



**C L I F F O R D**  
**C H A N C E**

A Guide to Employment  
in the European Union

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- Trade unions, collective disputes and industrial action
- The application of TUPE and the Acquired Rights Directive
- Protecting confidential information
- Health and safety
- Whistleblowing
- European legislation and its implications for employers
- Work permits and other immigration issues
- Preparation and negotiation of social plans

The Brussels office has direct access to the Commission Directorate responsible and can enter into dialogue with the Commission on behalf of clients.

# Introduction

## The purpose of this guide

This guide is designed to provide an overview of employment law in each of the 27 member states of the European Union (“EU”). It has been limited to a general description of the areas of employment law in each Member State that are of most interest:

- how employees are engaged and dismissed;
- the costs associated with employment;
- the rights of employees at the end of the period of employment.

Despite the complexity of modern employment law, there are some general principles common to Member States arising from the impact of EU Directives on the domestic law of each of the countries. A good illustration of this is the Acquired Rights Directive, which protects employees in the event of the acquisition of businesses and economic entities, and the legislation this has given rise to in Member States. Harmonisation is increased by the fact that, in the interpretation and application of law based on EU Directives, the decisions of the Court of Justice of the European

Union guide domestic Courts and Tribunals in each state.

However, whilst common principles are evident, so too is a surprising degree of diversity. This is perhaps most noticeable in the cases of the United Kingdom and Ireland but is also apparent in the other EU Member States.

The pace of development both in terms of EU and domestic employment law continues unabated. For these reasons this publication cannot serve as a substitute for current and necessarily detailed advice on particular employment law problems which may arise, but it is hoped that it will provide a valuable and informative outline of the relevant law in the countries covered for our clients.

Unless the context otherwise requires, references in this publication to the masculine include the feminine, and references to “European Union” and “EU”, where the context requires, include references to “European Community” and “EC”. References to the “European Economic Area” and the “EEA” are references to the European Union and Iceland, Norway and Liechtenstein.

*This publication is designed to provide a general summary of EU countries’ approaches to employment related law as at 1 January 2013 (unless otherwise stated). It does not purport to be comprehensive or to render legal advice and consequently no responsibility can be accepted for loss occasioned to any person acting or refraining from acting as a result of any statement in this publication.*

## Further information

We also have the following additional guides: an International Guide to Employment (covering Australia, China, Dubai, Hong Kong, India, Japan, Russia, Singapore, Turkey, the UAE and the US), Employment Law in the United Kingdom, Employee Share Plans in the United Kingdom and Employee Share Plans in Europe and the United States.

Our regular newsletters are designed to keep you up-to-date with new developments in the world of employment law. If you would like to join our distribution list please contact Tania Stevenson (**Tania.Stevenson@cliffordchance.com**) or your usual Clifford Chance contact.

# Clifford Chance Offices Worldwide

## Abu Dhabi

Tel: +971 2 613 2300  
Fax: +971 2 613 2400

## Amsterdam

Tel: +31 20 7119 000  
Fax: +31 20 7119 999

## Bangkok

Tel: +66 2 401 8800  
Fax: +66 2 401 8801

## Barcelona

Tel: +34 93 344 2200  
Fax: +34 93 344 2222

## Beijing

Tel: +86 10 6535 2288  
Fax: +86 10 6505 9028

## Brussels

Tel: +32 2 533 5911  
Fax: +32 2 533 5959

## Bucharest (associated office)

Tel: +40 21 666 6100  
Fax: +40 21 666 6111

## Casablanca

Tel: +212 520 132 080  
Fax: +212 520 132 079

## Doha

Tel: +974 4 491 7040  
Fax: +974 4 491 7050

## Dubai

Tel: +971 4 362 0444  
Fax: +971 4 362 0445

## Düsseldorf

Tel: +49 2 11 43 550  
Fax: +49 2 11 43 555 600

## Frankfurt

Tel: +49 69 71 99 01  
Fax: +49 69 71 99 4000

## Hong Kong

Tel: +852 2825 8888  
Fax: +852 2825 8800

## Istanbul\*

Tel: +902 12 339 0000  
Fax: +902 12 339 0099

## Kyiv

Tel: +38 044 390 5885  
Fax: +38 044 390 5886

## London

Tel: +44 20 7600 1000  
Fax: +44 20 7600 5555

## Luxembourg

Tel: +352 48 50 501  
Fax: +352 48 13 85

## Madrid

Tel: +34 91 590 75 00  
Fax: +34 91 590 75 75

## Milan

Tel: +39 02 806 341  
Fax: +39 02 806 34200

## Moscow

Tel: +7 495 258 5050  
Fax: +7 495 258 5051

## Munich

Tel: +49 892 16 32 0  
Fax: +49 892 16 32 8600

## New York

Tel: +1 212 878 8000  
Fax: +1 212 878 8375

## Paris

Tel: +33 1 44 05 52 52  
Fax: +33 1 44 05 52 00

## Perth

Tel: +61 8 9262 5555  
Fax: +61 8 9262 5522

## Prague

Tel: +420 2 22 555 222  
Fax: +420 2 22 555 000

## Riyadh\*\*

Tel: +966 1 250 6500  
Fax: +966 1 400 4201

## Rome

Tel: +39 06 422 911  
Fax: +39 06 422 912 00

## São Paulo

Tel: +55 11 3019 6000  
Fax: +55 11 3019 6001

## Seoul

Tel: +82 26363 8100  
Fax: +82 26363 8101

## Shanghai

Tel: +86 21 2320 7288  
Fax: +86 21 2320 7256

## Singapore

Tel: +65 6410 2200  
Fax: +65 6410 2288

## Sydney

Tel: +61 2 8922 8000  
Fax: +61 2 8922 8088

## Tokyo

Tel: +81 3 5561 6600  
Fax: +81 3 5561 6699

## Warsaw

Tel: +48 22 627 1177  
Fax: +48 22 627 1466

## Washington, D.C.

Tel: +1 202 912 5000  
Fax: +1 202 912 6000

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# Austria

## 1. Introduction

Whilst there is no single statute governing all aspects of individual and collective employment law, the most important areas of Austrian labour law are codified in a wealth of detailed statutes and regulations. These provisions seek primarily to protect the rights of employees. There are four main sources of Austrian labour law: legislation, collective agreements, work agreements and individual employment contracts. Statutory provisions are normally for the benefit of the employee and therefore collective agreements, works agreements or individual employment contracts must not contain terms less advantageous to employees. However, the “favourableness principle” (*Günstigkeitsprinzip*) allows amendments to be made to agreements at a lower level, provided that they are beneficial to the employee. The primary piece of legislation in this area is the Labour Constitution Act 1974 (*ArbVG - Arbeitsverfassungsgesetz*).

The low incidence of industrial disputes in Austria is the direct result of harmonious relations between Government, employers and trade unions, built on a social partnership between employers’ and employees’ representative organisations. The frequent use of collective bargaining as a method of resolving disputes has played a fundamental role in ensuring a history of industrial peace. Strikes are rare even where a new agreement is being negotiated and are often considered to be illegal during the effective period of an existing agreement.

Austria has two organisations that represent employees’ interests at supra-enterprise national level; these are the Trade Unions Federation (*ÖGB – Österreichischer Gewerkschaftsbund*), based on voluntary association, and the statutorily created Labour Chambers (*AK - Arbeiterkammern*). The majority of employees in the private sector are compulsory members of the *Arbeiterkammern*. The statutory

organisation for employers is the Chamber of Commerce (*WKO – Österreichische Wirtschaftskammer*), membership of which is also compulsory.

There is a well-developed system of “co-determination” which ensures employee participation in the workplace, and Works Councils protect the interests of employees on issues affecting work practices.

Both collective and individual disputes are handled by special labour courts.

## 2. Categories of Employees

### 2.1 General

Austrian employment legislation has traditionally drawn a distinction between blue-collar (*Arbeiter*) and white-collar (*Angestellte*) workers. Legislation has traditionally been used to regulate conditions affecting white-collar workers, whilst most of the provisions for blue-collar workers have developed within collective agreements. However, relatively recent changes in Austrian labour law are aimed at treating blue-collar and white-collar workers more equally in the future.

### 2.2 Directors

Senior executives and directors have a special position in labour law. Certain protective laws (particularly the Hours of Work Act 1969 (*AZG- Arbeitszeitgesetz*), do not apply to managing directors (*Vorstandsmitglied* of an *Aktiengesellschaft* and *Geschäftsführer* of a *GmbH*) and only partly to senior executives. Senior executives are not represented by the Works Council.

The Employees’ Act 1921 (*AngG- Angestelltengesetz*) also applies to the *Geschäftsführer* of a *GmbH* if he is not a controlling shareholder, but never applies to *Vorstandsmitglieder* of a stock corporation unless explicitly agreed between the parties. The *Vorstandsmitglieder* only have a service contract (*freier Dienstvertrag*).

## 3. Hiring

### 3.1 Recruitment

There are no provisions regulating employee recruitment. However, according to the *ArbVG* employers must consult the Works Council, if any, in connection with general personnel planning. The employer must also inform the Works Council whenever an employee is recruited.

Employers with 25 or more employees are obliged by law to employ one disabled person for every 25 employees or to pay a monthly compensation tax.

### 3.2 Work Permits

Non-EEA nationals need a work permit for all types of employment, which can only be applied for in Austria by the prospective employer. A residence permit is also required for non-EEA nationals staying for a period exceeding six months. Once a work permit is granted, generally, an application for a residence permit must be made from abroad to the local representative authority (Austrian embassy or consulate general).

EEA nationals or Swiss nationals making use of their right of free movement and staying longer than three months within the federal territory have to apply for a confirmation of registration (*Anmeldebescheinigung*). In general EEA nationals do not need any kind of work permit, but there are various temporary provisions for nationals of the new EU-accession countries Romania and Bulgaria, limiting free access to the employment market until 1 January 2014. From 1 January 2014, nationals of these countries will have unlimited free access to the employment market in Austria.

On 1 July 2011 Austria implemented a new criteria-based immigration scheme: the Red-White-Red-Card (*RWR-C*).

By means of this new immigration scheme Austria intends to attract highly skilled international employees.

The RWR-C entitles its holder to residence and employment with a specific employer. RWR-C holders may apply for a Red-White-Red Card plus (RWR-C plus), if they have been employed for 10 months in the last 12 months. The RWR-C plus grants its holder unlimited access to the labour market. The RWR-C is available to the following groups of foreigners:

- (a) Highly qualified specialists
- (b) Skilled worker in shortage professions
- (c) Other key workers
- (d) Graduates of higher education (universities and colleges) in Austria

The most important criteria which have to be fulfilled by the applicant are qualification, work experience, language skills, an offer of employment relevant to the individual's qualifications and minimum remuneration.

Graduates of foreign universities who have a binding employment offer with an annual gross salary of at least 150% of the average yearly gross salary of full-time employees in Austria (2012: €53,211) may apply for a Blue Card-EU (BC-EU). The BC-EU is valid for a period of two years and entitles its holder to residence and employment with a certain employer. After 21 months of employment in the last 24 months the BC-EU holder can apply for a RWR-C plus.

## 4. Discrimination

Discrimination on the grounds of gender, ethnic affiliation, religion or philosophical belief, age or sexual orientation is expressly forbidden by the Equal Treatment Act 2004 (GIBG - *Gleichbehandlungsgesetz*). This Act also requires equal pay for equal work. A commission and an attorneyship for equal treatment has been established to ensure compliance with the principle of equal treatment. Moreover, discrimination on the ground of a disability is prohibited

by the Disabled Persons Employment Act 1970 (BEinstG-*Behinderteneinstellungsgesetz*).

Protection also exists for those involved in trade union activities. The ArbVG expressly forbids discrimination against personnel who exercise their statutory works representation powers. Special protection also exists against unwarranted dismissal.

As a result of Austria's accession to the EU, the Act on the Adjustment of Employment Contracts (AVRAG - *Arbeitsvertragsrechts-Anpassungsgesetz*) has been enacted.

The AVRAG was amended in 2011 to outlaw discrimination in relation to pay and social benefits. Breach of these provisions are sanctioned by administrative penalty fees (up to €50,000 per employee in case of repeated infringement) being imposed on the employer.

## 5. Contracts of Employment

### 5.1 Freedom of Contract

Employment relationships are regulated through individual employment contracts, which are subject to common law.

However, the freedom to contract is, in practice, limited. The ArbVG specifies that collective agreements concluded between statutory employer associations and trade unions also apply to employees who do not belong to one of the bodies concluding them. As a result, Austrian collective agreements cover the majority of employees and employers. Contracts of employment between employers and white-collar workers are governed by the AngG.

### 5.2 Form

In general, there is no special form required for an Austrian employment contract, which can be concluded orally or in writing. In practice, legislation and collective agreements cover the most important conditions of employment.

Individual contracts are often used for those employed at management level, specifying particular terms and conditions of employment.

The AVRAG provides that every employee is entitled to an employment document (*Dienstzettel*) which must contain the essentials of the terms of employment, such as name and address of employer, date of start of employment, notice periods, starting salary and holidays.

### 5.3 Trial Periods

A probationary period must not exceed one month. During this period, either party may terminate the employment with immediate effect without cause.

### 5.4 Confidentiality and Non-Competition

During employment, employees are subject to a general duty of loyalty. An employee is therefore not allowed to compete with the employer during the employment or to disclose business secrets. Post-termination restrictions on competitive activities must not exceed one year and may only limit activities relating to the previous employer's business. The restrictions must not unreasonably restrict the employee.

### 5.5 Intellectual Property

The patent right to inventions made by employees during the term of their employment will belong to the employee. Employers may enter into written agreements with employees conferring a right on the employers to future inventions or a right of use of future inventions. In such cases the employee must receive adequate remuneration.

## 6. Pay and Benefits

### 6.1 Basic Pay

Whilst there is no national statutory minimum wage, minimum rates of pay are fixed by collective agreements covering virtually all employees. Through these legally binding agreements, employees are entitled to a 13<sup>th</sup>-month

(holiday) bonus and a 14<sup>th</sup>-month (Christmas) bonus. In practice, the pay given by many employers is higher than the agreed rates.

Works Councils and employers can only determine incentive pay, whilst other payments can only be regulated by a workers' agreement to the extent allowed for by the collective agreement in force.

Regular benefits paid every year will become part of salary unless provided on a voluntary basis and stated to be subject to unilateral withdrawal.

## 6.2 Pensions

The majority of higher paid employees are covered by company plans. The pension target, inclusive of social security, is usually around 60 to 75% of final average earnings over a full career. Other benefits normally provided are disability pensions and spouses' pensions with child supplements. Statutory vesting of accrued benefits applies after five years' membership or ten years' service, if earlier.

Private pensions for employees are governed by the Company Pension Act 1990 (BPG-*Betriebspensionsgesetz*).

## 6.3 Incentive Schemes

Most agreements with executives contain provision for profit-related payments.

## 6.4 Fringe Benefits

Senior executives are often entitled to a company car and various insurances as fringe benefits.

## 6.5 Deductions

Employers are under a statutory obligation to deduct income tax and social security contributions from the earnings of their employees and to account to the tax authorities for these deductions.

# 7. Social Security

## 7.1 Coverage

The state social security system provides benefits in the case of retirement, disability, death, sickness, industrial injury

**The rates for white-collar workers and their employers as a percentage of pay are as follows:**

Insurance	Employee	Employer	Total
Health	3.82	3.83	7.65
Accidents at work	none	1.4	1.4
Pensions	10.25	12.55	22.8
Unemployment	3.0	3.0	6.0

**The rates for blue-collar workers and their employers as a percentage of pay are as follows:**

Insurance	Employee	Employer	Total
Health	3.95	3.70	7.65
Accidents at work	none	1.4	1.4
Pensions	10.25	12.55	22.8
Unemployment	3.0	3.0	6.0

and unemployment, as well as covering health insurance and family allowances.

## 7.2 Contributions

Both employees and employers contribute to the financing of the social security system. Contributions are payable up to a maximum assessment basis of €4,230 (2012); (approximately €4,440 (2013)) per month. There are different rates of contribution depending upon whether the employee is a white or blue-collar worker.

In addition to his or her social security contributions, both white and blue-collar employees pay Chambers Labour fees (*Arbeiterkammerumlage*) at a rate of 0.5%, and an employer has to bear an additional charge under the Insolvency Compensation Act (*Insolvenz-Entgeltsicherungsgesetz-Zuschlag*) at the rate of 0.55%. There are other contributions for particular categories of work.

# 8. Hours of Work

The number of working hours is regulated either by statute or by collective

agreement. Under the Working Hours Act 1969 (AZG - *Arbeitszeitgesetz*) statutory working hours are limited to eight per day and 40 per week, although more may be possible in certain industries (for example, where drivers or shift workers are employed), provided that the average weekly working hours over a specified period do not exceed 40 hours. Longer working hours can be provided for by collective agreements, to the extent permitted by the AZG.

Under collective agreements the average working week is about 38.5 hours. Overtime is permissible as long as no more than 10 hours are worked in total on any one day. The permitted statutory maximum amount of overtime per week is generally 10 hours; these 10 hours consist of five hours overtime per week and a further 60 hours overtime annually. Thus, per year the maximum numbers of weeks with 10 hours overtime is 12 (60 divided by five). Once the 60 hours annual overtime are worked only five hours overtime may be worked per week. However, under certain circumstances further exceptions may apply.

The AZG also makes provision for work breaks and rest periods. Further provisions for work breaks and rest periods are determined in the Hours of Rest Act 1983 (ARG-*Arbeitsruhegesetz*). However, the AZG as well as the ARG does not apply to senior executives or *Geschäftsführer* of a GmbH, unless otherwise provided in the collective agreement.

The working hours of young persons are governed by the Children and Young Persons Work Act 1987 (KJBG - *Kinder und Jugendlichenbeschäftigungsgesetz*).

Hours in excess of normal working time constitute overtime. An employee working overtime receives payment at a higher rate than for normal working time or time off. The AZG provides for a 50% increase in pay for normal overtime and collective agreements frequently provide for a 100% increase for work on public holidays and Sundays.

## 9. Holidays and Time Off

### 9.1 Holidays

Employees are entitled to paid absence from work on any public holiday, unless the public holiday falls on a Sunday in respect of which the employer has no obligation to provide regular pay. All employees are statutorily entitled to a minimum of 30 working days holiday a year (36 working days after 25 years' service). Saturdays are counted as working days for this purpose.

### 9.2 Family Leave

Pregnant women are entitled to take maternity leave starting eight weeks prior to confinement, and are entitled to a further period of eight weeks after having given birth. Throughout the maternity leave period they receive full pay. Either parent also has the right to take unpaid parental leave for a period of up to two years.

There are various statutory provisions regulating the type of work and length of working hours that can be undertaken by pregnant women.

### 9.3 Illness

Employers are liable to pay full salary to white-collar workers as well as blue-collar workers for the first six weeks of sickness, with a further period of four weeks on half pay when the full pay period ends. The period of full pay increases with the length of the employment relationship up to 12 weeks' pay.

### 9.4 Other time off

The applicable collective agreements, work agreements or the employment contract may entitle the employee to request flexible working arrangements. These agreements may also include provisions giving employees specified time off on particular occasions.

## 10. Health and Safety

### 10.1 Accidents

Employers are responsible for equipping and running places of work so that employees are protected from avoidable work-associated accidents and illness. The Work Inspection Office (*Arbeitsinspektorat*) has the authority to ensure that health and safety regulations are complied with.

### 10.2 Health and Safety Consultation

Works Councils set up by statutory authority in all companies employing five or more permanent employees have a right to co-determination on matters of health and safety.

