.\(^{35}\) The Labor Code of Vietnam requires that a probationary contract must include the following details:

- Name and address of the employer or the employer’s legal representative;
- Full name, date of birth, sex, residential address, and number of identity card or other legal document of the employee;
- Job description and workplace;
- Term of the labor contract;
- Wage rate, method and time of payment of wages, allowances and other additional payments;
- Working hours and holidays;
- Personal protective equipment of the employee.\(^{36}\)

**Remuneration**

The Labor Code of Vietnam stipulates that wages are the amount of money which the employer pays to the employee in order to undertake the work as agreed upon and paid in consideration of the rate of production and quality of the work completed. Wages include wage rates for the work or position plus wage allowances and other additional items. Employees may not earn an amount below the minimum salary level stipulated by the government.\(^{37}\)

The minimum rate is fixed on a monthly, daily and/or hourly basis that varies with regions and industries.\(^{38}\) Depending on the minimum living conditions of employees and family households, socio-economic conditions and wage rates on the labor market, the Vietnamese government will announce minimum regional wage rates on the basis of recommendations from the National Wage Council.\(^{39}\)

Accordingly, for 2012, different minimum wages were set in different cities and provinces, ranging from VND 1,400,000 to VND 2,000,000 per month.\(^{40}\)

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34 Labor Code, art 27.
35 Labor Code, art 28.
36 Labor Code, art 26(1) and art 23.
37 Labor Code, art 90.
38 Labor Code, art 91(1).
39 Labor Code, art 91(2).
40 Decree Number 70/2011/ND-CP.
Overtime work must be remunerated at 150 per cent of the wage rate for overtime work during business working days, 200 per cent of the wage rate for overtime work performed during weekly days off (e.g., weekends), and 300 per cent of the wage rate for overtime work performed during holidays and paid leave days. Employees working at night will be paid an additional minimum 30 percent of the wage rate.

**Working Hours and Holidays**

The maximum working hours are 8 hours per day or 48 hours per week under normal working conditions. Daily working hours must not exceed 6 hours in one day for employees subject to extremely heavy, dangerous, or toxic working conditions.

Overtime work is strictly regulated by the Labor Code. The employer ensures the number of overtime hours of the employee does not exceed 50 per cent of the normal working hours in one day, and if the employer stipulates work on a weekly basis, it is prohibited to work more than 12 hours per day or 30 hours per month and the total overtime hours may not exceed 200 hours per year, except in special circumstances where the maximum overtime hours may not exceed 300 hours.

Employees are also entitled to fully paid days off on public holidays, paid annual leave, personal leave, sick leave, and maternity leave. Sick leave and maternity leave are covered by the social insurance fund and are not paid by the employer.

There are 10 statutory public holidays. If the public holidays fall on a weekly day off, the employee is entitled to take the following day off. The amount of annual leave varies by industry, with 12 days off for standard industry; 14 days off for heavy, dangerous, and toxic work; and 16 days for extremely heavy and dangerous and toxic work.

A female employee (who works in normal working conditions) is normally entitled to take 6 months’ maternity leave. When an employee gives birth to more than one child at one time, she is entitled to take an additional 1 month’s leave for every additional child calculated from the second child onwards.

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41 Labor Code, art 97(1).
42 Labor Code, art 97(2).
43 Labor Code, art 104(1).
44 Labor Code, art 104 (3).
45 Labor Code, art 106(2).
46 Labor Code, art 115.
47 Labor Code, art 115 (3).
48 Labor Code, art 111(1).
49 Labor Code, art 157(1).
50 Labor Code, art 157(1).
Healthcare coverage

There is no uniform mandatory healthcare coverage. Instead, there are some provisions that impose certain financial obligations on the employer in relation to the health of the employees.

The law requires that employers and employees must participate in compulsory social insurance and compulsory health insurance. Health examinations must be arranged by the employers at least once every 6 months for female employees who shall be given a specialized gynecological examination, for workers performing extremely heavy or toxic work, for disabled employees, for junior employees and senior employees. During the period when an employee on leave receives social insurance, the employer is not obliged to pay wages to such employee.

Vocational Training

The law requires employers to have annual plans for and devote budget to training and improving job and professional skills of employees. In addition, employers are also obliged to provide a report regarding the results of training to the provincial administrative authority for labor.