## 11. Industrial Relations

### 11.1 Trade Unions

Employees have a right of freedom of association and the right to engage in union activity. Since the establishment of the Austrian Trade Union Confederation (ÖGB - *Österreichischer Gewerkschaftsbund*) all political viewpoints and groups of employees have been represented within it.

However, there is no direct trade union representation in the workplace. Instead, employees are represented by statutorily

elected Works Councils. The ArbVG requires the creation of Works Councils in all establishments employing at least five employees if employees or a trade union request the establishment of a Works Council.

The number of members of the Works Council depends on the number of employees it represents.

### 11.2 Collective Agreements

The ArbVG gives legal authority for the conclusion of collective agreements. This authority is restricted to the statutory representatives of employees (such as Chambers of Labour) and employers (Economic Chambers). However, agreements concluded between voluntary organisations are effective if they receive recognition from the Federal Conciliation Office (*Bundeseinigungsamt*), which often requires proof that the organisation's activities extend over a significant geographical and occupational area.

Single employer agreements are uncommon, as it is extremely rare for individual employers to be given the authority to conclude collective agreements.

Agreements must be registered with the Federal Ministry of Labour, Social Affairs and Consumer Protection (*Bundesministerium für Arbeit, Soziales und Konsumentenschutz*) and be published in the official journal before they are valid. Their content is limited by the ArbVG to covering issues essential to pay and working conditions, rights and obligations. The vast majority of employment relationships are regulated by collective agreements.

Collective agreements are usually put in place for particular industries or branches of industries.

### 11.3 Trade Disputes

The negligible level of industrial conflict and the relative neutrality of the state in industrial conflict have led to a notable

absence of specific statutory regulation of the conduct or resolution of industrial disputes. The general law does not explicitly recognise a right to strike, although Austria has ratified various international conventions which guarantee the right to strike. However, strikes aimed directly at the state are considered unlawful, and some public sector workers are banned from striking.

The “social partnership” based on co-operation between Government, employers and unions, is the main method by which strikes and industrial conflict are regulated.

#### **11.4 Information, Consultation and Participation**

The concept of “co-determination” allows employees significant input in the decision-making process and should exist when staff have an equal status to management in respect of establishment issues. However, in reality co-determination is limited to what are seen as social issues, in particular dismissals, and does not exist in relation to commercial or economic matters.

Employee rights are enhanced by Works Councils, which have rights of co-determination in respect of fundamental organisational changes and changes in working practices. A Works Council has the right of access to information regarding the financial position of the company, and is entitled to one-third of the seats on its company’s supervisory board. The Works Council can meet with management at least four times a year.

## **12. Acquisitions and mergers**

### **12.1 General**

The employer must inform the Works Council, if any, of any proposed changes to the business. A merger with other companies will qualify as such a change. Although no strict time limit applies, the employer must notify the Works Council as soon as possible and sufficiently in

advance for the proposed change to be thoroughly discussed. As a general guideline, Works Councils are often informed roughly two to four weeks in advance. The Works Council may request that a representative of the competent trade union joins the consultations. The extent of the information to be given to the Works Council is not governed by law, however, the information must be detailed enough to allow for a thorough consultation with the Works Council.

Notice of termination given by a selling entity on account of a business transfer is null and void, as is notice of termination given by the purchasing entity after the transfer on account of the transfer. Transferring employees can be dismissed if the dismissal is not motivated by the business transfer (e.g. for misconduct). However, the employer has to provide clear evidence that the reason for the dismissal was not the transfer.

### **12.2 Information and Consultation Requirements**

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

Non-compliance with any of the information/consultation procedures does not carry any criminal sanctions. In general, the Works Council cannot hinder or delay the transaction from proceeding.

One exception exists in relation to the closure of undertakings with more than 200 employees. In such circumstances the Works Council can file an objection in respect of a failure to consult which could lead to a delay in the closure taking effect.

However, in practice this legal provision is seldom applied and it is therefore largely irrelevant. Should a social plan be drafted by the special conciliation body, the adjustment may be more favourable to employees in the event of a delay in informing and consulting the Works Council.

If no Works Council exists, the employer has to inform all transferring employees in writing about the proposed transfer of business. There is no specific time limit for such information. As a general guideline, employees are often informed two to four weeks in advance. The information has to be given in writing and no consultation is required.

The information/consultation process has to be completed before the “transfer of the undertaking”. Under Austrian employment law, this is neither necessarily signing nor closing/completion, but the point in time, when the purchaser is executing the main employer functions over the employees of the transferring unit. Effectively, however, this point in time often coincides with the closing/completion.

### **12.3 Notification of Authorities**

From an employment perspective there is no need to notify the authorities of an acquisition or merger.

### **12.4 Liabilities**

A sale and purchase agreement can be signed before the information or consultation is completed. Non-compliance with the information and consultation obligation would not affect the validity of a sale and purchase agreement, thus, the Works Council cannot delay or prevent a merger or acquisition. In the case of collective

dismissals which qualify as a change to the business non compliance with information obligations may trigger administrative penalty fees in the amount of €2,180.

## 13. Termination

### 13.1 Individual Termination

A white or blue-collar employee whose employment is terminated by the employer giving notice or by the employee for good cause is entitled to severance pay (*Abfertigung*), provided he or she has completed three years' service. This system is applicable to employment relationships that commenced before 1 January 2003. The amount of the payment depends on the length of service and ranges from 2 to 12 months' salary.

The Statutory Corporate Employee Retirement Schemes Act 2002 (*BMSVG -Betriebliches Mitarbeiter- und Selbstständigenvorsorgegesetz*) imposes a new severance pay regime in relation to all employees whose employment commences after 31 December 2002. This replaces the old severance pay regime described above. In principle, the employer is obliged to make contributions of 1.53% of the monthly remuneration (plus special payments) for each employee to a fund (*Mitarbeitervorsorgekasse*) and the employees are entitled to receive the balance of these contributions upon termination of their employment contracts, provided that certain conditions are satisfied.

For employment contracts entered into on or before 31 December 2002, the old severance pay scheme will continue to apply unless employer and employee agree that the new BMVG shall apply instead. They may also agree to transfer accrued entitlements to severance pay into the new scheme. The law also allows mixed systems and/or overall transfers from the old system to the new system. Overall transfers were only permissible up to 31 December 2012.

With effect from 1 January 2013 on the termination of an employment or service agreement that was subject to mandatory unemployment insurance the employer has to pay a levy of approximately €113 (2013) to the statutory health insurance fund (*Krankenkasse*). This amount will be adjusted annually.

However, in certain cases (e.g. where the employee terminated the contract, termination by the employer for cause and with immediate effect, termination in the course of the one month probationary period, etc) the employer is exempt from paying the levy.

### 13.2 Notice

There are different notice periods for blue-collar and white-collar workers. The notice period in respect of blue-collar workers is generally 14 days. Collective agreements provide for different notice periods. In respect of white-collar workers, employers may terminate an employment on six weeks' notice, expiring at the end of a quarter. Depending on length of service, this period increases to five months after 25 years' service. White-collar employees may terminate their employment on one month's notice expiring at the end of a month. Employees' notice obligations of up to six months may be agreed subject to the overall requirement that it cannot be shorter than the notice required to be given by the employer.

Notice of dismissal will only be effective if the relevant Works Council has been notified in advance. The Works Council has one calendar week in which to consult about the intended dismissal and comment on it. Thereafter the employer can give notice to the employee, although the Works Council must again be notified. Should the Works Council agree, the notice is final, otherwise the notice can be appealed against by either the Works Council or the employee concerned. Such an appeal will be heard by a Labour Court, but will only succeed if it can be shown

that the motives for dismissal are socially unjustifiable.

An employment contract may be terminated without notice only for good cause. A good cause justifying the immediate dismissal of an employee exists, for instance, if the employee has caused serious harm to the employer's interests and it is, therefore, unreasonable for the employer to employ the employee until the end of the applicable notice period.

### 13.3 Reasons for Dismissal

Generally, both parties have the right to terminate an employment for any reason. Restrictions on the employer derive from public policy aimed at the protection of employees from unwarranted dismissal.

If an employer's motives for dismissal are socially justifiable, then the dismissal is likely to be lawful. Dismissal will be unlawful, for instance, where the contract is terminated because of the employee's involvement in a Works Council, or involvement as an employee representative for health and safety, or due to an employee's call-up for national service.

As a matter of general principle, only the Works Council is allowed to contest dismissals but, if there is no Works Council or the Works Council does not react, the employee may contest his dismissal.

### 13.4 Special Protection

It is recognised that certain groups of employees are vulnerable to unwarranted notice of dismissal. Legislation therefore gives special protection to, for example, Works Council members, pregnant employees, apprentices, disabled persons and employees on military service.

### 13.5 Closures and Collective Dismissals

Special rules apply to collective dismissals, but the classification of collective dismissals depends on the number of employees in the company and the number of employees to be

dismissed. For example, the dismissal of five or more employees of a company with more than 20 and less than 100 employees will qualify as a collective dismissal for the purposes of employment protection legislation.

An employer must give 30 days' prior notice to the competent regional labour office if collective dismissals within a period of another 30 days are planned. At the same time, the employer has to submit evidence to the authorities that consultations have been held with the Works Council in accordance with the ArbVG. Failure to comply with these obligations may render the dismissals invalid.

A social plan may be required in respect of companies employing 20 or more employees in order to avoid, remove or alleviate the consequences resulting from collective dismissals. The social plan has to be negotiated with the Works Council and put into effect as a works, or shop, agreement.

## **14. Data Protection**

### **14.1 Employment Records**

The collection, storage and use of information held by employers about their (prospective, current and past) employees and workers are governed by the Austrian Data Protection Act 2000 (DSG 2000 - *Datenschutzgesetz 2000*).

Employee data may only be processed as far as the purpose and content of the data is justified by the statutory requirements imposed on the employer and provided the employee's confidentiality is safeguarded.

Generally, the processing of employee data is permissible to the extent necessary to operate an ordinary employer-employee relationship.

### **14.2 Employee Access to Data**

Employees, as data subjects, have the right to make a subject access request either in writing or, in agreement with the employer, orally. This entitles them to be advised of what data is held about them, to whom it is disclosed and to be given a copy of their personal data. The employer may resist a subject access request if justified interests of the employer or a third person would otherwise be endangered. Requests must be answered within eight weeks. Generally, the employer has to comply with such a request without charging the employee. Legally, a charge of €18.89 may, however, be levied if a request does not concern the current data of the employee or the employee has previously requested access to data during the current year.

### **14.3 Monitoring**

The monitoring of employee email, internet and telephone use and Closed

Circuit TV monitoring is governed by the ArbVG and the DSG 2000. Monitoring is permissible unless it affects a person's dignity. Control measures introduced to protect the dignity of data subjects require an agreement between the Works Council and the employing company before any monitoring can take place. If no works agreement can be concluded with the Works Council, the employer must not take the proposed measures.

### **14.4 Transmission of Data to Third Parties**

An employer who wishes to provide employee data to third parties must do so in accordance with the DSG 2000 principles and processing conditions. Data may be transmitted only if the confidentiality of the data subject concerned is safeguarded. If the data subject concerned has consented to the transmission of data, the confidentiality requirement is deemed to be satisfied. Such consent may be revoked at any time. Where the third party is based within the European Union, permission to transfer data is not required in general. The transmission of data to third parties not based in the European Union requires the permission of the Data Protection Commission unless certain exceptions apply.

*Contributed by Schönherr Rechtsanwälte GmbH Attorneys at Law*

# Belgium

## 1. Introduction

The legal relationship between employees and employers is mainly governed by the 1978 Law on Employment Contracts (*Loi du 3 juillet 1978 relative aux contrats de travail - Wet van 3 juli 1978 betreffende de arbeidsovereenkomsten*) and other legislation. Collective labour agreements ("CLA"), individual contracts of employment, work rules and normal practice are other important sources of employment law and are classified as such by a 1968 Law.

Collective labour agreements are agreements negotiated between employers and employee representatives at national, industry or individual company level. They are automatically legally binding in respect of all employers and their employees in, for example, a particular industry. Some of the terms of the collective labour agreement create individual rights for the employees and form part of the individual contracts of employment.

The employer must provide each employee with a copy of work rules (*arbeidsreglement - règlement de travail*) which sets out the basic common terms and conditions of employment (such as hours of work, methods of payment and disciplinary procedures), independently from the employment contract.

Belgium is officially trilingual (Dutch, French and German). There are strict rules on the use of Dutch, French or German in employment documents and in connection with working relations. These vary according to the geographical area where the place of business is located to which the employee is attached; the language is French in Wallonia, Dutch in Flanders and German in the relatively small German speaking area. Brussels is officially a bilingual city (Dutch and French) and the language to be used will normally depend on the mother tongue of the individual employee.

Labour disputes are settled by local labour Tribunals and by the labour Courts, at appeal level. These Courts are presided over by a professional judge and two lay members - one representing employers, and the other employees.

There are a number of Government agencies that are responsible for enforcing the various health and safety, employment and social security laws.

## 2. Categories of Employees

### 2.1 General

Belgian employment law distinguishes between the blue-collar worker (carrying out principally manual work) and the white-collar worker (carrying out principally intellectual work). A number of the regulations applicable to blue-collar workers differ substantially from those applicable to white-collar workers. Although the Belgian Constitutional Court ruled in 2011 that this differential treatment is discriminatory and should be amended by mid-2013, the Belgian government has not yet made any progress in the harmonisation of blue and white-collar workers' status.

Management and senior supervisory personnel are distinguished from other white-collar workers for the purpose of certain labour law provisions. The law also contains special provisions in respect of other categories, for example, sales representatives, domestic servants, employees working from home and students.

### 2.2 Directors

Depending on the function they perform, directors of limited companies may be treated for employment law and social security purposes as both office holders and employees. Normally separate rules apply to each capacity. A director for instance may be dismissed as a director with immediate effect and without compensation; if the director is also an employee, the stricter rules for

terminating an employment contract have to be complied with to terminate the employment relationship.

Directors, who are remunerated through directors' fees, need to register and pay social security contributions as self-employed persons. Non-remunerated directors do not have to pay social security contributions provided that they can actually prove that their mandate is non-remunerated.

Managing directors of small or medium-sized companies which do not form part of a larger group of companies will also need to obtain and submit a certificate which proves that they have sufficient knowledge and/or professional experience to run the company ("*attestation connaissances de gestion de base - bekwaamheidsattest*").

### 2.3 Other

Employers may employ temporary staff either to replace an employee, or in order to respond to an extraordinary increase of work, or to carry out exceptional work. Temporary employees must be paid a wage which *pro rata* is not less than what they would be entitled to if they were a permanent employee. Temporary (or interim) staff supplied through an employment agency may be employed in the same circumstances; they are employed by the agency but are entitled to the same employment rights as if they were a normal employee of the company.

A part-time employment contract must be made in writing before the employee starts work. Part-time employees must normally work a minimum of one third of the usual full-time hours per week and a minimum of three hours each working period. Part-time employees have priority in applying for similar full-time positions that become available and for which they have the required qualifications. Their salary must be proportionately equivalent to that paid to full-time employees. This also applies to other employment rights.

Secondment in Belgium is only allowed in exceptional circumstances and provided certain procedures have been followed. For example, intra-group secondments or secondment aimed at a short-term execution of specialised tasks which require specific professional qualifications, are allowed provided advance notification is given to the Social Inspection. Other secondments require the prior consent of the Social Inspection. In both cases a prior written agreement between the employer, the seconded employee and the recipient of the employee's services must set out the terms of the secondment.

The above secondment rules do not apply however when an employer second one or more employees to another company to perform services provided (i) there is a written agreement between the employer and the company benefiting from the services; (ii) this agreement explicitly and precisely determines which instructions can be given to the employees by the company benefiting from the services; (iii) the employer's authority remains with the employer; and (iv) the execution of the agreement in practice between the employer and the company benefiting from the services must be completely in line with the provisions of this agreement. The company benefiting from the services will, in any event, always be able to give instructions to the employees in relation to the applicable health and safety rules. Finally, the company benefiting from the services should inform its works council about the existence of the secondment arrangement and should provide the works council (at its request) with a copy of the relevant clauses of the written agreement that contain an overview of the instructions that can be given to the employees. In the absence of a works council, this information should be given to the Health and Safety Committee and, in the absence of such committee, to the Trade Union Delegation. The procedure to be followed in relation to such information provision is yet to be established by the Belgian government.

Civil and criminal sanctions may be imposed in the event of unauthorised secondment. In the event that an employee is seconded in breach of the mandatory rules, the company who uses the service of the seconded employee is considered to have an employment contract of indefinite duration with the seconded employee and the employer and the user are jointly liable vis-à-vis the employee.

### **3. Hiring**

#### **3.1 Recruitment**

Employers are free to select personnel as they wish (see however section 4 "Discrimination"). Nevertheless, there are some obligations imposed upon employers when recruiting and selecting (such as paying the job candidate's expenses, giving proper information to the candidate etc). Companies with at least 50 employees must hire a certain percentage of trainees and young employed persons ("Rosetta" jobs). There are also special rules concerning disabled people.

#### **3.2 Work Permits**

Work permits are required for non-European Economic Area (EEA) nationals and should be applied for before the employee enters Belgium. They are usually only granted to persons in middle or senior management for a period of one year, but are renewable. In addition, residence permits are required both for the employee and his or her family and should be applied for as soon as the work permit has been granted. In addition, if the employee is not subject to the Belgian social security regime and employed by a non-Belgian employer, a Limosa declaration must be submitted before the employee starts working in Belgium.

### **4. Discrimination**

Besides various specific legislation (for example the Acts dd. 5 March and 5 June 2002 prohibiting discrimination against part-time employees and employees with

a fixed-term contract), the general Belgian anti-discrimination legislation is laid down in the following acts:

- (a) Anti-racism act dd. 10 May 2007;
- (b) Gender act dd. 10 May 2007;
- (c) General anti-discrimination act dd. 10 May 2007.

According to this legislation, discrimination on specific grounds (i.e. sex, skin colour, national or ethnic origin, age, disability, language, political conviction, wealth, etc.) is prohibited. Most of these grounds originate from the EC Discrimination Directives. For grounds not originating from EC Discrimination Directives, Belgian law allows direct or indirect discriminatory treatment if the employer can objectively justify such treatment by a legitimate aim and the means of achieving that aim are appropriate and necessary. For grounds originating from EC Discrimination Directives, it is only possible to justify indirect discriminatory treatment (i.e. when an apparently neutral provision or practice prejudices a certain group of people).

The anti-discrimination legislation gives specific legal protection to those who raise a discrimination complaint and a breach of the Discrimination Acts can lead to civil and criminal penalties.

### **5. Contracts of Employment**

#### **5.1 Freedom of Contract**

There are certain restrictions on freedom of contract. No contractual term may be less favourable to the employee than any mandatory legislative provision or any applicable collective agreement. Indeed most of the provisions protecting employees are deemed to be mandatory ("*imperative - dwingend*"). Additionally, provisions in the individual contract that allow the employer to unilaterally vary the essential elements of the contract, or to automatically terminate the contract (for instance, in the case of an employee reaching the standard retirement age) are void.

## 5.2 Form

A contract for an indefinite term need not be in writing. However, a provision purporting to contract out of a legislative provision or a collective labour agreement (where this is allowed) must be in writing, as must certain specific clauses such as a non-competition provision, a clause providing for a trial period or a clause capping the termination entitlement of a higher-paid employee. Some of these provisions must be agreed in writing prior to the commencement of employment.

Several types of contracts such as fixed-term contracts or contracts for a specific assignment must be in writing. Such contracts may be renewed but not for several successive periods, except in justified circumstances. They are closely regulated to ensure that they are not used to evade the application of legal rules on indefinite contracts, for example, those on termination of employment.

However, a certain degree of flexibility exists to conclude successive fixed-term contracts. The parties may agree to conclude a sequence of a maximum of four fixed-term contracts, each contract having a minimum term of three months (not exceeding in aggregate a period of two years; in some circumstances and provided consent is obtained from the Social Inspection, a period of three years is permitted provided each contract has a minimum term of six months).

## 5.3 Trial Periods

The parties can agree (before the commencement of employment and in writing only) to a trial period. The law provides trial periods which are different for blue-collar workers (seven to 14 days), white-collar workers (one to six months) and employees earning above a pay threshold (one to 12 months). During the trial period, the contract can be terminated on short notice which varies according to the category of employee.

Special rules apply when the contract is suspended (due to sickness, for instance)

and different periods apply for students and servants.

## 5.4 Confidentiality and Non-Competition

The law provides that an employee has a duty to refrain from disclosing business secrets and any other secrets of a confidential nature during the contract or after its expiry; nor may an employee engage in unfair competition. The terms of an employment contract can reaffirm these employee obligations but may not contain more restrictive obligations than those imposed by law.

Restrictions on competition applicable after the employment has ended are only valid if certain conditions are met (the restriction is limited to similar activities, geographically limited and does not extend beyond Belgium, applies for a maximum duration of one year and provides for non-compete compensation) and if these conditions have been expressly set out in the non-competition provision. The provision will not be effective if the employer dismisses other than in circumstances involving serious fault on the part of the employee. Where a non-competition provision is enforced the employer must make a payment to the employee equal to at least half the remuneration which would have been earned during the non-competition period had the employment continued. International companies and companies with a research and development unit benefit from more flexibility as regards the conditions of application of non-compete clauses and may also increase the duration and geographical limitations applicable to such clauses.

## 5.5 Intellectual Property

In general, the employee is owner of his inventions. It is however possible to contractually provide otherwise in respect of inventions made by an employee during his/her working hours, in the course of his/her work and with materials provided by the employer. Other than in these circumstances, there is some legal

debate as to whether an employer can contractually provide that patents will belong to it instead of to the employee.

Works protected by copyright also belong to the employee and may only be transferred to the employer by express agreement. In contrast, the patrimonial rights to software programmes and databases protected by copyright developed by employees automatically belong to the employer.

## 6. Pay and Benefits

### 6.1 Basic Pay

The National Labour Council negotiates annually a national collective labour agreement on minimum wages which is binding on all employers. As at February 2012, the standard minimum monthly gross wage amounts to €1,472.40. For full-time employees of 21½ years of age with more than six months' service this minimum wage amounts to €1,511.48. For employees of 22 or over with more than twelve months' service this minimum wage amounts to €1,528.88. In some sectors the collective labour agreements provide for remuneration scales.

Pay, including that of managers and executives, is usually index-linked as a result of compulsory collective labour agreements. The system is not uniform and different rules for the index-linking of salaries apply depending on the relevant collective agreement.

"Wage moderation" measures have been introduced that dictate salary increases at a national level. Whereas in 2012 salaries could still increase up to a maximum of 0.3%, the Belgian government has imposed a salary freeze for the period 2013 and 2014 (excluding increases resulting from the automatic indexation of salaries and the application of regular salary scale increases).

Collective labour agreements in many industry sectors require that on top of the monthly basic salary, employers pay an

additional year-end bonus in the form of a thirteenth month, or in some rare instances, even a fourteenth month salary. During his/her holiday, a white-collar worker is entitled to his normal remuneration (simple holiday pay) and an additional 92% of his monthly gross salary (double holiday pay). A white-collar worker's holiday entitlement and holiday pay is calculated by reference to the work carried out the previous year. Upon termination of a white-collar worker's employment contract, the employer is legally compelled to pay to the employee an end of service holiday payment for (i) accrued but untaken holiday in the year of termination (i.e. 15.34% of the gross remuneration earned by the employee during the year preceding the termination) and (ii) the holidays to which he/she is entitled in the year following the year of termination, based on his/her employment with the employer in the year of termination (i.e. 15.34% of the gross remuneration earned by the employee during the year of termination).

Blue-collar workers are entitled to a holiday allowance paid by the National Office of Annual Holiday ("*Office National des Vacances Annuelles - Rijksdienst voor Jaarlijkse Vakantie*"). In order to finance this, the employer must pay a contribution each quarter equal to 6% of (108% of) the gross salaries and an annual contribution equal to 10.27% of (108% of) the gross salaries.

## 6.2 Pensions

The Belgian pension system is made up of: (i) state pension, (ii) occupational pension at company or industry level and (iii) individual pension arrangements.

There is no obligation on employers generally to provide an occupational pension arrangement to their employees. However, as a result of mandatory industry or company pension schemes, a large percentage of Belgian employees do benefit from such occupational pension benefits.

The following requirements are applicable to occupational pension schemes:

- (a) the scheme must be operated by a pension fund, an insurance company or a pension institution from another EU member state
- (b) membership is compulsory for all employees fulfilling the eligibility criteria for membership
- (c) the regular legal retirement age is 65 but employees who work longer must remain covered by the pension plan
- (d) access to benefits prior to (early) retirement is only permitted in specific circumstances
- (e) the employees' entitlements to vested rights can be postponed until one year after the employees' affiliation to the pension scheme for employer contributions (provided this is specified in the pension scheme rules). Immediate vesting applies in relation to employee contributions
- (f) for tax reasons, the pension benefit should be capped at 80% of the employee's last salary
- (g) minimum investment returns are applicable (3.75% on employee contributions and 3.25% on employer contributions in DC plans)
- (h) upon leaving the company/industry, employees have the option to transfer their benefits to another pension fund or insurance company (or to leave them in the former employer's scheme).

## 6.3 Incentive Schemes

A Law of 26 March 1999 introduced a favourable tax regime for stock options generally applicable to Belgian resident individuals. This law provides that the grant of stock options constitutes a taxable benefit, calculated on the basis of a percentage of the value of the underlying shares. The grant of stock options will be deemed to have been refused on the

60<sup>th</sup> day following the date of the offer of such stock options, in the absence of an express acceptance of the offer by the employee. For listed options, the taxable benefit is determined on the basis of the stock market price preceding the offer. For non-listed options, the taxable benefit is equal to 18% (15% for options offered until 31 December 2011) of the value of the underlying shares, such percentage being increased by 1% per year or fraction of a year for the duration of the life of the option exceeding five years from the date of the offer. If certain conditions are met, the taxable benefit can be reduced to half. Any positive difference between the value of the underlying shares and the exercise price is also subject to tax. Provided specific conditions are met, the benefit derived from the grant of the stock options is not subject to social security contributions.

With effect from 1 January 2008, a bonus regime for "non-recurring benefits linked to results" was implemented in Belgium. This bonus regime is aimed at softening Belgium's reputation for having some of the most onerous taxes in Europe. Whilst "normal" remuneration is, broadly speaking, subject to combined employer and white-collar worker social security and income tax charges of 48% and 53.5% respectively, by contrast the regime of non-recurring benefits linked to results only provides for an employer contribution of 33% and an employee contribution of 13.07%.

For a bonus to be subject to this favourable regime, various conditions must be met. The key features of the scheme are as follows:

- (a) The bonus plan must be applicable to all employees or to certain categories of employees
- (b) The bonus plan must set clear and well-defined collective targets that a company, a group of companies or a certain category of employees needs to achieve. Targets that are guaranteed to be met at the time that they are set, or which are linked

to the fluctuation of the value in the company's shares, are excluded

- (c) The bonus amounts cannot exceed €3,100 net per employee per year (this amounts applies for 2013)
- (d) The bonus cannot replace other (existing) forms of remuneration (an existing bonus scheme can only be replaced under certain conditions)
- (e) The bonus plan must be introduced either through a collective bargaining agreement or, in the absence of a Trade Union Delegation for the workers involved in the bonus plan, through a collective bargaining agreement or through a so-called "act of accession" (this is a document drafted by the employer in accordance with specified procedures).

#### 6.4 Fringe Benefits

There is a comprehensive state health system, but private medical plans that provide insurance for medical expenses not covered by the social security programme are not uncommon for salaried employees.

Other fringe benefits such as cars, meal vouchers and life insurance cover are common. The procedure for agreeing, amending or withdrawing them can sometimes be cumbersome and require a number of formalities to be complied with.

#### 6.5 Deductions

Tax on employees' earnings is deducted by employers at source. The tax year is from 1 January to 31 December.

Employees' social security contributions must also be deducted at source. There are concessions and deductions allowed for non-resident executives.

## 7. Social Security

### 7.1 Coverage

The Belgian social security scheme covers: (i) old-age and survivor's pensions; (ii) unemployment; (iii) work

accidents; (iv) occupational diseases; (v) family benefits; (vi) medical care and benefits; and (vii) annual vacation.

### 7.2 Contributions

Every employer should be registered with the *Office National de Sécurité Sociale* and is liable to pay social security contributions. The scheme is funded by employers deducting social security contributions from employees' pay at source and by employers' own contributions. Both employees' and employers' contributions are based on a percentage of total earnings. Contributions are due in respect of all persons employed in Belgium. Exceptions may apply to European Union nationals who are simultaneously working in more than one EU member state or are working only temporarily in Belgium and are continuing to contribute to their home country scheme, or to nationals from countries that have reciprocal agreements with Belgium that provide for such exemptions.

Employees' social security contributions amount to 13.07% of salary and must be withheld from the gross salary. Employers' contributions must be paid on top of the gross salary and vary depending on whether they are for blue-collar (approximately 50%) or white-collar workers (approximately 35%). However, in certain sectors, these percentages can be much higher. This difference is mainly due to the fact that for blue-collar workers holiday pay is paid by the employer indirectly through social security contributions but for white-collar workers holiday pay is paid directly by the employer to the employee.

## 8. Hours of Work

Subject to exceptions, the maximum permissible hours of work are 38 hours per week. Collective agreements sometimes provide for less than the maximum. Overtime is allowed in certain circumstances within specific limits. In addition to compensatory rest periods, overtime must be paid at a premium of

50% of hourly pay, increased to 100% for Sundays and public holidays.

Work at night, on Sundays and during public holidays is only allowed under specific and strictly regulated circumstances.

## 9. Holidays and Time Off

### 9.1 Holidays

Employees are entitled to a minimum of 20 days per year, although collective labour agreements (or individual employment contracts) can increase such holiday entitlement. A holiday allowance is paid annually to blue-collar workers by a special fund. Employers pay a holiday bonus (so-called "double holiday pay") to white-collar workers in addition to the normal remuneration during the period of absence; the double holiday pay amounts to 92% of monthly gross salary.

There are ten paid public holidays.

There is a system of paid educational leave that allows employees to attend recognised courses and take a specified number of hours off work for this purpose while maintaining their salary. During the educational leave the employee is entitled to his/her regular wages, subject to a maximum ceiling provided by law. The employer receives a limited reimbursement from the state.

### 9.2 Family Leave

Women are entitled to 15 weeks' maternity leave. Maternity pay is provided by the social security fund; it amounts to 82% of the daily gross salary (uncapped) for the first 30 days and 75% of the daily gross salary (up to €94.87) for the remaining period. The father is also entitled to ten days' paid paternity leave after the birth. The first three days of paternity leave are paid by the employer. The seven remaining days are paid by the medical cost insurance to which the employer is affiliated. Paternity pay for this period amounts to 82% of the daily gross salary (up to €103.72).

Women are also entitled during their working hours to take one or two breast-feeding breaks of 30 minutes each day during a nine month period after the birth.

Both the mother and the father are entitled to parental leave up to a child's 12th birthday. The parents have a number of options: (i) they can choose to entirely suspend their employment for a maximum period of four months (this period may be split up into four separate monthly periods); (ii) the parents may prefer to work part-time during an uninterrupted period of eight months (this period may be split up into periods of a minimum two months); (iii) the parents may opt to reduce their working time from 100% to 80% during a period of 20 months (this period may be split up into periods of a minimum five months). Each parent is entitled to parental leave regardless of which parental leave option (if any) the other parent chooses.

If the employer terminates the employment contract for a reason related to parental leave, it will be compelled to pay an indemnity of six months' remuneration in addition to the ordinary termination package.

### 9.3 Illness

Employees are entitled to guaranteed wages in the event of sickness. The arrangement depends on the classification of the employee (white-collar workers or blue-collar workers), seniority and on whether the employee is in his trial period or not. White-collar workers engaged under an indefinite contract who are sick after the end of their trial period are entitled to guaranteed wages during the first 30 days of their absence. After the period covered by the guaranteed wages, the employee is entitled to benefits from the social security fund.

## 10. Health and Safety

### 10.1 Accidents

Employers are liable for their employees'

work related accidents including those occurring on the way to or from work or during and as a result of the employment. Insurance covering such liability is compulsory. Also, every employer must organise or subscribe to a company medical service responsible for the health and safety of workers.

### 10.2 Health and Safety Consultation

Any undertaking with 50 or more employees must establish a Health and Safety Committee ("*Comité pour la Prévention et Protection au Travail – Comité voor Preventie en Bescherming op het werk*") with employer and employee representatives. The committee is entitled to receive a monthly report on health and safety conditions, information on potential risks and reports on the activities of the safety officer and medical service from the employer. It must be consulted on health and safety policy, the purchase of protective equipment and changes in the working environment. It does not have power to stop the work of the undertaking on health and safety grounds.

All companies irrespective of the size of workforce must create an internal or external safety and security service in the work place, which must collaborate with the Health and Safety Committee, if any.

## 11. Industrial Relations

### 11.1 Trade Unions

There is a legally guaranteed right to form, belong to or not to belong to a trade union. Unions are not incorporated, have no liability at law and can in principle not be sued. However, a union recognised by the Ministry of Labour has locus standi in the labour Court to sue for enforcement of legal rights granted to its members. The three major union confederations, which are closely linked with the three major political parties, are as follows:

- (a) *ACV-CSC* (Confederation of Christian Trade Union) – linked to the Christian Democrats

- (b) *ABW-FGTB* (Belgian General Federation of Labour) – linked to the Socialists
- (c) *ACLVB-CGSLB* (Federation of Liberal Unions of Belgium) – linked to the Belgian Liberal Party.

Unions tend to be industry based. They usually have separate sections for white and blue-collar workers and for French and Dutch speakers. Local groups are co-ordinated at national level where the most important negotiation and decision-making occur, although there has been a trend to more company-based agreements to supplement national agreements, particularly in more prosperous, strongly unionised undertakings.

### 11.2 Collective Agreements

Collective agreements are concluded:

- (a) at national level by the National Labour Council which has a general jurisdiction in matters such as minimum wages, recruitment, hours of work, etc
- (b) at industry sector level in Joint Committees with representatives of both employers and employees in different types of trades and industries and cover matters such as minimum wages, index linking of remuneration, hours of work, annual holidays, restriction on the employers' rights of dismissal, annual bonus etc
- (c) at the individual undertaking level by agreement between the employer and the relevant unions.

### 11.3 Trade Disputes

Belgium has no comprehensive strike law, but, in the case of "official" strike action, participation is neither a crime nor a breach of contract. The contracts of the employees who are striking and of those who are prevented from working are suspended for the duration of the strike; the employees are not entitled to their wages. Employees who participate in the

strike will normally receive a daily payment from their respective union organisations. Employees who do not participate in the strike but cannot work as a result of the strike are entitled to salary from the employer or to unemployment benefits subject to the approval of the unemployment authorities. Lock-outs, although possible, are rarely initiated by employers in Belgium.

#### 11.4 Information, Consultation and Participation

Trade unions, via their representatives in the National Labour Council, have the right to be consulted by the Government on proposed regulations in certain fields of labour law. Also, unions participate in the management of, for example, the National Social Security Office, the National Employment Office and the Work Accident Fund.

At plant or undertaking level, information is provided to and consultation/negotiation can be conducted with or through:

- (a) Trade Union Delegation – these represent union members and deal with plant or undertaking level negotiations and disputes; collective labour agreements in each sector of industry determine the terms upon which a union delegation may be established in an undertaking;
- (b) Works Council – undertakings with at least 100 employees must establish a Works Council. The council is made up of employee and employer representatives and has a right to certain information about the business and a right to be consulted before certain management decisions are taken – there is a limited right of co-decision-making (principally on “social matters” like annual holiday dates). Consultation is required in respect of collective redundancies and take-overs. The Works Council must meet at least once a month and upon the request of at least

half the employees. Time spent on council activities is treated as normal working time; and

- (c) Health and Safety Committee – undertakings with 50 or more employees must have such a committee.

## 12. Acquisitions and Mergers

### 12.1 General

The Acquired Rights Directive has been implemented in Belgium under CLA n° 32 *bis*. This CLA implements the European Acquired Rights Directive and deals with the employment law implications of a take-over or acquisition of a business. In essence, it provides for an automatic and mandatory transfer of the employees (with their existing employment contract) of the transferred undertaking (or transferred part of undertaking) from the transferor to the transferee. Moreover, it makes the transferee liable together with the transferor for any obligations resulting from the transferred employment contracts existing at the time of the transfer. In principle the sale or transfer of the business cannot be used as a reason for dismissal. Likewise, unless there has been a change in the terms and conditions of employment, an employee cannot treat the sale as a breach of contract.

An undertaking that takes over another must also respect the terms of any previously agreed collective labour agreement until the expiry of that agreement. In addition, the terms of any such collective labour agreement which are deemed to form part of the individual employment contracts cannot be withdrawn or modified unilaterally by the employer.

Special rules apply when the undertaking transferred is that of an insolvent company.

### 12.2 Information and Consultation Requirements

With the exception of article 15 *bis*, the CLA n° 32 *bis* does not contain any

provisions imposing special information and/or consultation requirements in the event of a transfer of an undertaking or a part of an undertaking. Therefore, the general rules on information and consultation set out in the CLA n° 9 of 9 March 1972 apply. This provides that in the case of a merger or acquisition, closure or other significant structural changes in respect of which the undertaking is conducting negotiations, the Works Council needs to be informed at an appropriate time and before any announcement is made. It must be consulted in advance on the impact of the transaction on the employment prospects, the organisation of the work and the employment policy in general.

If the company does not have a Works Council, the information and consultation must take place with the Trade Union Delegation. If the company does not have a Trade Union Delegation, the information and consultation must take place with the Health and Safety Committee. In the absence of a Health and Safety Committee, there is no legal obligation to inform the employees directly (except in the case of a transfer of undertaking that comes within the scope of CLA n° 32 *bis*), but it is prudent to do so.

The employer must inform the employees’ representatives of the economic, financial or technical reasons for the contemplated transaction as well as of the possible economic, financial and social consequences of the transaction. In addition, the employees’ representatives must be effectively consulted on such measures, in particular on employment forecasts, on work organisation and on the company’s employment policy.

It should be noted that CLA n° 9 does not set out how the procedure of information and consultation should be conducted. Although the information could be provided verbally, it is however advisable to have written proof (e.g. a statement in the minutes of the council’s or union’s meeting). The *consultation*

should be interactive: the employer will have to give its employees' representatives the opportunity to ask questions in relation to the contemplated transaction, to formulate arguments and make counter propositions, and will have to examine and answer the questions, arguments and counter propositions.