The employer and employee must sign a professional training contract if the employee is provided with training, job and professional skills improvement or re-training in Vietnam or overseas with funding provided by the employer. A trade training contract must include the following details:

- The profession in which training is provided;
- Training location and training period;
- Training fees;
- Period for which the employee undertakes to work for the employer after training;
- Responsibility to refund training fees;
- Responsibilities of the employer.

Directors

In addition to the labor law, some high-ranking employees, such as general directors and members of the board, also are governed by the Vietnam

51 Labor Code, art 186(1).
52 Labor Code, art 152(2).
53 Labor Code, art 186 (2).
54 Labor Code, art 60(1).
55 Labor Code, art 60(2).
56 Labor Code, art 62(1).
57 Labor Code, art 62 (2).
Investment Law and the Enterprise Law, as well as the company charter (articles of association). The term for the above positions may not exceed five years, but it is renewable. The company has the right to pay remuneration, salary, and bonus to members of the board, director, or general director and other managers in accordance with its business results and efficiency.

In addition to the job description (which may be stipulated in a labor contract), the functions, duties, obligations, rights, and authorities of these employees may be provided by the relevant law and the company charter and/or decisions assigned by general shareholding meetings, members’ council, and boards.

**Discrimination**

**In General**

Discrimination on the basis of gender, race, color, social class, beliefs, religion, HIV infection, or disability is strictly prohibited under the Labor Code.

**Gender**

The Labor Code provides the State with the obligation to grant equal rights to women as those granted to men. In addition, it should encourage creating favorable conditions for women in regard to employment conditions. Employers are strictly prohibited from discriminatory behavior toward female employees or conduct that degrades female employees’ dignity and honor. Employers must implement the principle of gender equality in regard to recruitment, utilization, training, working hours, rest breaks and holidays, and wage rates.

**Age**

There is no specific provision of discrimination of age, apart from the general provision in the Labor Code that entitles employees to work without being discriminated against on the basis of their gender, race, color, social class, beliefs, religion, HIV infection, or disability. The Labor Code does restrict the age of an employee to be at least of 15 years of age. The retirement age is 60 years of age for men and 55 years of age for women.

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58 Law on Enterprise, arts 109 and 116.
59 Law on Enterprise, art 58.
60 Law on Enterprise, art 58.
61 Labor Code, art 8(1).
62 Labor Code, art 153(1).
63 Labor Code, arts 153.
64 Labor Code, art 154(1).
65 Labor Code, art 8(1).
66 Labor Code, art 3(1).
67 Labor Code, art 187(1).
Disability

The law does provide specific discrimination prohibitions in regard to disabled employees, as well as certain provisions suggest preferential treatment for them. The government, in general, recognizes the right of disabled persons to employment and encourages business to employ disabled workers. In addition, the government may regulate the policy on providing low-interest loans from the Job Creation Fund to employers employing disabled employees.

The Labor Code prohibits allowing a disabled person whose ability to work has been reduced by 51% or more to work overtime or at night. In addition, an employer is prohibited from assigning disabled workers to heavy, toxic or dangerous work, or work requiring contact with toxic substances as stipulated by the MOLISA.

Race

There is no specific provision of discrimination of race, apart from the general provision in the Labor Code that entitles employees to work without being discriminated against on the basis of their gender, race, color, social class, beliefs, religion, HIV infection, or disability.

Religion

The Labor Code holds that employees are entitled to work without being discriminated against on the basis of their gender, race, color, social class, beliefs, religion, HIV infection, or disability. Other than this general provision, however, there is no specific provision providing additional details on religious discrimination.

Collective Bargaining and Worker Participation in Management

Employer and Employee Rights and Duties under Collective Bargaining

In Vietnam, the State encourages the parties to sign an agreement through a collective bargaining process, where such an agreement would provide employees with more favorable conditions than those stipulated in labor law. Under the Labor Code, collective bargaining means debate and negotiation between the labor collective representative and the employer with the following objectives:

68 Labor Code, art 176(1).
69 Labor Code, art 176(2).
70 Labor Code, art 178.
71 Labor Code, art 8(1).
72 Labor Code, art 8(1).
73 Labor Code, art 73.
• Formulating a harmonious, stable and progressive labor relationship;
• Establishing new working conditions to provide a basis for signing a collective labor agreement;
• Resolving problems and difficulties in the exercise of rights and implementation of obligations of each party to the labor relationship.74

The collective agreement should include these following details:

• Wages, bonuses, allowances, and pay raises;
• Working hours and rest breaks, overtime and rest breaks between shifts;
• Job security for employees;
• Ensuring occupational safety and hygiene; implementation of internal labor rules;
• Other matters in which the parties are interested.75

The representative of the labor group must be the organization representing the labor collective at the grassroots level of the enterprise, and the other party must be the employer or legal representative of the employer.76 When collective bargaining comes into effect, all employers and employees must be responsible for full implementation of the terms and conditions under the collective agreement.77

If the rights that are stipulated in the signed labor contract of an employee are less favorable than those provided for in the collective agreement, the respective terms of the collective agreement take precedence. The employer must amend the internal regulations to comply with the collective agreements within 15 days after the effective date of the collective agreement.78 The parties have the right to request full compliance with the agreement. If any breach of the agreement occurs, each party has the right to request a resolution of the collective labor dispute in accordance with the procedure stipulated by law.79 The employer bears all expenses of negotiation, signing, registration, change, and announcement of the collective bargaining agreement.80

**Employer Obligations to Implement Worker Participation Schemes**

The employer has the responsibility to facilitate employees to establish or join trade unions and to participate in employee activities.81 The employers must

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74 Labor Code, art 66.
75 Labor Code, art 70.
76 Labor Code, art 69(1).
77 Labor Code, art 84 (1).
78 Labor Code, art 84(2).
79 Labor Code, art 84(3).
80 Labor Code, art 82.
81 Labor Code, art 192 (1).
guarantee operational conditions for trade unions. In addition, the Labor Code strictly prohibits employers from hindering or causing difficulty for employees to establish or join a trade union.

Health and Safety Protection in the Workplace

Under Vietnamese labor law, employers are required to carry out appropriate measures to ensure occupational safety and hygiene. The employers must rely on standards, national technical regulations, and local technical regulations in order to formulate their own internal rules and working procedures to ensure occupational safety and hygiene as appropriate for each type of machinery, equipment and workplace.

Furthermore, employers also have the obligation to inspect and evaluate dangerous and harmful factors in workplaces, to periodically check and maintain machinery, equipment, workshops and warehouses. Employees are also required to comply with these regulations and internal labor rules of employers and to promptly report to the employer the discovery of work-related accidents, occupational diseases, dangerous toxicity or breakdown.

Workers’ Compensation

Under Vietnamese labor law, work-related accidents are defined as accidents which injure any body parts or functions of the body of an employee, or cause an employee’s death during the process of working and closely related work performance or labor task. An employee who is injured in a work-related accident must be immediately treated and fully attended to.

During the period in which an employee is absent from work for medical treatment in respect of a work-related accident or occupational disease, the employer must pay full salary and expenses for the treatment.

Dispute Resolution

In General

There are strict regulations on dispute resolution of labor agreements. The regulations differ depending on whether the dispute is individual or collective.

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82 Labor Code, art 192 (3).
83 Labor Code, art 138.
84 Labor Code, art 136(2).
85 Labor Code, art 138 (1).
86 Labor Code, art 138(2).
87 Labor Code, art 142 (1).
88 Labor Code, art 144.

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Procedures for Individual Employees

Individual labor disputes with an employee are handled by labor conciliators or the People’s Court.\(^{89}\) Within five working days from the date of receipt of the request for conciliation, the labor conciliator must terminate the conciliation.\(^{90}\) The labor conciliator must put forward a settlement proposal for consideration by the two parties.\(^{91}\)

If the two parties agree to the settlement proposal, the labor conciliator must prepare the minutes of settlement. Both parties are obliged to comply with the agreements recorded in the minutes of settlement. If the two parties do not agree to the settlement proposal or if one of the disputing parties is not present for a second time without proper reason after being validly summoned, the labor conciliator must prepare the minutes of unsuccessful conciliation.\(^{92}\) In the event of an unsuccessful conciliation, or if one of the parties fails to implement the minutes of settlement, or if the labor conciliator has not resolved the matter on expiry of the time limit for resolution, each disputing party has the right to bring the dispute to court in Vietnam.\(^{93}\) An individual labor dispute must pass through conciliation procedures prior to petition to a court, except for the following labor disputes:

- A dispute relating to the disciplinary measure of dismissal for breach of the law on labor, or a dispute arising from unilateral termination of a labor contract;
- A dispute relating to payment of compensation for loss and damage of payment of allowances upon termination of a labor contract;
- A dispute between a domestic servant and an employer;
- A dispute relating to social insurance or health insurance; and
- A dispute relating to payment of compensation for loss and damage pursuant to a contract between an employee and a labor export enterprise or professional labor export enterprise.\(^{94}\)

Procedures for Groups of Employees

In General

Collective labor disputes may involve either rights or benefits.\(^{95}\) The procedure for settling collective labor disputes is the same as the procedure for settling the labor disputes with an individual employee.\(^{96}\)
Collective Labor Dispute Concerning Rights

The employees and the employer may select the labor conciliators, Chairman of a district People’s Committee or the People’s Court to settle the collective labor disputes concerning rights.97

In the event of an unsuccessful conciliation or if either of the parties fails to implement the minutes of settlement, each party has the right to petition the Chairman of a district’s People’s Committee to resolve the collective labor dispute.98 The Chairman is responsible for resolving the collective labor disputes within five working days from the date of receipt of the request for resolution.99

The authorized representatives of the parties must be present at a session resolving a collective labor dispute about rights. If necessary, the Chairman may invite representatives of other bodies and organizations concerned to attend the session for some cases. In resolving the dispute, the Chairman may rely on various regulations, such as the law on labor, the collective labor agreement, and internal labor rules in order to consider and deal with conduct in breach.100 If the Chairman resolves the matter but the two parties remain in dispute or if the Chairman fails to resolve the matter on time, each party has the right to petition to the courts to resolve the matter.101

Collective Labor Disputes Concerning Benefits

The employees and the employer may select the labor conciliators or the Labor Arbitration Council to settle the collective labor disputes concerning benefits.102

In the event of an unsuccessful conciliation or if either of the parties fails to implement the minutes of settlement, each party has the right to petition the Labor Arbitration Council to resolve the dispute.103 The Labor Arbitration Council is responsible for resolving collective labor disputes within seven working days of the date of receipt of the request for resolution.104

The authorized representatives of the two disputing parties must be present at a session resolving a collective labor dispute about benefits. In necessary cases, the Labor Arbitration Council may invite representatives of other bodies and organizations concerned to attend the session. At the dispute resolution meeting, the Labor Arbitration Council of the company must put forward a settlement proposal for consideration by the two parties.

97 Labor Code, art 203(1).
98 Labor Code, art 204(2).
99 Labor Code, art 205(1).
100 Labor Code, art 205(2).
101 Labor Code, art 205(3).
102 Labor Code, art 203(2).
103 Labor Code, art 204(2).
104 Labor Code, art 206(1).
If the two parties agree to the settlement proposal, the Labor Arbitration Council must prepare the minutes of settlement. Both parties are obliged to comply with the agreements recorded in the minutes of settlement. If the parties disagree with the settlement proposal or if one of the disputing parties is not present for a second time without proper reason after being validly summoned, the Labor Arbitration Council must prepare the minutes of unsuccessful conciliation. When one of the parties fails to implement the minutes of settlement after five days from the date of the minutes of settlement or within three days after the establishment of the minutes of unsuccessful conciliation, both parties have the right to conduct procedures in order to initiate a strike.

According to the Ministry of Labor, War Invalids and Social Affairs, the number of Conciliation Councils set up in business is quite low, accounting for around 30 per cent of all businesses. According to a survey on the implementation of labor laws in 2009, out of 1,500 enterprises surveyed, 82.67 per cent of enterprises had a trade union but only approximately 60 per cent had established a Labor Arbitration Council. This may be attributed to the fact that Labor Arbitration Councils are not consistently used to resolve collective disputes because they lack credibility among workers, particularly in terms of the staff’s legal capacity to handle the process.

In fact, the functions of Labor Arbitration Councils are not widely recognized and very few cases are given to the councils to resolve, since resolving collective labor disputes is not compulsory by law. According to incomplete statistics in April 2011, there were only two cases resolved in Ho Chi Minh City, one case in Binh Duong, and four in Dong Nai.

**Termination**

Under Vietnamese law, unilateral termination by employers is strictly regulated. On the other hand, the parties are entirely free to agree on termination on any grounds they desire for mutually agreed termination. When the parties agree to terminate employment, they are not required to give advance notice.

**Aspects of Termination of Employment**

A contract is deemed terminated:

- Upon the expiry of the contract term, except in case the labor contract of an employee who is a part-time trade union officer is still within term of such office, such contract will be extended until expiry of the period of such office;
- If the task required under the contract is completed;
- When both parties agree to terminate the contract;

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105 Labor Code, art 206(2).
106 Labor Code, art 206 (3).
107 Labor Code, art 36 (3).
• When the employee has satisfied the conditions of period of employment for social insurance contribution and reaches the age of pension entitlement;

• When the employee is sentenced to a jail term or to the death penalty, or is prohibited from performing the job prescribed in the labor contract by a legally enforceable decision of a court;

• When the employee dies; or is declared by a court to have lost legal capacity for civil acts, to be missing or to be dead;

• When the employer being an individual dies, or is declared by a court to have lost legal capacity for civil acts, to be missing or to be dead; or the employer not being an individual terminates its operation;

• When the employee is disciplined in the form of dismissal;

• When the employer exercise his right to unilaterally terminate the labor contract in accordance with the Labor Code;

• When the employer exercise his right to unilaterally terminate the labor contract in accordance with the Labor Code; or the employer retrenches the employee as a result of restructuring, change of technology, for economic reasons, or due to merger, consolidation or separation of the enterprise or co-operative.108

Under Vietnamese labor law, dismissal is the highest labor disciplinary measure, and it may be applied to employees when they (i) commit an act of theft, embezzlement, gambling, deliberate violence causing injury, using drugs at workplace, disclosure of business or technology secrets or infringement of intellectual property rights of the employer, or are guilty of conduct causing or threatening to cause serious loss or damage to the property or interests of the employer; or (ii) the employee is disciplined by the form of deferral of a wage increase and then commits a second offense during the period when the initial disciplinary measure had not been absolved, or the employee was disciplined in the form of demotion and thereafter committed a second offense; or (iii) an employee of his or her own accord takes an aggregate of 5 days off in one month or an aggregate 20 days off in one year without proper reasons.109

A disciplinary hearing meeting must be held and the employee has the right to defend himself or herself or to employ a lawyer or another person to do so.110

When an enterprise or a co-operative has its operation terminated, or is dissolved or declared bankrupt, there shall be priority payment of wages, allowance, social insurance and health insurance, unemployment insurance, and other interests of the employees.111

108 Labor Code, art 36.
109 Labor Code, art 126(1).
110 Labor Code, art 123(1).
111 Labor Code, art 47(4).
Restrictions on Termination

The law provides restrictions on unilateral termination, which in practice makes it very difficult for the employer to dismiss an employee. An employer may unilaterally terminate the contract only under the following conditions:

- The employee repeatedly fails to perform the work in accordance with the terms of the labor contract;
- The employer is ill or injured and remains unable to work after having received treatment for a period of 12 consecutive months in case of an indefinite term labor contract; or 6 consecutive months in case of definite term labor contract; or more than half of duration of the contract in case of a seasonal or specific job labor contract with a duration of less than 12 months;
- As a result of natural disaster, fire or for any other reason of force majeure despite all necessary measures to remedy the problem implemented by the employer;
- The employee fails to attend the workplace for a period of 15 days.\textsuperscript{112}

Required Notice Periods

Employers must provide an advance notice to their employees within a minimum statutory time limit.\textsuperscript{113} Employees who resign are required to give advance notice to their employers before a minimum statutory time limit. In both cases, the relevant time limits are 30 days in advance for fixed term labor contracts, 45 days for indefinite labor contracts, and 3 days for seasonal or specific job labor contract with a duration of less than 12 months.\textsuperscript{114}

Procedures for Termination

There must be proper legal grounds for an employer to terminate a labor contract with an employee. Employers are required to follow a number of statutory steps, such as sending an advance written notice regarding the employment termination to employees within the minimum statutory time limit.

If employers fail to prove the legal grounds for termination or fail to follow proper statutory procedures, a termination may be declared to be wrongful. If this is the case, employers may be required to reinstate the employees, pay their salaries for the period that they were not allowed to work, and pay two months of the employees’ salaries as a penalty for wrongful termination.