It is important to note that, although there is a duty to effectively consult (*i.e.* to try to reach a consensus), the employer will not need to obtain an actual agreement with its employees' representatives; they have no power of veto. Accordingly, the employees' representatives will in principle not have the ability to delay or to prevent the contemplated transaction. However, case law demonstrates that trade unions can nevertheless have a significant impact on a transaction: in the case in question, trade unions (who were not informed/consulted in relation to a contemplated transfer of undertaking) started summary judicial proceedings the day before signing of the commercial agreement. The Court ruled that the company first had to duly inform and consult its employees before entering into the agreement.

Article 11 of the CLA n° 9, provides that the information must take place "*in due course and before any announcement is made*", and consultation must "*effectively*" take place "*in advance*". Article 3 of the CLA n° 9, provides that the information and consultation must take place "*prior to the decision being taken. (...) This must enable the works council to expertly conduct discussions during which the members will be able to advise, make suggestions or objections.*" Accordingly, the information and consultation process must take place prior to the decision on the planned change in structure. The employees' representatives cannot be presented with a "*fait accompli*" and the employer may not reduce the information and consultation to a mere formality. In addition, the Works Council must be informed before any public statement is made.

Even if a company does not have to inform and consult with the employees' representatives according to article 11 of CLA n° 9, it may nevertheless have an obligation to inform on the basis of article 25 of the Royal Decree of 27 November 1973, when (i) it has a Works Council and (ii) the contemplated transaction could have a significant impact on the social, financial and economic situation of the company.

Under the Royal Decree, the employees' representatives need to be informed of the consequences of the events or the decisions for the development of the company's activities and for the employees' situation. The Royal Decree does not require consultation as such. The information must be provided "*if possible, before the decision is implemented*". The information may therefore be given after signing but before closing. The words "*if possible*" mean that these decisions have to be communicated before they are implemented, unless it is practically impossible for the employer to convene the Works Council or the employer has an obligation of confidentiality based on other regulations.

Finally, if redundancies are contemplated, the employer will be obliged to follow an additional information and consultation procedure if it is facing a collective dismissal. However, the rules that must be applied in such situation are different (and stricter) than those described above.

### 12.3 Notification of Authorities

The Federal Ministers of Finance and of Economic Affairs and the Minister of Economic Affairs of the Brussels region must be notified in advance of a transfer of one-third or more of the equity of a company conducting its business in Belgium if that company's net assets are €2,500,000 or more, but no government consent or response is required and the law does not provide for any penalty in case of a failure to notify. This notification obligation does not apply in relation to the Walloon and Flemish region.

### 12.4 Liabilities

Failure to comply with the information and consultation obligations of CLA n° 9 does not affect the validity of a transaction. However, it can result in a criminal fine of between €300 and €3,000 (multiplied by the number of employees, but subject to a maximum amount of €300,000) or an administrative fine of between €150 and €1,500 (multiplied by the number of employees, but subject to a maximum amount of €150,000). In addition, employees could claim damages for actual losses suffered as a consequence of the non-compliance. However, in practice, it would be difficult for them to show such a loss. Finally, there is also a very limited risk that summary proceedings will be brought to delay the completion of the transaction until consultation has occurred. Once completed, the transaction cannot be revoked.

Failure to comply with the information obligations of the Royal Decree can also result in criminal fine of between €300 and €3,000 or administrative fines of between €150 and €1,500. However these fines are more of a theoretical risk.

In the event of a collective dismissal, failure to comply with the information and consultation obligations may also give rise to criminal sanctions. In addition, the employees may challenge the validity of the information procedure. If the challenge is found to be justified, the employees can ask to be reinstated, and failure to reinstate them will result in an additional indemnity.

## 13. Termination

### 13.1 Individual Termination

An employment contract entered into for a fixed-term or for a specific assignment expires automatically when the agreed period has elapsed or when the agreed assignment is completed.

An employment contract entered into for an indefinite period of time can be terminated by giving notice or by paying compensation in lieu of notice.

### 13.2 Notice

A contract concluded for an indefinite period of time may be terminated by the employer or the employee by giving notice. Notification of the start date and the duration of the notice period must be

in writing and sent by registered mail to the other party. The notice is deemed to have been received three working days after the date of the dispatch of the notice and takes effect on the first day of the following week in the case of

blue-collar workers, and on the first day of the following month in the case of white-collar workers. In urgent cases, this process can be expedited, using a bailiff notification. Notice periods are:

Blue-collar			
Seniority	Notice by Employer		Notice by Employee
	Employees hired before 01/01/2012	Employees hired after 01/01/2012	
< 6 months	28 days	28 days	14 days
≥ 6 months and < 5 years	35 days	40 days	14 days
≥ 5 years and < 10 years	42 days	48 days	14 days
≥ 10 years and < 15 years	56 days	64 days	14 days
≥ 15 years and < 20 years	84 days	97 days	14 days
≥ 20 years	112 days	129 days	28 days

White-collar earning €32,254 per annum or less		
Seniority	Notice by Employer	Notice by Employee
< 5 years	not less than 3 months	1,5 month
for every further commenced period of 5 years' service	a further 3 months	max 3 months

White-collar earning more than €32,254 per annum			
Seniority	Employees hired before 01/01/2012	Employees hired after 01/01/2012	Employees hired after 01/01/2014
<b>Notice by Employer</b>			
< 3 years	"reasonable notice" (not less than 3 months for each period of five years' service commenced)	91 days	91 days
≥ 3 years and < 4 years		120 days	116 days
≥ 4 years and < 5 years		150 days	145 days
≥ 5 years and < 6 years		182 days	182 days
≥ 6 years and < 7 years		210 days	203 days
≥ 7 years and < 8 years		240 days	232 days
for every further year of service		a further 30 days	a further 29 days
<b>Notice by Employee</b>			
< 5 years	max 4, 5 or 6 months depending on whether the annual salary is lower or higher than €64,508	45 days	
≥ 5 years and < 10 years		90 days	
≥ 10 years		135 days	
≥ 15 years and a annual salary > EUR 64,508		180 days	

For blue-collar workers, collective agreements regularly provide for longer notice periods and for white-collar workers, collective labour agreements can provide for certain special procedures or can impose restrictions on dismissals which may entitle the dismissed employees to additional indemnities.

Highly paid white-collar workers are defined as those earning above a pay threshold which is adjusted annually (€32,254 per annum for the year 2013). For white-collar workers hired before 1 January 2012, the notice period has to be agreed at the time of the dismissal failing which it has to be fixed by the Labour Court. In fixing a reasonable period of notice, the Court will take into account factors such as the age of the employee, his or her period of service with the employer, the position held, the remuneration as well as all circumstances of the case including the employee's prospects of finding a new job. Several formulae based on statistical analysis of relevant cases are used for calculating notice periods, but Courts are not bound

by any of them. There is a recent tendency in case law to fix the reasonable notice period at one month per year of service. For white-collar workers hired after 1 January 2012, the notice periods are fixed by statute (see above) and any of the above formulas lose their relevance.

A period of notice fixed in advance will not bind the parties, except in the case of higher paid white-collar workers (i) earning salaries above a threshold level (in 2013, €64,508 per annum); (ii) employed after 1 April 1994; and (iii) with whom a notice period was agreed before the commencement of the employment. Such previously agreed notice periods may not be less than three months for each period of five years' service commenced.

The employer can also terminate the contract by paying compensation in lieu of notice. In this case, there are no particular formalities and the termination can take effect immediately. The compensation equals the amount of the monthly remuneration (including all benefits) times the number of months/days' notice period that should otherwise have been given to the employee.

### 13.3 Reasons for Dismissal

There is, in principle, no obligation to justify a decision to give notice but the right to give notice must not be exercised "abusively" otherwise the other party may be entitled to claim damages. However, with regard to blue-collar workers, the law considers a termination to be "abusive" if the blue-collar worker can show that he or she was not dismissed for reasons connected with his or her conduct or competence or some bona fide economic reason connected with the running of the business. In addition, Belgian anti-discrimination legislation provides that it is unlawful to select employees for redundancy on discriminatory grounds.

The employer can terminate the contract immediately for gross misconduct ("*motif*

*grave - dringende reden*"), i.e. any culpable act or omission immediately rendering the continued working relationship impossible. The termination must be notified in writing but is operative instantly. If the employer does not act within three working days of discovering an employee's gross misconduct, it cannot be used to justify instant dismissal without notice or payment in lieu of notice.

Until 30 June 1997, the normal retirement age was 60 years for women and 65 years for men. As of that date, however, the retirement age for women is progressively being increased so that with effect from 2009, the normal retirement age is 65 years for both men and women.

Termination is not automatic in the case of retirement and notice has to be given by the employer but reduced notice periods apply from age 60 (in the event of a resignation by the employee) and from the age of 65 (in the event of dismissal by the employer).

Employees meeting specific age and seniority conditions are, upon dismissal, entitled to a kind of early retirement regime (*stelsel van werkloosheid met bedrijfstoelage - Régime de chômage avec complément d'entreprise*). Under this regime, these employees are entitled to supplementary unemployment allowances payable by the employer for the period from the end of the notice period until the employee reaches the age of retirement (i.e. 65 years). The amount of the supplementary unemployment allowance is equal to half of the difference between the net salary (calculated by reference to the monthly gross salary up to a ceiling) and unemployment benefits. The general early retirement regime is available to persons over 60 years of age with at least 40 years' service. In addition to the general early retirement regime, specific early retirement regimes exist for various categories of employees (e.g. for employees with a long career, employees working night shifts, etc).

### 13.4 Special Protection

The law provides special protection for several categories of employees who are considered particularly vulnerable such as pregnant women, candidates and employees' representatives in the Works Councils and Health and Safety Committees, safety advisers, employees holding political office and those called up for service with the armed forces, etc.

Such protection generally includes a prohibition against dismissal and an obligation to pay a variable sum by way of compensation if the prohibition is infringed. For instance, an employees' representative in the Works Council at the beginning of his or her mandate and with more than 20 years' service could claim a special payment of up to eight years' salary.

### 13.5 Closures and Collective Dismissals

In the event of the closure of an undertaking with an average of at least 20 employees in the four previous quarters, or in the event of a large reduction in its workforce (i.e. to below one quarter of the average number of persons employed in the four preceding quarters), an additional redundancy payment must be paid to employees with more than one year's service whose employment has been terminated during a stipulated period before or after the closure of the undertaking or reduction in its workforce.

There are other procedures and payments in the event of collective dismissals by an undertaking that had an average of at least 20 employees in the previous calendar year. How the rules on collective dismissals will apply depend upon the size of the undertaking and the number of dismissed employees. In addition to the notice or payment in lieu of notice, a payment must be made to employees who, following their redundancy, are either unemployed or have found new employment but at lower pay. An employee is not entitled to receive both collective dismissal and closure payments.

In the event of either closure or collective dismissals, there is an obligation to inform and consult with employees. The employer must inform the Works Council or, if there is no Works Council, the Trade Union Delegation or, if there is no Trade Union Delegation, the Health and Safety Committee (or the employees directly if none of these bodies exist) of the proposed redundancies or closure. In addition, various Governmental agents must be informed such as the Ministry of Labour and the Regional Office of Employment. Specific procedures, formalities and waiting periods apply in both circumstances. Failure to comply with the information and consultation procedure may give rise to severe civil, criminal and/or administrative sanctions.

## 14. Data Protection

### 14.1 Employment Records

The collection, storage and use of information held by employers about their employees and workers (prospective, current and past) are regulated by the law of 8 December 1992 on the protection of privacy in relation to the processing of personal data (the "Privacy Law"). The Privacy Law was amended with effect from 1 September 2001 by the law of 11 December 1998 implementing the EU Data Protection Directive. Infringement of the Privacy Law can lead to fines, compensation claims from affected employees or regulatory action.

Essentially employers, as data controllers, are under an obligation to ensure that they process personal data about their employees (whether held on manual files or on computer) in accordance with specified principles including the following: a requirement to ensure that data is accurate, up to date, and is not kept longer than is necessary and a requirement that it is stored securely to avoid unlawful access or accidental destruction or damage to it.

Employers are generally advised to ensure they have some sort of document

retention policy in place and to ensure that staff are aware of their data protection obligations. Employers will also need to provide certain information to the employees in respect of the data processing. A notification to the Privacy Commission (the Belgian data protection regulator) will often be required. The notification is essentially a registration of what data is processed and the purposes of the processing.

The processing of sensitive personal data, (meaning data which reveals racial or ethnic origin, political opinions, religious or philosophical beliefs or trade-union membership and data concerning sex life as well as judicial data), can only be processed if the employer can rely on one of the statutory justifications for such processing.

### 14.2 Employee Access to Data

Employees, as data subjects, have the right to make an access request. This entitles them, subject to certain limited exceptions, to be told what data is held about them, how it has been obtained and to whom it has been disclosed and to be provided with a copy of their personal data. Subject access requests are uncommon and there is no standard approach in respect of whether fees are levied for the provision of this information.

### 14.3 Monitoring

The monitoring of employee e-mail, Internet and telephone usage and Closed Circuit TV monitoring is regulated by the Privacy Law, among other pieces of legislation. On 26 April 2002, the National Labour Council approved a collective labour agreement which deals specifically with the protection of employee privacy in the context of the monitoring of electronic communications data. This agreement is binding on all employers.

Monitoring is permissible provided that it is carried out in accordance with the Privacy Law principles and processing conditions. In addition, the collective labour agreement specifies that

monitoring is only permitted for certain purposes and that the infringement of the privacy of employees should be minimised; so for example, data should be collected about the duration of Internet connections rather than data about individual sites visited. Express employee consent to monitoring will usually be required. In addition, both the Works Council and the individual employees should be made aware of the purpose for which the monitoring is being conducted. Where disciplinary action is a possible consequence of anything discovered, this too should be made clear to employees. The collective labour agreement sets out specific procedural requirements when the monitoring gives rise to a need to link the data to a specific employee.

### 14.4 Transmission of Data to Third Parties

An employer who wishes to provide employee data to third parties must do so in accordance with the Privacy Law principles and processing conditions. In many cases it may be necessary to obtain express consent to such disclosure in the absence of a legitimate business purpose for the disclosure and depending on the nature of the information in question and the location of the third party. Where the third party is based outside the EEA, it should be noted that the Privacy Law prohibits the transfer of data to a country outside the EEA unless that country ensures an adequate level of protection for personal data or one of a series of limited exceptions applies. In the context of commercial transactions where employee data is requested, care must be taken to comply with the Privacy Law. Where possible anonymised data should be provided.

*Contributed by Clifford Chance, Brussels*

# Bulgaria

## 1. Introduction

Under the Bulgarian Constitution the right to work is recognised as a fundamental right of citizens and the Bulgarian state is obliged to facilitate the exercise of that right by all persons, including those with physical or mental impairments. The Constitution expressly prohibits forced labour and sets out the following basic rights for employees: (i) the freedom to choose employment; (ii) healthy and safe working conditions; (iii) a minimum salary; (iv) remuneration corresponding to the work performed; and (v) a right to rest and leave. Each of these rights is to be exercised in accordance with the relevant legislative provisions.

The Labour Code is the principle source of law regulating the legal relationship between an employer and an employee and includes the following: addressing trade unions and employers' organisations, collective agreements, employment contracts, information and consultation rules, working time, leave, work discipline, disciplinary liability and other employer's and employee's liabilities, remuneration, health and safety and termination of the employment relationship. The majority of the provisions of the Labour Code are statutory and, therefore, may not be amended or waived even by the mutual consent of employer and employee. The Labour Code was adopted in 1986 and has been amended a number of times with a view to implementing the relevant EU Directives applicable to labour issues.

It is a fundamental principle of the Labour Code that the State must consult with the representative organisations of the employees and the employers before labour legislation is implemented. This concept is referred to as the "social dialogue". Social dialogue is achieved by means of trilateral collaboration (the "tripartite principle"). Trilateral collaboration is performed by the National Council for Tripartite Cooperation (the NCTC) which is comprised of

representatives of the Council of Ministers and the employees' and the employers' representative organisations.

State control over the implementation of labour legislation is executed by the "General Labour Inspectorate", the special executive agency to the Ministry of Labour and Social Security Policy.

It is not possible to contract out of the statutory protection conferred on employees, and contracts of employment or clauses of such contracts that are contrary to mandatory statutory provisions or to collective agreements are null and void.

Some specific areas of employment law (e.g. health and safety at work, employment promotion, collective labour disputes etc.) are governed by specific legislation (for example Health and Safety at Work Act, Employment Promotion Act, Settlement of Collective Legal Disputes Act). Bulgarian law provides that the legislative provisions of such specific legislation prevail over the more general provisions of the Labour Code.

In addition, certain labour issues are regulated in more detail by secondary legislation.

It should also be noted that other legislation also contains specific provisions regulating employment relationships, such as the Higher Education Act and Republic of Bulgaria Defence and Armed Forces Act.

Bulgaria has been a member of the International Labour Organisation since 1920 and it has ratified numerous international treaties governing labour matters such as forced labour, trade-union freedom, discrimination, minimum age for employment etc. Bulgaria ratified the European Social Charter in 2000. Such international treaties take priority over any conflicting provisions of domestic legislation.

Collective agreements are regulated by the Labour Code and have a dual nature. On the one hand they have contractual effect and on the other hand they are a source of law in the sense that they establish minimum rights and obligations in respect of certain categories of employee which are more favourable for the relevant employees than the minimum terms and conditions prescribed by the Labour Code.

The civil departments of the relevant Regional Court settle labour disputes between employees and employers. Collective labour disputes between employees' organisations and employers are settled under the procedures regulated by the Collective Labour Disputes Settlement Act, i.e. through negotiations, mediation and/or arbitration, where the arbitration is performed by the National Institute for Conciliation and Arbitration at the Ministry of Labour and Social Policy.

## 2. Categories of Employees

### 2.1 General

The terms "factory workers" (applicable to blue-collar employees who are directly involved in production or other activities principally requiring manual work) and "office workers" (applicable to white-collar employees performing mainly intellectual work) are used in the Labour Code to differentiate these two categories from a purely linguistic point of view. Bulgarian labour legislation does not include specific regulations providing for differential treatment of blue and white-collar staff.

There are currently three labour categories in Bulgaria: first, second and third and these categories are significant for the purposes of the right to retire as employees who come within the first or second labour categories are entitled to retire earlier than employees in the third category.

## 2.2 Directors

Directors who manage and represent companies perform their duties pursuant to management agreements. By their legal nature, those agreements are not contracts of employment but “special mandate” agreements, which are regulated by Bulgarian commercial and civil law. For social insurance purposes (see further below) company directors are treated as compulsory insured persons against all social insurance risks.

## 2.3 Other

The Civil Servants Act (the “CSA”) defines civil servants as persons holding salaried tenured positions in the state administration and assisting a body of state power in the exercise of its powers.

The CSA regulates the requirements that must be met by a person in order to be appointed as a civil servant. One of the key requirements is that such a person must be a Bulgarian citizen, a citizen of another EU Member State, a citizen of a European Economic Community Treaty Member State or a citizen of the Swiss Confederation. Civil servants do not work under an employment relationship regulated by the Labour Code but under a civil-service relationship that is governed by the CSA. The establishment of a civil-service relationship is always preceded by an open competition procedure.

## 3. Hiring

### 3.1 Recruitment

Employers are free to select and employ personnel corresponding to their particular requirements provided that the selection and employment procedures are not discriminatory.

Employers recruit via a variety of sources such as internet or media advertising and personnel recruitment agencies. Employers may at their discretion inform the National Employment Agency of vacant positions and are further obliged to inform the Agency: (i) when such

positions are filled or are withdrawn without being filled; (ii) of those employed persons who have been notified of the vacant positions by the National Employment Agency; (iii) of those unemployed persons who have refused to accept a vacant position; and (iv) of their refusal to hire persons who have been notified of the vacant positions by the National Employment Agency.

The state policy on employment is governed by the Employment Promotion Act. This provides that each Bulgarian citizen, as well as each citizen of another European Union Member State, European Economic Area Member State or of the Swiss Confederation, is entitled to work in Bulgaria without a work permit and when they seek a job they are entitled to register with the competent local department of the National Employment Agency (see further below).

### 3.2 Work Permits

Bulgaria strictly applies the EU regulations pertaining to the free movement of people. Citizens of the EU and EEA and the Swiss Confederation do not require work permits to work in Bulgaria and are allowed to enter freely into an employment relationship with a local employer; however, they will have to apply for a long-term residence permit.

Other foreigners must follow the procedure prescribed by the Bulgarian Promotion of Employment Act. This provides that foreign citizens are entitled to employment in Bulgaria only after receiving a work permit by the National Employment Agency. The work permit is specific to an individual. A work permit entitles the holder to employment in Bulgaria for a prescribed period in a specified role for an employer which is the physical or legal entity registered under Bulgarian law that has applied for the work permit. A work permit is issued for one year and may be re-issued for up to three years. As an exception, a work permit may exceed three years in

duration in the case of: (i) the managerial staff of companies and branches of companies established in Bulgaria; (ii) teachers in secondary schools and universities; and (iii) professional athletes and coaches in professional sports clubs.

Work permits will be issued to foreigners for positions in respect of which Bulgarian citizenship is not required if the following conditions are satisfied:

- (a) the state, development and public interests of the national labour market are satisfied;
- (b) the total number of foreigners working for the local employer does not exceed 10% of the average number of Bulgarian citizens, citizens of Member States of the European Union, citizens of other States which are parties to the Agreement on the European Economic Area, citizens of the Swiss Confederation and the persons under Art. 18, para. 3 of the Employment Promotion Act hired under an employment relationship within the preceding twelve months;
- (c) the conditions of work and pay offered are not less favourable than the conditions available to Bulgarian citizens for the relevant work category; and
- (d) the remuneration meets national minimum wage requirements.

The employment of foreigners illegally staying in Bulgaria is prohibited by law. In the event that an employer hires a foreigner illegally staying in Bulgaria in breach of this prohibition, the employer must pay the remuneration agreed with the employee for a period of three months, unless the employer or the employee proves a different duration of employment. The remuneration may not be lower than the minimum salary established for Bulgaria or for the economic activity concerned.

In addition, the penalty for a legal person who has hired a foreigner illegally staying in Bulgaria is between BGN 3,000 and BGN 30,000. When the violation has been committed by an individual, the penalty is between BGN 750 and BGN 7,500.

## 4. Discrimination

The Labour Code prohibits direct or indirect discrimination on the grounds of ethnicity, origin, gender, sexual orientation, race, skin colour, age, political and religious convictions, affiliation to trade union and other public organisations and movements, family and property status, mental or physical disabilities, as well as differences in the contract term and the duration of working time.

The Protection Against Discrimination Act (the "PADA") also prohibits direct or indirect discrimination on the grounds of gender, race, nationality, ethnicity, genetics, citizenship, origin, religion or belief, education, personal convictions, political affiliation, personal or social status, disability, age, sexual orientation, marital status and financial status (Protected Grounds) or any other grounds established by law or international agreement to which the Republic of Bulgaria is a party.

Direct discrimination is legally defined as any less favourable treatment of a person, on one of the prohibited grounds specified in PADA, than the treatment another person is receiving, received, or would receive in comparable circumstances. Indirect discrimination arises where a person is placed in a less favourable position compared to other persons through an apparently neutral provision, criterion or practice, as an indirect consequence of falling within one of the protected categories specified in PADA, unless that provision, criterion or practice is objectively justified in view of a legal aim and the means of achieving this aim are appropriate and necessary.

Discrimination during the recruitment process is expressly prohibited.

Employers may not set requirements or require information with regard to the Protected Grounds, unless one of the legislative exceptions applies. In addition, employers may not refuse to employ a person on the grounds of pregnancy, maternity or parental responsibility.

Employers are also obliged to ensure equal working conditions for all employees, including: (i) equal pay for the same job or for a job of equivalent value; (ii) equal opportunities for training with a view to improving skills and qualifications; and (iii) equal criteria when terminating employment contracts and imposing disciplinary sanctions. One of the most significant obligations on an employer is the requirement to adapt the workplace to meet the particular needs of disabled employees unless the costs of such changes are unreasonably high.

Harassment, including sexual harassment, is expressly outlawed. Harassment is any unwanted physical, verbal or other conduct on one of the prohibited grounds aimed at, or resulting in, a violation of a person's dignity and the creation of a hostile, offensive or intimidating environment. Sexual harassment is any unwanted physical, verbal or other conduct of a sexual nature, which violates dignity or honour and creates a hostile, offensive, degrading or intimidating environment and in particular where the rejection of and/or pressure to accept such conduct may influence any decision-making affecting the person.

On receipt of a complaint from an employee about being harassed in his/her workplace the employer is obliged to hold an inquiry immediately and take measures to stop the harassment, including disciplinary measures where the harassment was caused by another employee.

PADA specifies limited situations in which different treatment will not amount to discrimination. For example, when different

treatment of persons on the grounds of their religion is necessary with regard to occupations in religious institutions.

The Commission for Protection against Discrimination is the competent Bulgarian institution which ensures equal opportunities and compliance with PADA and other legislative provisions regulating equal treatment. Every individual, legal entity or institution may bring a case to the Commission. The Commission may also initiate a case in circumstances where it becomes aware of discriminatory practices.

When exercising its powers, the Commission is competent to assess whether there have been violations of equal treatment legislation and has the power to: (i) order the cessation of discriminatory treatment and require the status quo to be re-established; (ii) impose administrative sanctions and enforcement measures; and (iii) issue mandatory directions for compliance with equal treatment legislation. In cases of discrimination, the Commission can impose pecuniary sanctions ranging from BGN 250 to BGN 2,500. More severe sanctions may be imposed in serious cases. Sanctions ranging from BGN 500 to BGN 2000 can be imposed in circumstances where an employer fails to provide the Commission with evidence or information that has been requested or fails to allow access to its premises.

The decisions of the Commission are subject to appeal to the Supreme Administrative Court.

## 5. Contracts of Employment

### 5.1 Freedom of Contract

The Labour Code regulates freedom of contract. Contracts of employment establishing terms and conditions which are less favourable for employees than mandatory provisions of law or collective agreements are null and void. Generally, neither the employer nor the employee may unilaterally modify the employment

relationship, although there are some exceptions provided by law. For example, the employer may, where production so requires or in the case of a temporary suspension of work, unilaterally assign the employee temporarily to other work in the same or in another enterprise for a period of up to 45 calendar days within one calendar year, and in the case of a temporary suspension for the duration of the suspension. Where the assignment exceeds 45 days, the consent of the employee is required. In addition, the employer may unilaterally increase an employee's pay.

However, the situation when an employee is transferred to another job within the same enterprise, without changing the specified place of work, the position and the amount of the basic wage, is not treated as a modification of the employment relationship.

## 5.2 Form

The Labour Code requires contracts of employment to be in writing. The employer is obliged to notify the respective territorial directorate of the National Revenue Agency within three days of concluding or amending the employment contract and within seven days of its termination.

Under Bulgarian law employment contracts may be concluded for an indefinite period or as fixed-term contracts.

An employment contract is deemed to be for an indefinite period, unless otherwise agreed.

Fixed-term contracts of employment may be entered into: (i) for a period not exceeding three years, unless otherwise provided for by legislation or an act of the Council of Ministers; (ii) for the duration of a specific project; (iii) for the temporary replacement of an employee who is absent from work; (iv) to temporarily fill a position until a permanent employee is appointed following a competitive examination; or (v) for a fixed term of

office where the relevant authority has specified a fixed term.

Fixed-term employment contracts for a period not exceeding three years are normally entered into for casual, seasonal or short-term work, as well as with newly employed persons in enterprises that have been pronounced bankrupt or put into liquidation. As an exception, a fixed-term employment contract may be concluded for a period of more than one year for work that is not of a casual, seasonal or short-term nature. The employee may also conclude such an employment contract for a shorter period upon request in writing. In both cases, the fixed-term employment contract may be renewed once only for a term of at least one year. Any fixed-term employment contract concluded in violation of these legislative requirements will be treated as a contract of indefinite duration.

In line with Council Directive 1999/70/EC of 28 June 1999, Bulgarian employees engaged under fixed-term contracts of employment enjoy the same rights and obligations as employees engaged under contracts of indefinite duration. Fixed-term employees may not be treated in a less favourable manner than comparable permanent employees performing the same or similar work at the enterprise solely because of the fixed-term nature of the employment relationship except where certain rights are contingent on the possession of qualifications or the acquisition of skills as a matter of law.

## 5.3 Trial Periods

The Labour Code regulates contracts of employment with a trial period. Where the work requires the abilities of the employee to be assessed, his or her permanent appointment may be preceded by a contract of employment with a trial period of up to six months. Such a contract may also be concluded where the employee wants to verify whether the work is suitable for him/her.

A trial period contract must expressly state whose benefit the trial period is being established for. Where the contract does not include such a statement, the trial period is presumed to be for the benefit of both parties.

During the trial period, the parties have the same rights and obligations as under a permanent contract of employment.

After the expiry of the trial period no other trial period contract may be concluded between the same employer and employee for the same type of work at the same establishment.

The party for whose benefit the trial period is established may terminate the contract without notice at any time prior to the expiry of the trial period. If the contract is not terminated until the expiry of the trial period, it is then considered a permanent contract of employment.

## 5.4 Confidentiality and Non-Competition

Under the provisions of the Labour Code, an employee is obliged to be loyal to the employer, not to abuse the employer's trust, not to disclose any confidential data and to protect the reputation and goodwill of the enterprise.

An express non-competition clause operating during the employment relationship may be included in a contract of employment. According to recent decisions of the Bulgarian Supreme Court of Cassation, non-competition clauses limiting the employee's right to work after the termination of the employment relationship are contrary to the Labour Code and the Constitution of the Republic of Bulgaria. The Constitution provides that every citizen has the right to freely choose an occupation and place of work. This right may not be a subject to restriction in a private agreement, including through a clause in an employment agreement. In addition, the Labour Code expressly prohibits the refusal of the personal right to work.

## 5.5 Intellectual Property

The general rule under the Copyright and Related Rights Act is that copyright over work created by an employee during the course of an employment relationship belongs to the author. The employer is, however, granted the exclusive right to use such copyrighted work for its own purposes, without permission from the author and without paying compensation, unless the contract of employment provides otherwise. The employer is allowed to exercise that right in a manner that is consistent with the usual business activity of the enterprise. If the employee's remuneration during the period when the copyrighted work was created is obviously disproportionate to the revenues collected as a result of the copyrighted work's use, the employee, as author, is entitled to demand additional remuneration.

An exception to this general rule is the copyright over computer software and databases. When the latter are created under the terms of the employment contract, the copyright belongs to the employer, unless otherwise agreed.

## 6. Pay and Benefits

### 6.1 Basic Pay

Usually, the national minimum wage is determined by the Council of Ministers annually at the beginning of the relevant year, and the minimum wage applies with effect from 1 January of that year.

The minimum monthly wage applicable until the end of 2012 was BGN 290 (approx. €148) and the minimum hourly wage was BGN 1.72 (for an eight-hour working day, five-day working week). With effect from 1 January 2013 the minimum monthly wage will be BGN 310 (approx. €158).

Collective agreements in some industrial and business sectors also may establish more generous minimum remuneration levels for the relevant industry sectors.

Employers are not obliged to index salaries. The employer and the employee may agree on index linking when concluding an individual contract of employment or index linking may be agreed in a collective labour agreement.

Normally the salaries in the so-called "budget sphere" (i.e. institutions and establishments financed by the state budget) are indexed on an annual basis pursuant to the State Budget Act.

### 6.2 Pensions

Supplementary social insurance in Bulgaria is organised by compulsory and voluntary supplementary social insurance. It is implemented through participation in supplementary, compulsory, universal and/or occupational pension funds, supplementary voluntary retirement insurance funds and/or funds for supplementary voluntary retirement insurance under occupational schemes. It is also implemented through supplementary voluntary unemployment or vocational-training insurance funds, which are incorporated and managed by insurance companies or by companies for supplementary voluntary insurance for unemployment and/or professional qualification licensed according to the procedure established by the Social Insurance Code. The Bulgarian State regulates the activity of supplementary social insurance companies and funds for the purpose of protecting the interests of the insured persons and the pensioners. The Financial Supervision Commission (a state-funded body accountable to the Bulgarian Parliament) also regulates the activity of supplementary social insurance companies and funds.

Current Bulgarian legislation gives employers the opportunity to pay social insurance contributions for their employees to supplementary voluntary social insurance companies and funds and many employers do so. Employers are not, however, legally obliged to pay such contributions for the supplementary voluntary social insurance of their

employees. As far as compulsory insurance is concerned, the social insurance contributions for universal pension funds (5% of remuneration) are compulsory and they are split between the employer and the employee (2.2% is payable by the employee and 2.8% by the employer), whereas the contributions for professional pension funds (12% of remuneration for employees working in first work category and 7% for employees working in second work category) are payable by the employer. Compulsory voluntary insurance applies to employees born after 31 December 1959.

### 6.3 Incentive Schemes

Bulgarian law does not specifically regulate share schemes and they are not mandatory. However, such schemes may be operated as a means of incentivising employees and may be covered by collective agreements.

### 6.4 Fringe Benefits

Fringe benefits, such as company cars and mobile phones, are not mandatory, though such benefits are normally provided to managerial staff. Individual contracts of employment will regulate the nature of any such benefits to be provided.

### 6.5 Deductions

Without the employee's consent, deductions from his/her salary may be made by the employer only on the grounds expressly stipulated in the Labour Code, for example, employers are obliged to make deductions from employees' salaries for income tax and social security payments borne by the employees on a monthly basis. However, an employer may not make deductions from the employee's salary as a "fine" for breach of labour discipline, for example, when the employee is late for work or smokes in unauthorized areas.

## 7. Social security

### 7.1 Coverage

The social security system regarding persons employed in Bulgaria is

administered by the State. The Social Insurance Code requires employees to be compulsorily insured against all social risks where they are employed for more than five working days (or 40 hours) within one calendar month, irrespective of the nature and duration of their work and the method of calculating and paying their remuneration. Directors who manage and represent companies under management agreements and civil servants also have to be insured against all social insurance risks.

The public social insurance system in Bulgaria provides benefits, allowances and pensions for: (i) temporary disability; (ii) temporarily reduced working capacity; (iii) disablement; (iv) maternity; (v) unemployment; (vi) old age; and (vii) death.

These benefits are funded through the social security payments of the employer and the employee, the amounts of which are determined on an annual basis.

The mandatory health insurance in Bulgaria guarantees insured persons access to medical assistance and a right to choose a general practitioner and dentist. The amount of the health insurance contribution is determined on an annual basis.

Employees may also subscribe to voluntary health insurance. Such insurance is provided by joint-stock companies, registered and licensed under the Commerce Act.

## 7.2 Contributions

Contribution rates for public social insurance funds are determined by the Social Insurance Code and depend on what work category (one, two or three) the employee is in and whether the insurance is against all risks or provides more limited cover. Contribution rates are as follows:

- (a) for pensions fund contributions –
  - (i) 17.8% for employees born before 1 January 1960 whereas,

for work category one and two the contribution rate is 20.8%;

- (ii) 12.8% for employees born after 31 December 1959 whereas, for work category one and two the contribution rate is 15.8%;

- (b) general sickness and maternity fund contributions – 3.5%; and
- (c) unemployment fund contributions – 1%.

In addition to the above contributions, a further contribution is made in relation to employment injury and occupational disease that varies from 0.4% to 1.1% of remuneration. The Public Social Insurance Budget Act determines the rate of contributions for the relevant year, according to the area of economic activity.

Social insurance contributions are calculated on the employee's gross monthly remuneration. If, however, the monthly remuneration is less than the minimum level of social insurance income laid down for employees in that profession for the relevant calendar year then the contributions are based on that minimum level. If the employee's gross monthly remuneration is in excess of the maximum level of social insurance income stipulated for the relevant calendar year the contribution is based on the maximum income level rather than the actual salary.

For example, Bulgarian law provides that the minimum amount of social insurance income for clerical staff engaged in the electrical energy production industry is BGN 380. If such a clerical employee receives gross monthly remuneration of BGN 300, then the social insurance contributions will be calculated on the amount of BGN 380, as this is the minimum social insurance income stipulated for employees in that profession. However, if the employee receives gross monthly remuneration of BGN 400, then the social insurance contributions are calculated on the amount of BGN 400. If the employee's

gross remuneration is BGN 2500, then the mandatory social insurance contributions are calculated on BGN 2000, as this is the maximum monthly social insurance income envisaged by Bulgarian law for 2012. The draft of the 2013 Social Security Budget Act provides for maximum social insurance income of BGN 2200.

From 1 January 2009 the social insurance contributions for the general sickness and maternity fund (3.5%) is split 60:40 between the employers and the employees. The social insurance contributions for the pensions fund are split between the employee and the employer as follows: (i) for employees born before 1 January 1960, 7.9% is payable by the employee and 9.9% is payable by the employer (12.9% for work category one and two); and (ii) for employees born after 31 December 1959, 5.7% is payable by the employee and 7.1% is payable by the employer (10.1% for work category one and two).

The health insurance contribution rate for 2013 is 8% of remuneration and the payment of health insurance contributions are shared between the employer and the employee in the following ratio: 4.8% - paid by the employer, 3.2% - paid by the employee.

## 8. Hours of Work

The normal working week in Bulgaria consists of five days with a maximum daily working time of eight hours and a maximum weekly working time of 40 hours. Working hours are established by the internal activity rules of each enterprise. Flexible working time may be established where the organisation of work so allows.

The Labour Code sets out the circumstances in which the above daily and weekly maximum limits can be extended, in which case the length of the normal working day may not exceed 10 hours and the total weekly working

time may not exceed 48 hours. Such extensions are permissible for a period of not more than 60 working days in one calendar year and for not more than 20 successive working days.

The normal working week can be extended in the following circumstances: (i) where production reasons so demand; (ii) after preliminary consultations by the employer with the trade union representatives and employees' representatives; (iii) after prior notification to the Labour Inspectorate; and (iv) after a written order issued by the employer. In the event the employer extends the employee's working time it is obliged to compensate the employee by granting a corresponding reduction in working time within four months.

Lower maximum working time limits exist in relation to: (i) certain jobs where the risks to the employee's life and health cannot be completely eliminated but a reduction in the working time leads to containment of those risks; and (ii) employees under the age of 18. Secondary legislation prescribes those areas of work subject to reduced working time. Where there is a reduction in working time, the employee's remuneration and other entitlements may not be reduced.

An employer, after consulting with trade union representatives and employees' representatives, may establish open-ended working hours for certain positions where the nature of the work so requires. Employees to whom open-ended working time applies are obliged to continue performing their duties beyond normal working hours, if necessary.

The employer is obliged to compensate employees for open-ended working hours on work days by granting additional annual paid leave (not less than five working days). In the case of open-ended working hours on weekends and holidays the employees have to be compensated by increased remuneration for overtime work.