Severance or Redundancy Payments

Vietnamese labor law requires employers to pay severance to employees who have been regularly working for the employer for 12 months or more.\textsuperscript{115} The

\textsuperscript{112} Labor Code, art 38 (1).
\textsuperscript{113} Labor Code, arts 37(2) and 38(2).
\textsuperscript{114} Labor Code, art 38(3).
\textsuperscript{115} Labor Code, art 48(1).
severance allowance shall be one half of one month’s wage for each year of employment.\textsuperscript{116}

If contributions to the unemployment insurance fund were made for the benefit of the employee, employers are not required to pay severance for the duration of time that the employees paid their unemployment insurance premium. Any income earned by an employee in the form of a salary, wage, allowance, and bonus is subject to personal income tax (PIT). Severance payments, at the minimum statutory level, are not subject to PIT, whereas any extra payments are subject to PIT.

Employers are required to withhold and pay PIT to taxation authorities. Employers are not required to contribute to any allowances after termination, unless otherwise agreed by the parties in the labor contract and so long as all required severance payments are paid in full.

**Time Limit for Claims Following Termination**

The limitation period for requesting a labor conciliator to resolve an individual labor dispute is 6 months and one year for requesting a court to resolve an individual labor dispute from the date of the conduct that any party claims breached its rights or benefits.\textsuperscript{117}

**Employer Duties, Liabilities and Worker Benefits under National Unemployment Insurance Programs**

In Vietnam, unemployment insurance is governed by the Law on Social Insurance and relevant regulations on unemployment insurance. The unemployment insurance regime provides unemployment compensation and introduces new jobs to employees after they have lost a job or their labor contract has been terminated and they have not been able to find a job.\textsuperscript{118} The employees working for enterprises employing ten or more persons and under the labor contract with indefinite term or term of 12 to 36 months must participate in unemployment insurance.\textsuperscript{119}

The employers and employees must contribute 1 per cent of their salary, which will be matched by the State.\textsuperscript{120} The employees must receive the monthly unemployment compensation, equivalent to 60 per cent of their average salary during the last 6 months. The period in which unemployment compensation is received depends on the period during which the employee has paid the unemployment insurance.\textsuperscript{121}

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\textsuperscript{116} Labor Code, art 18(1).
\textsuperscript{117} Labor Code, art 202.
\textsuperscript{118} Law on Social Insurance, art 3(4).
\textsuperscript{119} Law on Social Insurance, art 2(3) and (4).
\textsuperscript{120} Law on Social Insurance, art 102.
\textsuperscript{121} Law on Social Insurance, art 82.
\end{footnotesize}

(Release 1 – 2012)
Mandatory Job-Retraining Programs and/or Placement Programs

In cases of reorganization or changes in technology, employers are required to retrain employees. When there is a merger, consolidation, division, or separation, succeeding employers must be responsible for continuous performance of the labor contract. 122 On transfer of ownership or right to use assets of an enterprise, the previous employer must prepare a labor usage plan with the foregoing details. 123

In cases of reorganization or changes in technology or when all available employees are unable to be employed, there must be a plan for labor usage. 124 If a labor contract is terminated under these circumstances, an employee who is let go but who has worked for the former employer for 12 months or longer must be entitled to receive a job-loss allowance equal to one month’s salary for each working year but no less than two months’ salary. 125

Retirement

There is no scheme for pension plans under Vietnamese labor law. However, both employers and employees are required to contribute to the compulsory social insurance fund that shall pay pensions to employees when they retire. 126

Employer and Employee Contributions

Employers and employees are required to make social insurance, medical, and unemployment contributions to the social insurance fund. The fund shall pay allowances to employees for sick leave, maternity leave, work-related accidents, occupational disease, and pensions. 127

Conclusion

In general, Vietnamese labor law is very protective of employees. Employers are required to have legal grounds for termination of labor contracts or have evidence of violations by employees for labor disciplinary measures.

In practice, in order to avoid further claims regarding unfair termination, employers normally pay out their employees by offering a severance payment level that is higher than the minimum level required by law and the employer should consider employing workers on a short-term contract basis. This situation

122 Labor Code, art 45.1.
123 Labor Code, art 45(2).
124 Labor Code, art 44 (1).
125 Labor Code, art 49 (1).
126 Labor Code, art 187.
127 Labor Code, art 186.
does not provide security or enhance the position of the employees in the long run.

The new Labor Code also promises to ensure benefits and rights of the employers. However, it seems to impose more burdensome obligations, such as the obligation to hire disabled persons and the duty to provide training. It will be beneficial to see which direction the debates go within the Party, and whether labor market flexibility could be enhanced by the new law without compromising the basic rights of the workers.