Work between 10.00 p.m. and 6.00 a.m. (between 8.00 p.m. and 6.00 a.m. for employees under 18 years of age) is legally defined as night work. The maximum daily limit for night work is seven hours and the maximum weekly limit is 35 hours.

Night work is prohibited for employees under the age of 18, pregnant women and female workers at an advanced stage of IVF treatment. It is also prohibited for mothers with children under the age of six or with disabled children, employees who continue to study whilst working and reassigned employees, except where such employees consent. In the case of reassigned employees the health authorities must also be of the opinion that the night work will not adversely affect the employee's health.

Shift work is also permissible if the nature of the production process so requires. However, assigning work during two successive work shifts is prohibited.

The general rule is that overtime work (i.e. work done on the order of, or with the knowledge of and with no objection from the employer or the relevant line manager in excess of the employee's normal working hours) is prohibited and is permissible only as an exception in the following cases strictly prescribed by the Labour Code: (i) in the case of work related to national defence; (ii) to prevent, manage and mitigate the effects of crises and disasters; (iii) for the urgent repair of public utilities, transport infrastructure and for provision of medical aid; (iv) for the performance of emergency repair work to premises, machinery or equipment; (v) in order to complete work which cannot be performed within the normal working time; or (vi) to perform seasonal hard work.

The duration of overtime work performed by an employee may not exceed 150 hours within one calendar year, 30 hours of day work or 20 hours of night work within one calendar month, six hours of day work or four hours of night work during one

calendar week, or three hours of day work and two hours of night work during two successive working days. These limits may be exceeded only in the circumstances under points (i), (ii) and (iii) above.

Overtime is prohibited for certain categories of employee, such as persons under the age of 18 or pregnant women.

The rate of pay for overtime work is agreed between employer and employee but may not be less than: (i) 50% of the normal rate of pay for work on working days; (ii) 75% of the normal rate of pay for work on weekends; or (iii) 100% of the normal rate of pay for work on public holidays.

An employer and an employee may agree on part-time employment provided that the part-time employee is not treated less favourably than a comparable full-time employee who performs the same or similar work at the enterprise. Part-time employees are entitled to the same rights and have the same duties as employees working on a full-time basis, except where the law makes the enjoyment of certain rights contingent on the number of hours worked, length of service, qualifications possessed etc.

The Labour Code defines secondment as the performance of labour duties outside the place of the employee's permanent work. The maximum permissible period of secondment is 30 calendar days. Secondment for a period in excess of 30 days requires the express written consent of the employee. Pregnant women, female workers at an advanced stage of IVF treatment and mothers of children under the age of three may only be seconded with their written consent.

Where the secondment period relates to the provision of services in an EU or EEA State or in the Swiss Confederation exceeds 30 calendar days, then during the period of secondment the employee is entitled to at least the minimum work conditions as those established for

employees who perform the same or similar work in the host country.

During a period of secondment the employee is entitled to receive his/her gross salary plus a travelling allowance for the secondment period.

## 9. Holidays and Time Off

### 9.1 Holidays

The public holidays in Bulgaria are: 1 January; 3 March (National Day); 1 May; 6 May; 24 May; 6 September; 22 September; 1 November (non-study day for all educational establishments); 24, 25 and 26 December for Christmas; Good Friday, Holy Saturday and Easter, including the Sunday and Monday allocated for its celebration in the respective year.

The basic annual paid leave to which every employee is entitled by virtue of the Labour Code is not less than 20 working days. Longer basic annual paid leave may be agreed by collective agreement or by the parties to the labour relationship. During the first year of employment, an employee is only entitled to take paid annual leave after acquiring at least eight months' service.

Certain categories of employee are entitled to extended paid annual leave, in addition to the basic annual entitlement because of the special nature of their work, such as teachers. The amount of the extended annual paid leave ranges from 26 to 48 working days. The Labour Code stipulates that employees that: (i) work in conditions in which there is a risk to life and health, regardless of the safety measures taken; and (ii) have open-ended working hours, are entitled to additional annual paid leave of not less than five working days.

Recent amendments to the Bulgarian Labour Code oblige employers to approve a schedule for the use of employees' paid annual leave for the next calendar year. The schedule has to be

prepared by December 31 of the preceding year after consultations with the trade unions and employees' representatives. It has to be drafted so as to enable all employees to use their paid annual leave by the end of the calendar year in which leave accrues.

The general rule is that annual leave should be used in the year in which it accrues. However, not more than 10 working days of the paid annual leave may be postponed to the next calendar year (i) by the employer for important production reasons; and (ii) where the employer consents to the employee's written request to postpone for good cause. In addition, leave may be postponed when the employee was unable to use it, in whole or in part, during the year as a consequence of taking statutory leave.

If paid annual leave remains untaken two years after the leave year to which it relates, the right to use it automatically lapses regardless of the reasons of not using it. This rule applies to paid leave due from 2010 onwards. Paid leave referable to the years before 2010 does not lapse automatically and may be used until the termination of the employment relationship.

### 9.2 Family Leave

Female employees are entitled to pregnancy and childbirth leave of 410 days for each child. 45 days of this leave must be used before the birth of the child. In addition, an employee may take childcare leave until the child reaches the age of two. This leave is in addition to the childbirth leave and it is available in respect of the first, second and third child. For subsequent children, childcare leave of six months is available for each additional child.

Benefit payments will be made during pregnancy and childbirth leave provided that the employee has made the requisite social insurance contributions for at least twelve months. The daily cash benefit for pregnancy and childbirth leave is 90% of

the average daily remuneration or of the average daily insurance income as determined under Article 48 of the Social Insurance Code. The daily cash benefit may not exceed the average daily net remuneration for the period for which the benefit is calculated and may not be less than the national minimum daily wage. The qualifying conditions for childcare benefit are the same conditions as those for the pregnancy and childbirth benefit.

Childcare leave may be used by the father of the child or by one of the child's grandparents if they are working under an employment contract; however, in these cases the child's mother must consent to leave being used by such persons. Where childcare leave is taken by the father or a grandparent they are entitled to receive childcare benefit too. The leave of the mother is suspended during any period when the father (or grandparent) takes childcare leave. Any period of childcare leave counts as a period of employment service.

If the mother and the father of the child are married or live together, the father is entitled to 15 calendar days paid childbirth leave commencing when the child is discharged from hospital if he has made the requisite social insurance contributions for at least twelve months.

Pregnancy, childbirth and childcare payments are paid by the relevant regional office of the National Social Security Institute upon presentation of the relevant documents.

### 9.3 Illness

Persons insured against all social insurance risks (see Section 7.1 above) are entitled to the following benefits (amongst others):

- (a) cash compensation for, amongst other things, temporary disability through general sickness and occupational disease, urgent medical examinations, preventive care and rehabilitation;

- (b) cash allowances for disability as a result of general sickness, preventive care and rehabilitation and technical aids related to the impairment; and
- (c) pensions for disability arising from workplace injury, occupational disease or general sickness.

These Social Insurance Code payments act as an income substitute where employment income is lost or reduced.

#### **9.4 Other time off**

In addition to the paid annual leave and subject to employer's consent, employees are entitled to unpaid time off. Unpaid time off of up to 30 days per calendar year counts towards the employee's length of service, whereas time off in excess of 30 days per calendar year will only count towards length of service if statutory legal provisions so provide.

## **10. Health and Safety**

### **10.1 Accidents**

The Health and Safety at Work Act regulates health and safety at work.

Employers are obliged to ensure health and safety at work so that any risks to the employees' health and safety are eliminated, restricted or mitigated. Every employer must establish health and safety rules and these must comply with the legislative provisions of the Health and Safety at Work Act. Employers are also obliged to provide medical services for their employees and free protective clothing and equipment for employees who work in conditions where there is risk to their health and safety. Employees also have to be instructed and trained on safe methods of work.

A failure to ensure health and safety conditions will result in financial penalties ranging from BGN 1500 to BGN 15 000 (employers) or from BGN 1000 to BGN 10 000 (liable official), unless they are subject to more severe punishment under legislation relevant to the sector or

criminal liability under the Bulgarian Penalty Code.

### **10.2 Health and Safety Consultation**

Working Conditions Committees have to be established in any enterprise whose workforce exceeds 50 employees. Such committees may not have more than 10 members - half of them being employees' representatives and the other half being representatives of the employer. In large companies such committees may be established not only for the enterprise but also for its constituent departments.

Working Conditions Groups must be set up in companies/organizations employing between 5 and 50 persons, as well as in each separate structural department of companies/organizations employing over 50 persons. The group consists of the employer or the head of the respective structural unit and one representative of the employees responsible for safety and health at work.

The purpose of Working Conditions Committees and Groups is to provide a forum for the regular discussion of health and safety issues, to consider recommendations for improving health and safety and to verify that health and safety obligations are being complied with.

## **11. Industrial Relations**

### **11.1 Trade Unions**

Employees are free to form trade unions and to join and leave them at will, subject only to the terms of the trade union's statutes. Trade unions protect and promote employees' interests through collective bargaining, participation in trilateral collaboration, strikes and other lawful actions. There is no minimum membership requirement in order for a trade union to be qualified to represent the employees' rights and interests for the purposes of concluding a collective agreement with the relevant employer.

In order for a trade union to be recognised as a representative

organisation of employees at a national level it must have: (i) at least 75,000 members; (ii) employees organisations in at least 25 of the two-digit code economic activities identified in the Bulgarian Classification of Economic Activities and at least 51% of the people engaged in each economic activity being trade union members, or at least 50 organisations with at least five trade union members in each economic activity; (iii) local bodies in more than one fourth of the municipalities in the country and a national governing body; and (iv) legal capacity acquired in accordance with the Labour Code provisions at least three years before filing the application.

National recognition is a pre-requisite for a trade union to participate in the trilateral cooperation and the social dialogue as regulated by the Labour Code. Trade unions can influence the social and economic development of the country.

### **11.2 Collective Agreements**

The subject matter and contents of collective agreements are in general regulated by the Labour Code.

Bulgarian labour legislation establishes mandatory minimum standards for protecting employees' rights and interests. More beneficial rights and standards can, however, be agreed under collective agreements. The main purpose of collective agreements is to regulate in more detail the specific relationship between employers and employees in the context of the working conditions in any particular industrial sector.

A collective agreement may be concluded at a company, branch, industry or municipality (for activities funded by the municipal budget) level. At the first three levels only one collective agreement may be concluded.

A collective agreement at a company level must be concluded between the employer and the trade union organization, while collective agreements at branch, industry

and municipality levels are concluded between the representative trade union organisation and the representative employers' organisation.

A collective agreement must be in writing in order to be valid. It must also be registered with the labour inspectorate division where the employer's registered office is located. Agreements of sectoral and national significance are registered with the Executive Agency "General Labour Inspectorate".

The procedure for drafting, negotiating and executing a collective agreement is regulated by the Labour Code. A collective agreement will have effect in relation to the employees who are members of the trade union which is party to the agreement. Those employees who are not members of the trade union may accede to a concluded collective agreement by written application to the employer or the leadership of the trade union, in accordance with the pre-determined procedure set out in the collective agreement. As a result, the employees will be entitled to the labour and social-security advantages of the collective agreement without being members of the trade union.

An employer is obliged to notify its employees of all collective agreements applicable to the enterprise or branch or industrial sector level and to have copies of the full texts of those agreements available for inspection by the employees.

The collective agreement is deemed to have a duration of one year, unless otherwise stipulated in the agreement. The agreement may not, however, exceed two years. The parties to the agreement may agree that individual clauses of the agreement shall apply for a shorter term.

The negotiations for concluding a new collective agreement must commence not later than three months prior to the expiry of the collective agreement currently in force.

In addition, a collective agreement concluded between an employers' organisation and trade unions (i.e. an agreement that has been concluded at branch, industry or municipality level) continues to be binding on an employer who has terminated its membership in the employers' organisation after the collective agreement has been concluded.

### 11.3 Trade Disputes

There is no legal definition of "trade dispute" (also referred to as a collective labour dispute).

Generally, such disputes arise in the context of the implementation, variation or termination of a collective agreement, but disputes may also arise in relation to other issues including those relating to employment.

There are two types of trade dispute: (i) disputes relating to "rights" arising from legislation or collective agreements; and (ii) disputes relating to interests. An "interest" dispute arises from a difference of opinion between the parties in relation to the expediency of certain decisions affecting the interests of the parties. A competent court can resolve "rights" disputes, whereas disputes relating to "interests" cannot be brought to a court for resolution.

The Settlement of Collective Labour Disputes Act (the "SCLDA") regulates the means by which a trade dispute can be resolved. It provides that resolution can be achieved via the following means: (i) negotiation; (ii) mediation and/or voluntary arbitration by trade union and employers' organizations and/or the National Conciliation and Arbitration Institute); and (iii) strike action.

In order for a strike to be lawful it must be conducted in strict conformity with the procedures prescribed by the SCLDA which apply to both parties to the dispute. Both employer and non-striking employees may bring an action for a declaration that the strike is unlawful.

The SCLDA prohibits an employer from dismissing employees for the purpose of preventing or ending a lawful strike. The employer is also prohibited from employing new workers in place of those striking lawfully, except in limited prescribed circumstances ("lockout").

### 11.4 Information, Consultation and Participation

An employer is legally obliged to provide certain information to the trade unions and to the employees' representatives at the enterprise and to consult with them. Such information includes (i) the planned collective dismissals, (ii) the change of employer under Art. 123, para. 1 of the Labour Code; and (iii) the current financial and business status of the enterprise, among others.

The trade unions and the employees' representatives are obliged to make the employees aware of the information received from the employer and take into account employees' opinions on the relevant issues when consulting with the employer. Employees are entitled to prompt, reliable and intelligible information about the economic and financial situation of the employer which are relevant to their labour rights and duties. Pursuant to the Labour Code, an employer who fails to comply with its information and consultation obligations is subject to a pecuniary penalty of between BGN 1500 and BGN 15,000, whereas the specific individual who is responsible for the breach is liable to a fine between BGN 1000 and BGN 10,000. In the case of a repeated violation, the penalty is between BGN 20,000 and BGN 30,000 (employer) or BGN 5000 and BGN 20,000 (individual).

## 12. Acquisitions and Mergers

### 12.1 General

The employment relationship with an employee is not terminated in the event of a change of employer in any of the following situations: (i) as a result of the

creation of a new enterprise following a merger of enterprises; (ii) a merger following the acquisition of one enterprise by another; (iii) the distribution of the operations of one enterprise among two or more enterprises; (iv) the transfer of part of a business to another; (v) a change of the legal status of a business organisation; (vi) a change of ownership of all or part of a business; (vii) the cession or transfer of activity from one business to another (including a transfer of tangible assets); or (viii) in the case of a grant of a lease over or concession in all/part of the enterprise. The two employers are jointly and severally liable to the employee in respect of any employment obligations that arose prior to the change of the employer in scenarios (iii), (iv), (vi), (vii) and (viii) above, whereas in the cases of scenarios (i), (ii) and (v) the transferee employer is solely liable to the employees with regard these issues. The terms and conditions of the employment relationship remain unchanged following such a transfer to a new employer.

## 12.2 Information and Consultation Requirements

Prior to a transfer to a new employer, the Labour Code requires the transferor employer and the transferee employer to inform the trade unions' representatives and the employees' representatives at their enterprises of: (i) the proposed change and the date of the transfer; (ii) the reasons for the transfer; (iii) the possible legal, economic and social implications of the transfer for the employees; and (iv) the measures with regards to the employees in relation to the transfer.

The transferor employer is obliged to provide the above information no later than two months before the transfer takes place. The transferee employer is equally obliged to provide the information in good time and in any event no later than two months prior to the transfer.

If either the transferor or transferee employer envisages that measures will be

taken in relation to their respective employees in connection with the transfer, such employer is obliged to consult the trade unions' representatives and employees' representatives in good time in relation to the measures and to attempt to reach an agreement in respect of such measures. In practice it is recommended that the consultation process be completed prior to completion of the transaction.

## 12.3 Notification of Authorities

Depending on the precise circumstances of a business or share sale the Bulgarian tax authorities may need to be notified.

## 12.4 Liabilities

If an employer fails to fulfil its information and consultation obligations, the trade unions' representatives and the employees' representatives or the employees, themselves can notify the General Labour Inspectorate which may impose a fine ranging from BGN 1500 to BGN 5000 (employer) or BGN 250 to BGN 1000 (individual employee assigned to manage this process). The General Labour Inspectorate may also issue mandatory orders to the employer to end the infringement of the consultation obligations, for example, a requirement to provide the employees with the information required or to conclude an agreement with the employees in respect of the measures that will be taken in connection with the transfer. The General Labour Inspectorate does not have the powers to prevent a transaction completing.

# 13. Termination

## 13.1 Individual Termination

A contract of employment (of fixed-term or indefinite duration) may be terminated only on the grounds specified in the Labour Code. The general grounds for termination of an employment contract without a preliminary written notice are as follows:

- (a) by written agreement between the employer and the employee;

- (b) where the dismissal of an employee is declared illegal by the court or if the employee is reinstated by the court/the employer but the employee fails to report for work within two weeks of receipt of the court/employer notice;
- (c) upon the expiry of the agreed term;
- (d) upon the completion of the work as specified;
- (e) upon the return to work of the employee for whom cover has been provided;
- (f) where the position has been designated for occupation by a pregnant woman or an occupational rehabilitee, and an eligible applicant is appointed;
- (g) where the employee who was elected or who won a competitive examination starts to work (for civil service only);
- (h) if the employee is unable to execute the work assigned by reason of illness which has led to permanent incapacity (disablement);
- (i) upon the death of the person with whom the employee concluded the employment contract;
- (j) upon the death of the employee;
- (k) owing to the position being designated for performance by a civil servant.

## 13.2 Notice

The Bulgarian Labour Code differentiates the legal grounds on which an employee may terminate his/her employment contract with written notice and the grounds on which the employer is entitled to do so. The general rule is that the notice period is the same for employer and employee. Contracts of employment for an indefinite term may be terminated with 30 days' written notice. However, the parties may agree on a longer notice period, not in excess of three months. Fixed term contracts may be terminated with up to

three months' written notice but the notice cannot be longer than the unexpired part of the fixed term. Notice starts to run on the day after the notice is received.

An employee may terminate the labour contract with prior written notice for any reason. However, an employer may only terminate the contract of employment in the circumstances set out in the Labour Code. An employer wishing to terminate an employment contract must ensure it complies with applicable statutory requirements as well as the contractual requirements and ensure that any applicable procedures are strictly followed.

### 13.3 Reasons for Dismissal

An employer may only give notice to terminate the employment contract in the following circumstances:

- (a) upon closure of the enterprise;
- (b) upon closure of part of the enterprise or a reduction in workforce;
- (c) where there is a reduction in the volume of work;
- (d) when work is suspended for more than 15 working days;
- (e) where the employee lacks the capacity to perform the work;
- (f) where the employee does not possess the necessary educational or professional qualifications to perform the role;
- (g) where an employee refuses to move with the enterprise/division in which he/she works when it is relocated;
- (h) where the employee's post must be vacated in order to reinstate a wrongfully dismissed employee who previously occupied that position;
- (i) upon reaching the age of 65 in the case of professors, associate professors or persons holding a doctoral degree;

- (j) where the employment relationship has arisen after the employee has acquired and exercised his/her right to a length of service and age related pension;
- (k) where the requirements for execution of the respective duty change and the employee does not satisfy the new requirements;
- (l) if the performance of the employment contract is objectively impossible (e.g. a driver has been banned from driving).

In addition to the above cases, employees of the company's management can be dismissed with notice if a new management agreement of the company has been entered into. Such a dismissal may only be effected upon commencement of the new management agreement but not later than nine months after the commencement of the management agreement.

An employer may unilaterally terminate the contract of employment without prior written notice on a number of grounds including when:

- (a) where the employee is unable to execute the work assigned by reason of illness and the employer fails to provide the employee with suitable alternative work conforming to the requirements of the health authorities;
- (b) where the employer delays the payment of remuneration or Labour Code compensation or social insurance compensation;
- (c) if the employer changes the place or nature of work or the agreed rate of remuneration, except in the cases where the employer has the right to make such changes;
- (d) if the employer fails to fulfil other obligations agreed in the employment contract or in the collective agreement, or established by a statutory provision;

- (e) where as a consequence of the change of employer the working conditions under the new employer deteriorate substantially;
- (f) if the employee continues his/her studies as a full-time student at an educational institution, or enters a full-time doctoral degree course;
- (g) in the event that the employee enters the civil service;
- (h) the employer terminates its activity and the employee cannot submit the application for termination because the employer is no longer located at the registered address set out in the employment agreement the application may be submitted to the relevant Labor Inspectorate according to the employer's registered seat. If it is established that the employer has terminated its activity, the employment contract is considered terminated as of the date when the application for termination was submitted to the Labour Inspectorate; and/or
- (i) in the event that the employer has unilaterally placed the employee on unpaid leave. An employer must prove the existence of one of the lawful grounds for dismissal and that the dismissal has been effected following the legally prescribed procedure.

The employee may unilaterally terminate the labour contract without prior written notice to the employer in a number of circumstances including the following:

- (a) where the employee is unable to execute the work assigned by reason of illness and the employer fails to provide the employee with suitable alternative work conforming to the requirements of the health authorities;
- (b) where the employer delays the payment of remuneration or Labour

- Code compensation or social insurance compensation;
- (c) if the employer changes the place or nature of work or the agreed rate of remuneration, except in the cases where the employer has the right to make such changes;
  - (d) if the employer fails to fulfill other obligations agreed in the employment contract or in the collective agreement, or established by a statutory provision;
  - (e) where as a consequence of the change of employer the working conditions under the new employer deteriorate substantially;
  - (f) if the employee continues his/her studies as a full-time student at an educational institution, or enters a full-time doctoral degree course;
  - (g) in the event that the employee enters the civil service;
  - (h) the employer terminates its activity and the employee cannot submit the application for termination because the employer is no longer located at the registered address set out in the employment agreement the application may be submitted to the relevant Labor Inspectorate according to the employer's registered seat. If it is established that the employer has terminated its activity, the employment contract is considered terminated as of the date when the application for termination was submitted to the Labour Inspectorate; and/or
  - (i) in the event that the employer has unilaterally placed the employee on unpaid leave.

Where an employment contract is terminated at the employer's initiative in consideration of compensation the employee must consent in writing in order for the termination to be valid. If the employee fails to respond in writing to such an offer within seven days, the

employee is deemed to have rejected the proposal. If the employee accepts the offer, the employer must pay the employee a compensation sum of not less than the aggregate of the employee's previous four months' gross remuneration, unless the parties have agreed on a higher level of compensation.

The Labour Code strictly regulates the compensation payable in the case of dismissal. The potential compensation payable in the event of dismissal includes the following:

- (a) in the case of dismissal for breach of work discipline or because the employee is serving a custodial sentence, the employee must pay the employer compensation equal to the employee's gross remuneration for the notice period if employed under a contract of indefinite duration or a sum equal to the actual detriment in the case of a fixed-term employment relationship. For these purposes the detriment is the gross remuneration for any period during which the employer has been left without an employee to do the work during the remainder of the fixed-term employment contract;
- (b) in the event of dismissal by reason of closure of all or part of the enterprise, a reduction in staff or the volume of work or a suspension of work for more than 15 working days, the employee's refusal to relocate when the enterprise/division has moved to another location or because the employee's post must be vacated in order to reinstate a wrongfully dismissed employee, who previously occupied that position, the employee is entitled to compensation equal to his/her gross remuneration for the period of unemployment up to a maximum of one month's pay. A higher level of compensation may be provided for by an act of the Council of

Ministers, by a collective agreement or by the employment contract. If the employee obtains alternative work at a lower level of pay during the compensation period, the employee is entitled to be compensated for the difference in pay for the said period;

- (c) upon termination of the employment relationship (for whatever reason), if the employee is eligible for a retirement-age pension, he/she is entitled to compensation equal to two months' gross remuneration; if the employee has worked for the same employer for the last 10 years of his/her employment, the compensation is equal to six months' gross remuneration.

An employee may object to the dismissal claiming that it is unjust either through filing a petition with the employer, or by lodging a claim of unjust dismissal at court. There is no term within which the employee must file the petition with the employer nor within which the employer must respond to the petition. In practice it is normal for this procedure to be initiated and finalised shortly after the dismissal. An employee must file a claim at court within two months of the date of the alleged unjust dismissal.

#### **13.4 Special Protection**

Special rules apply to the dismissal of certain categories of employees, for example, mothers of children under the age of three, employees who have commenced statutory leave, employees suffering from a disease prescribed by an ordinance of the Minister of Health or an occupational-rehabilitatee employee. The prior written approval of the relevant Labour Inspectorate must be obtained before dismissing an employee who falls within one of the protected categories.

An employee who holds a trade union position at an enterprise, sector or national level may only be dismissed during the term of the position and for a

period of six months thereafter with the prior consent of the central leadership of the trade union concerned.

A pregnant employee or a female worker who is at an advanced stage of IVF treatment may be dismissed with prior written notice only in the following circumstances: (i) upon closure of the enterprise; (ii) if he/she refuses to move with the enterprise or division in which he/she works when the enterprise or division is relocated; (iii) where the employee's post must be vacated in order to reinstate a wrongfully dismissed employee who previously occupied this position; and (iv) if the performance of the employment contract is objectively impossible. The Labour Code provides that the employer may unilaterally terminate the contract of employment of a pregnant employee without prior written notice on the following grounds: (i) in the case of dismissal as a consequence of the employee serving a custodial sentence; and (ii) in cases of dismissal for breaches of work discipline. In the event of dismissal for breaches of work discipline the prior permission of the Labour Inspectorate is required.

An employee who is taking pregnancy or child-birth leave may be dismissed only upon closure of the enterprise. Dismissal on other grounds is unlawful.

### 13.5 Closures and Collective Dismissals

"Collective dismissals" are statutorily defined as dismissals effected by the employer for one or more reasons unrelated to the individual employee, where the number of dismissals is: (i) at least 10 in an enterprise employing more than 20 and less than 100 employees during the month preceding the collective dismissals and the dismissals are carried out over a period of 30 days; (ii) at least 10% of the employees in an enterprise employing at least 100 but not more than 300 employees during the month preceding the collective dismissals and the dismissals are carried out over a

period of 30 days; or (iii) at least 30 in an enterprise employing 300 or more employees during the month preceding the collective dismissals and the dismissals are carried out over a period of 30 days. If an employer has dismissed at least five employees within the periods specified at (i) to (iii) above, each subsequent termination of employment which is for a reason unrelated to the individual employee must be aggregated with the preceding dismissals for the purposes of establishing whether there is a collective dismissal.

The Labour Code and Employment Promotion Act regulate the collective dismissal notification procedures.

The employer must start consultations with the trade union representatives and with the employees' representatives not later than 45 days before the proposed dismissals are to take effect, with a view to reaching agreement with the representatives on how to avoid or reduce the number of dismissals and to mitigate the consequences of these dismissals. Prior to the consultation, the employer has to provide the trade union representatives and the employees' representatives with written information setting out: (i) the reasons for the proposed dismissals; (ii) the number and categories of employees to be dismissed; (iii) the redundancy selection criteria; (iv) the number of employees employed in the main economic activities, groups of professions and positions at the enterprise; (v) the period during which the dismissals due to be executed; and (vi) the compensation due in connection with the dismissals.

The employer must also forward a copy of the information to the competent division of the National Employment Agency within three days of providing this information to the employees' representatives. The proposed redundancies cannot take effect earlier than 30 days after the National Employment Agency is notified, irrespective of the notice periods.

## 14. Data Protection

### 14.1 Employment Records

An employer's collection, retention and processing of information and data about its employees, is regulated by the Personnel Data Protection Act (the "PDPA") which implements the Data Protection Directive 95/46/EC.

The PDPA defines "personal data processing" as collecting, recording, organising, keeping, adapting or amending, restoring, consulting, using, disclosing, distributing, providing, updating, combining, blocking, deleting or destroying personal data. All employers are regarded as personal data administrators. Employers must ensure that personal data processing is performed strictly in accordance with the principles and for the purposes prescribed by statute.

### 14.2 Employee Access to Data

Employees have a right to access their personal data which is being processed by the public data administrator, provided that third party rights or other interests pertaining to national security and public order would not be harmed by such access.

### 14.3 Monitoring

The Bulgarian Constitution provides that the freedom and confidentiality of correspondence is inviolable. The only exception to this rule is where monitoring occurs with express judicial consent in circumstances where it is necessary for the purposes of detecting or preventing crime. It is also possible to incorporate monitoring clauses into individual employment contracts, stipulating that computer systems are provided exclusively for work purposes and accordingly the employer has the right to access the employee's communications that are not marked as personal. By executing the contract of employment the employee grants his/her explicit consent to such monitoring.

The Constitution provides that no one may be followed, photographed, filmed, recorded, or subjected to similar actions without their knowledge or where they have expressed their disapproval except as provided for by legislation. Video monitoring systems may be installed in the workplace with the express consent of the employees who will be filmed. Video monitoring may also be installed if it is for the purpose of protection of human life and safeguarding assets and the persons who will be filmed are duly notified.

#### **14.4 Transmission of Data to Third Parties**

The transmission of personal data by the employer (as data administrators) to any third party is permitted in the circumstances set out in the Personal Data Protection Act. Generally, these are the same circumstances in which personal data may be processed.

The transfer of personal data to any European Union Member State or any

European Economic Area member country is permitted freely subject to compliance with the requirements of the PDPA. The transfer of personal data to a third country is permitted only in cases where the destination country ensures an adequate level of personal data protection within its territory. The adequacy of the level of protection of personal data afforded by non-EEC/EEA countries is assessed by the Commission for Personal Data Protection having regard to all the circumstances including the nature of data, the purpose and duration of their processing and the legal basis for and security measures provided in that country. No assessment is carried out where the European Commission has already assessed the adequacy of a particular jurisdiction's personal data protection regime.

In those cases where the destination country does not ensure an adequate level of personal data protection or where the European Commission has not

assessed the adequacy of personal data protection, personal data may only be transferred to the non-EEC/EEA countries if: (i) the individual to whom such data relates has given his or her explicit consent; (ii) the transfer is necessary for the performance of a contract executed between the individual and the data administrator or is being performed at such person's request; (iii) the transfer is necessary for the performance of a contract executed in the interest of the individual between the data administrator and a third party; (iv) the transfer is for the exercising of any function required by law, or is necessary for the purposes of establishing, exercising, or defending legal rights; (v) the transfer is necessary in order to protect the life and health of the data subject; or (vi) the transfer concerns data which is already in the public domain.

*Contributed by Penev LLP*

# Cyprus

## 1. Introduction

Labour law in Cyprus is an amalgam of common law and statute law. Employment relationships are primarily governed by ordinary contract law principles and supplemented where appropriate by statutory rights and obligations. Industrial relations in Cyprus are regulated by a number of statutes, the main ones being the Termination of Employment Law and the Annual Holiday with Payment Law. Cyprus has, in addition, ratified a great number of ILO Conventions.

Trade unions and employers' organizations have generally adopted a responsible attitude. Successive government's policies have adopted the approach of keeping out of disputes and promoting the idea that labour-management relations are first and foremost the business of the parties themselves and seeking the active participation of workers and employers in the formulation and implementation of social and economic policies through tripartite bodies. Effecting procedural agreements for the settlement of disputes has contributed immensely to industrial relations stability on the Island. The Industrial Relations Service of the Ministry of Labour has also played an instrumental role in maintaining industrial peace through the development and preservation of sound industrial relations.

Although mediation has become practically the only way of providing help for the resolution of disputes, the two sides may still resort to arbitration, directly or after mediation.

## 2. Categories of Employees

### 2.1 General

The law does not draw any distinction between blue and white collar employees.

## 3. Hiring

### 3.1 Recruitment

Employees are typically recruited via advertising in newspapers and journals and to a lesser extent recruitment agencies and internal advertising.

### 3.2 Work Permits

It is very difficult for a non-Cypriot, other than a EU citizen, to obtain a work permit to work in Cyprus for a local employer. In order for a work permit to be granted, it must be shown that, because of qualifications and know-how, no Cypriots are readily available for that particular post. The process is supervised by the Ministry of Labour through the local Labour Office. Work permits are usually given for six months, and they are renewable. EU citizens are freely able to work and do not need to obtain any work permits.

In the case of non-Cypriots (excluding EU citizens) employed by international business companies, obtaining a work permit for the first six months is a simple procedure. Renewals are given annually thereafter, provided that the employee and employer comply with the regulations imposed by the Central Bank and Immigration authorities.

Foreign workers are divided into two classes, "executive" staff and "non-executive" staff. The term "executive" includes expatriates registered as directors or partners with the Registrar of Companies and Official Receiver. It also includes general managers of subsidiaries and branches of publicly quoted overseas companies, as well as departmental managers of international business companies operating from Cyprus for at least two years in accordance with the conditions and requirements of the Central Bank of Cyprus. International business companies are allowed to employ a maximum of three executives, unless they persuade the Central Bank that a greater number is justified. An expatriate

who wishes to be employed in an executive position must:

- (a) Be at least 24 years old;
- (b) Have the necessary qualifications; and
- (c) Receive appropriate remuneration (the minimum acceptable annual salary for newly appointed executives is €41,000). This amount may be adjusted annually by the authorities according to fluctuations in the salaries' index.

Expatriates employed in professional, administrative, managerial, technical, or clerical positions are classified as "non-executive" personnel. "Non-executive" staff must be recruited from within Cyprus. If all formal procedures are followed, such as announcing a position in the local press, and no suitable Cypriot candidates can be found, international business companies are allowed to employ an expatriate for the position.

The Migration Officer at the Ministry of Interior is the responsible authority for the initial grant and subsequent renewals of Temporary Residence and Employment (TRE) permits granted to all expatriates employed by international business companies in Cyprus. Any TRE permit can be revoked by the Minister of the Interior if he deems it to be in the public interest; a TRE permit will be considered automatically cancelled if the conditions under which it was granted cease to exist.

The application for an executive's First Temporary Residence Permit is made to the Civil Registry and Migration Department. The Civil Registry and Migration which issues the applicant executive his first Temporary Residence Permit within one month, unless his case warrants further consideration.

For the renewal of the Temporary Residence and Work Permit of aliens, it is necessary to submit an application on Form M.61 through the District Aliens and

Immigration Branch of the Police and to pay a fee of €34.17.

International business companies should inform the Central Bank, the Migration Officer, and the Department of Customs as soon as any of their expatriate staff resign or are no longer in their employment.

## 4. Discrimination

All forms of discrimination are prohibited by Article 28 of the Constitution including discrimination on the grounds of sexual orientation, age and religion. In addition to Article 28, a number of other laws have been implemented aimed at the elimination of sex discrimination in respect of equal pay and equal treatment. The source of these laws are various international conventions, most notably the ILO Conventions, which the Republic of Cyprus has ratified. In addition, case law has offered some assistance towards the development of the law, albeit of limited impact.

The Cyprus Government has also accepted Article 19 of the Revised European Social Charter, which provides, *inter alia*, for no less favourable treatment of migrant workers than that of nationals.

A number of additional measures aimed at removing discrimination have also been implemented:

- (a) Discrimination in social insurance legislation has been abolished almost completely.
- (b) Maternity protection legislation has been improved.
- (c) The health and safety of pregnant women and nursing mothers in the work place are better protected.
- (d) A pioneering scheme for parental leave and for leave for reasons of force majeure has been introduced.
- (e) Equal treatment in employment pensions has been secured.
- (f) Equality in pay, not only for the same or similar work, but also for work of equal value has been secured.

If the employer breaches the obligation of equal pay for equal work, he is guilty of a criminal offence and he could face a fine. Legislation also suspends the effect of any contractual terms discriminating against women.

Dismissal of and/or discrimination against an employee who has complained, or given evidence of a breach of the equal pay legislation by the employer is unlawful.

Although the ILO Convention on discrimination in employment and occupation has been incorporated into Cypriot legislation no measures have, to date, been taken to implement these provisions. Again due to lack of implementing legislation, there is, in essence, no protection and, consequently, no remedy in relation to pre-employment discrimination matters.

Equal Pay claims may be brought before the Industrial Disputes Court. If successful, the Court may make a declaratory judgment, give directions for the termination of the discrimination or award compensation to cover damages and order the employer to make up the shortfall from the date that the discriminatory practice arose.

The Equal Pay and Pregnancy Laws do create criminal offences. This is however of no value to the victim in financial terms. It appears that the criminal sanctions were introduced to show the willingness of the state to enforce the law but, unfortunately, no prosecutions have been initiated.

## 5. Contracts of Employment

### 5.1 Freedom of Contract

Parties are free to contract on whatever terms they may choose. There are, however, restrictions on the successive use of fixed-term contracts.

### 5.2 Form

In order to have legal effect, contracts must be in writing. The contract must include amongst other things details of commencement date, duration (if it is for a fixed term), the wage payable, place of work, and holiday entitlement.

### 5.3 Trial Periods

It is common to include an initial trial period in a contract and the typical duration is six months.

### 5.4 Confidentiality and Non-Competition

A contract may contain terms preventing competition and/or the disclosure of confidential information after the termination of employment but such terms are not commonly used. Such clauses will only be upheld if they are considered reasonable.

### 5.5 Intellectual Property

Intellectual property created during the course of employment belongs to the employer without compensation being payable to the employee.

## 6. Pay and Benefits

### 6.1 Basic Pay

The Government has the power to establish minimum wages by ministerial Orders. To date, the Orders issued cover the minimum wage of office clerks and shop assistants, which presently is €855 per month on engagement rising to €909 after six months' employment.

Obligations to increase wages exist if a party to the contract is a trade union or a member of a trade union is a party to the contract and wages will be reviewed at intervals in accordance with the provision of applicable collective agreements.

Wages are subject to increase twice a year by means of the review of the automatic cost-of-living adjustment.

### 6.2 Pensions

Private pension arrangements are provided by employers.

Workers who reach the pensionable age of 65 are entitled to a pension from the Social Insurance Fund based on their contributions, regardless of whether they choose to retire or continue working. In certain circumstances, the pension can be taken at the age of 63. Many enterprises provide additional retirement benefits either by making a lump sum payment or by paying a pension of their own. The pension scheme used may be based on contributions from both the employer and the employee, or from the employer only.

### 6.3 Incentive Schemes

Share scheme arrangements are administered by employers in Cyprus.

### 6.4 Fringe Benefits

Fringe benefits such as cars, houses, phones, etc are made available by employers to employees in managerial positions.

### 6.5 Deductions

Employers are obliged to deduct income tax and social security contributions from employees' salaries.

## 7. Social Security

### 7.1 Coverage

In October 1980, a new social insurance scheme (the Scheme) was put into operation. With some minor exceptions, the Scheme covers all employed and self-employed persons in the island. Non-employed persons may, under certain conditions, join the Scheme on a voluntary basis. The Scheme provides benefits by way of maternity allowance, sickness benefit, unemployment benefit, old-age pension, invalidity pension, widow's pension, orphan's benefit, missing person's allowance, marriage grant, maternity grant, funeral grant, and benefits for employment accidents and occupational diseases, i.e. injury benefit, disablement benefit, and death benefit.

### 7.2 Contributions

The contribution to the Scheme in the case of employees is 17.9% of their

insurable earnings, of which 6.8% is paid by the employee himself, 6.8% by the employer, and 4.3% from the General Revenues of the Republic of Cyprus.

The contribution in respect of self-employed persons is 16.9% of their income of which 12.6% is paid by themselves, and 4.3% from the General Revenues of the Republic of Cyprus.

In respect of voluntary contributors, the contribution is 14.8% of their insurable income, or 17.9% for a person residing in Cyprus but working abroad for a Cypriot employer, of which 11% and 13.6% respectively is paid by the voluntary contributor, and the balance from the General Revenues of the Republic of Cyprus (from 1 April 2009).

## 8. Hours of Work

Most offices observe a 40-hour week from Monday to Friday. Office hours are from 8 am to 5:30 pm, with a 90-minute lunch break during the winter, and 8 am to 7 pm, with a three-hour break during the summer. Government offices operate from 7:30 am to 2:30 pm from Monday to Friday. They are also open on Wednesday afternoons from 3 pm to 6 pm. There is a maximum working week of 48 hours including overtime.

The working time of young people and children is regulated by legislation. Persons of 15 to 18 years of age are not allowed to work more than 38 hours a week and must not work between 23.00pm and 7.00am.

## 9. Holidays and Time Off

### 9.1 Holidays

Under the Annual Holidays with Pay Law, the provision of annual holidays for all persons employed under a contract of service is mandatory. Presently, the minimum period of annual leave provided under the legislation is four weeks, 20 working days for employees working a five-day week, and 24 working days for

employees working a six-day week. Payments in lieu of any unused entitlement may be made or alternatively can be carried forward for a maximum of two years (employers contribute to the Central Holiday Fund at the rate of between 8% and 16% of their employees' wages (up to a wages ceiling) per month depending on the holiday entitlement). To be entitled to an annual holiday payment from the Fund, employees must have worked at least 13 weeks during the previous leave year.

Employers whose arrangements regarding holidays with pay are more favourable than the provisions of the Law may be exempted from contributing to the Fund. In such cases, annual leave is granted directly by the employers to their employees. Where an employed person is, by virtue of any Law, collective agreement, custom or otherwise, entitled to a longer period of holiday than three weeks, this right is guaranteed by the Annual Holidays with Pay legislation.

With respect to public holidays, there are no statutory provisions to indicate which days in the year are public holidays, except for Sunday. The public holidays given in the private sector are governed by collective agreements between employers and trade unions, and they usually follow the public holidays given in the public sector. In cases where the employer is not bound by a collective agreement, it is at his discretion to offer any of the public holidays given in the public sector.

### 9.2 Family Leave

Pregnant workers have the right to 18 weeks' paid maternity leave. 11 of the 18 weeks must be taken during the period beginning at the second week before the week in which birth is expected. The 18-week period may, in certain circumstances, be extended in cases where there is a delay in delivery of the child. Women who undertake the care of a child under 12 years old for

adoption are entitled to 16 weeks' maternity leave. Maternity pay is paid according to the Social Security Laws.

Female employees also have the right to one hour off (paid) per working day for a period of nine months after delivery or child care and breast-feeding. There is no right to paternity. Every employed parent (father and mother) who has worked for one employer for at least six months is entitled to parental leave totalling 18 weeks subsequent to a birth or adoption, in order to attend to the care and upbringing of the child. This leave is unpaid but the employee is credited with insurable earnings while taking it. Parental leave can be taken between the end of maternity leave and the child's sixth birthday for a minimum of one week and a maximum of four weeks in any year. Parents are also entitled to up to seven days' unpaid leave a year for urgent family reasons.

### **9.3 Illness**

If an employee's doctor recommends leave on ill-health grounds then the employer may require the employee to be seen by its doctor if it is not willing to grant leave. In cases where leave of absence on ill-health grounds is granted, 70% of an employee's wage is paid by the Ministry of Labour and 30% by the employer. The period over which payment will continue to be made will depend on the length of the employee's employment and the reason why leave is granted.

## **10. Health and Safety**

### **10.1 Accidents**

The workers' right to safe and healthy working conditions is safeguarded by appropriate legislation. The core legislation is the Safety and Health at Work Law, which is in line with the provisions of ILO Convention 155 of 1981 on Occupational Safety and Health, as well as with the principles and most of the provisions of the EU Framework Directive.

The Law 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. Enforcement of the legislation is imposed through inspections by qualified inspectors who make regular visits to workplaces to ensure continued compliance.

Additional health and safety legislation is gradually being implemented; the following have all recently come into effect: The Safety and Health at Work (Protection from Noise) Regulations of 2006 (P.I. 317/2006), The Safety and Health at Work (Protection from Asbestos) Regulations of 2006 (P.I. 316/2006) and The Asbestos (Safety and Health of Persons at Work) (Revoked) Law of 2006, Law 111(I)/2006.

### **10.2 Health and Safety Consultation**

The Cypriot government promotes the active involvement of both employers and workers in securing a safe and healthy working environment by introducing and implementing legislation on the establishment and operation of Safety Committees in the place of work. With respect to health and safety there is an obligation to consult with employees. Employers are also required to obtain employer's liability insurance.

## **11. Industrial Relations**

### **11.1 Trade Unions**

The business community of Cyprus is represented by the employers and Industrialist Federation (OEB), a Pancyprian independent organization comprising 40 professional associations and 400 major individual enterprises in the manufacturing, services, construction, and agricultural sectors of the economy. The OEB is the acknowledged spokesman for the business community and is consulted as such by the government.

The principal unions in Cyprus are the Pancyprian Federation of Labour (PEO)

and the Cyprus Workers' Confederation (SEK). However there are numerous other trade unions and occupational organisations such as PASYDY, POED, OELMEK, OLTEK, ETYK, POAS, and DEOK. Conflict between trade unions in Cyprus is rare and joint action among the leadership of the PEO and the SEK and the other occupational organisations is common.

### **11.2 Collective Agreements**

There are collective agreements between employers and trade unions in many industry sectors and they are the main means by which terms and conditions of employment are determined. Collective agreements usually have a two or three year duration.

### **11.3 Trade Disputes**

Article 27 of the Constitution safeguards the right to strike of every employee subject to some exceptions in relation to the army and police.

The Trade Unions Law provides that no one can be sued for conspiracy if he was acting with another in the furtherance of a trade dispute. In addition inducement to breach a contract in the furtherance of a trade dispute is not actionable.

Strikes in Cyprus are generally rare as industrial relations partners almost always find a way to agree on all issues relating to employment. The settlement of labour disputes is governed by the provisions of the Industrial Relations Code.

### **11.4 Information, Consultation and Participation**

Employers are under a duty to consult with their employees, if their employees belong to a Trade Union.

## **12. Acquisitions and Mergers**

### **12.1 General**

The provisions of the Acquired Rights Directive have been implemented in Cyprus. If the employer changes due to

the legal transfer of a business, the contractual and other rights and obligations arising from the employment relationship existing on the date of the transfer, automatically transfer to the transferee subject to a number of exceptions in relation to pensions. The transferee is obliged to continue to observe the agreed terms and conditions of any applicable collective agreement until the date of termination or expiry.

If an employee is dismissed in connection with a transfer other than for financial, technical or organisational reasons, the dismissal is illegal and the employee is entitled to damages, which are calculated according to length of service.

## 12.2 Information and Consultation Requirements

In the context of acquisitions and mergers there is an obligation to supply information and/or consult or negotiate with employee representatives, employees, works councils and trade unions.

The obligation to inform and consult is triggered when the vital interests (e.g. wages, social insurance and benefits) of employees of the trade unions are affected. The employees, or workers' representatives must be informed of the date, reasons for, and legal, financial and social implications of the transfer and of any anticipated measures. This information must be provided in good time, and in any event before the employees are directly affected by the transfer.

A sale and purchase agreement cannot be signed before the information and consultation is completed if the vital interests of trade union members will be affected.

There is no statutory minimum period over which the information/consultation process must take place; it is simply a question of fact and degree according to the circumstances of a given merger.

## 12.3 Notification of Authorities

There is a governmental body that regulates mergers and acquisitions. This must be consulted in the context of a merger or acquisition when the vital interests of trade union members are going to be affected.

The minimum period over which this consultation process can be completed will depend on the facts of each case.

Failure to comply with these consultation obligations may lead to the imposition of large fines of up to €1,700 and possible injunctions.

## 12.4 Liabilities

Failure to comply with the employee information and consultation obligations may lead to the imposition of fines not exceeding €850 and compensation may also be payable to the employees. The legislation does not specify whether the fine is multiplied by the number of employees involved and there is no case law on this point. The compensation payable to employees is calculated by reference to length and terms of service and field of work.

In addition the courts may grant an injunction preventing the transaction from completing until the information/consultation obligations are satisfied.

# 13. Termination

## 13.1 Individual Termination

An employer wishing to terminate the employment relationship must be careful to comply with the statutory reasons for dismissal.

## 13.2 Notice

Except where summary dismissal is allowed, employers are required by law to give a minimum notice period of:

- (a) 1 week's notice for 6 months to 1 year of service;

- (b) 2 weeks' notice for 1 to 2 years of service;
- (c) 4 weeks' notice for 2 to 3 years of service;
- (d) 5 weeks' notice for 3 to 4 years of service;
- (e) 6 weeks' notice for 4 to 5 years of service;
- (f) 7 weeks' notice for 5 to 6 years of service; and
- (g) 8 weeks' notice for more than 6 years of service.

An employer may terminate summarily in the circumstances listed in section 13.3 below. In addition, an employee may be summarily dismissed in other circumstances, e.g. where he/she has lied to the employer or has committed an act of gross misconduct or a criminal offence.

Notice provisions apply to redundancy dismissals as well. Employees are paid during the notice period but the employer can require the employee to accept payment in lieu of notice. An employee who receives pay in lieu of notice and finds another job keeps the pay but, if he leaves for another job while serving out his notice with the old employer, he loses the rest of the pay for the period of notice.

An employee who has been continuously employed for 26 weeks or more is required to give to his employer a minimum notice of one week. However, on notice from his employer, an employee who wishes to seek other employment may have up to five hours a week off during working hours without loss of pay.

## 13.3 Reasons for Dismissal

The basic rule is that a dismissal is unfair if the employer terminates the employment for any reason other than the exceptions provided by statute.

Before any employee can qualify for unfair dismissal compensation, he must be less than 65 years of age and must have been

continuously employed by the employer for not less than 26 weeks, unless there is a written agreement that may extend the qualifying period of continuous employment up to 104 weeks.

In cases where a dismissal is declared unfair, compensation is payable to the employee. The minimum amount payable is two weeks' pay up to a maximum of two years' wages. Factors to be considered in the award are wages, length of service, loss of career prospects, circumstances of the dismissal, and the employee's age. The maximum period of continuous employment with one employer that can be taken into account is 25 years (75.5 weeks' compensation). Moreover, the amount of compensation is decided by the Industrial Disputes Court after an application by the employee.

Termination will be considered fair and will not give rise to compensation in the following circumstances:

- (a) The employee fails to carry out his work in a reasonably efficient manner;
- (b) The employee is redundant;
- (c) The termination is due to an act of God or *force majeure*;
- (d) The contract is for a fixed term and has expired;
- (e) The employee renders himself liable to dismissal without notice; or
- (f) The contract of the employee is such that it is clear that the employer–employee relationship cannot reasonably be expected to continue.

### **13.4 Special Protection**

Pregnant employees and maternity leavers may not be dismissed unless guilty of a serious offence or conduct that justifies termination.

Trade union officials are also protected from dismissal without cause.

### **13.5 Closures and Collective Dismissals**

As stated above, redundancy is a valid reason for dismissal. Redundancy is defined by statute.

Employees are entitled to receive a statutory redundancy payment if they have been employed for a period of six months or more. Redundancy payments are not made by the employer but by the Government Redundancy Fund into which employers pay monthly contributions.

The Protection of Employees' Rights in the Event of Insolvency of the Employer Law provides for employees to be paid wages and annual leave pay due from their employer from a special fund if the employer becomes insolvent.

There are prescribed information and consultation procedures in the event of collective redundancies, i.e. where at least 10 employees in an undertaking employing between 21 and 100 employees or 10% of employees in an undertaking of between 100 and 300 employees are dismissed within 30 days.

An employer who proposes to make collective redundancies must consult the representatives of the employees in a timely manner with the aim of getting an agreement. The legislation does not stipulate a specific timetable. The

representatives must be notified in writing of the reasons for the dismissals, the criteria to be used, the period in which they will take place, the number and categories of employees who are to lose their jobs and the method of calculating any payment relating to dismissals. In addition, written notice of the collective dismissals must be given to the Ministry of Labour and Social Insurance and a copy of this notice provided to the employee representatives.

## **14. Data Protection**

### **14.1 Employment Records**

The collection, storage and use of information by employers is regulated by the Data Protection Law which effectively implements the EU Data Protection Directive.

### **14.2 Employee Access to Data**

Employees do have the right to request access to their data that is being held by their employer.

### **14.3 Monitoring**

Employers can monitor their employees' email, internet and telephone usage to the extent that such usage is not work related if monitoring is reasonable in all the circumstances.

### **14.4 Transmission of Data to Third Parties**

The Data Protection Act does not permit employers to provide their employees' data to third parties. However, if such data is required by state authorities as regards the public interest and national security then such provision is not contrary to the law provided that the principle of proportionality is observed.

*Contributed by Xenios L. Xenopoulos LLC*

# The Czech Republic

## 1. Introduction

The institutional framework for and the functioning of the labour market in the Czech Republic are regulated by the Employment Act (N° 435/2004 Coll.), which covers, for example, the prohibition of discrimination, the operation of the state-run Labour Offices (i.e. job centres) and private labour agencies, the qualification criteria for unemployment benefits, employment of foreigners and special provisions of employment relating to disabled persons.

The principal source of law regulating the employment relationship is the Labour Code (N° 262/2006 Coll.), which covers all areas of the individual employment relationship between an employer and an employee, including for example equal treatment and prohibition of discrimination, access to information, agency employment, working conditions, health and safety at work, liability for damages and dismissal. The Labour Code only contains a general prohibition of discrimination. The Anti-Discrimination Act (N° 198/2009 Coll.) contains more specific provisions on equal treatment and the prohibition of discrimination. In addition, more specific provisions regarding medical checks of employees are to be found in the Act on Specific Medical Services (N° 373/2011 Coll.). In general, the Labour Code allows for contractual freedom of parties within the limits set by the regulatory framework; it is not therefore possible to contract out of statutory employee protection.

Although the Labour Code contains basic provisions regarding trade unions, collective labour law rules (in particular the collective bargaining procedure) are contained in the Collective Bargaining Act (N° 2/1991 Coll.). Individual employee entitlements arising from collective agreements are legally enforceable in the same manner as other rights arising from an individual employment contract.

The state carries out its supervisory function through Work Inspectorates and Labour Offices that control and monitor compliance with the obligations arising from a great variety of labour law regulations regarding, amongst other things, wages, salaries, hours of work, work safety, employment of minors and female workers.

Disputes between an employer and employee are settled in ordinary District Courts where there are specialised Labour Law senates of judges and layman jurors.

## 2. Categories of Employee

### 2.1 General

Czech employment legislation applies equally to employees at every level, i.e. employees, agency workers and contract staff, with some minor distinctions, which apply to so called top level managers (e.g. certain rights and obligations are determined differently for the top level manager, the employer has additional obligations when the top level manager was removed or resigned from the position and his/her employment is to be terminated).

Under the Labour Code, a top level manager is an employee who fulfils both of the following conditions: (i) the employee is considered to be a manager (i.e. an employee who is entrusted with the management of individuals, and is authorised to determine and assign work to subordinates as well as to organise, manage and supervise work and give binding instructions) and (ii) the employee is in a top position within the employer's operations, being directly subordinate to: (a) the employer's statutory body (the board of directors of a joint stock company or executive director of a limited liability company); or (b) another manager who is directly subordinate to the employer's statutory body, but only if such employee has another subordinate manager (rather than "ordinary employee") below him - i.e. if there are

(at least) three levels of managers under the statutory body, only the top two are considered to be top level managers.

### 2.2 Directors

The position of directors of private and public limited companies, who may or may not also be employees of the company, is further regulated by corporate law.

### 2.3 Other

Part-time employees and employees on fixed-term contracts have a statutory right, which, broadly speaking, entitles those employees to be treated no less favourably in respect of their terms and conditions of employment than a comparable full-time indefinite employee.

The Labour Code stipulates that outside a traditional employment relationship, an employer and a worker can conclude two other types of agreement relating to work that are of a similar nature to the employment contract; an agreement for the performance of a work assignment, or an agreement on working activity. These agreements must be concluded in writing.

An employer and a worker may conclude an agreement for the performance of a work assignment if the expected duration of the assigned project is no longer than 300 hours in a calendar year.

An employer and a worker can conclude an agreement on working activity regarding work that does not exceed on average half of the prescribed weekly working hours (i.e. 20 hours per week).

## 3. Hiring

### 3.1 Recruitment

Employers recruit employees through a variety of sources, including via the Internet and by advertising in newspapers and/or journals. Recruitment agencies are also commonly used. State-run Labour Offices function *inter alia* as "Job Centres" and provide a free recruitment service. Employers are

obliged to notify the Labour Office of all vacant positions (the Labour Office keeps a database of all vacant positions and of all job applicants) for which they wish to employ non-EEA nationals.

### 3.2 Work Permits

Employers may hire non-EEA nationals only if there are no EEA national job applicants suitable who are available at the relevant time. Prior to such hiring the employers are obliged to notify the Labour Office about the vacant positions and to provide additional information. Work permits are required for employees who are non-EEA nationals, and may be granted for up to a maximum of two years with the possibility of prolonging them after this period. Swiss nationals are treated in the same way as EEA nationals. The application shall be made and the Labour Office shall issue the work permit before the employee arrives in the Czech Republic (the work permit is also a qualification for a residence permit). It is an administrative offence for an employer to employ a non-EEA national without an appropriate work permit in the Czech Republic or to employ such employees in contravention of the terms of the issued work permit. In the event of breach, the Labour Office may impose a fine from CZK 250,000 (around €10,000) up to CZK 10,000,000 (around €400,000).

## 4. Discrimination

Any direct or indirect discrimination perpetrated in the workplace on certain selected grounds (primarily gender, sexual orientation, religion, marital status, racial or ethnic origin, age, social origin or political association) is unlawful. Such discrimination in connection with recruitment is prohibited by the Employment Act and by the Labour Code in connection with treatment during the course of employment and with respect to termination of employment. The Employment Act and the Labour Code also guarantee equal treatment to all employees. The provisions of the Labour

Code only contain a general prohibition of discrimination. More specific non-discrimination and equal treatment provisions are contained in the Anti-Discrimination Act.

## 5. Contracts of Employment

### 5.1 Freedom of Contract

The basic principle that parties are free to contract on whatever terms they choose is modified by Czech Labour Law, which allows for contractual freedom of parties only within the limits set by the regulatory framework. It is therefore not possible to contract out of statutory employee protection or the mandatory provisions of the Labour Code.

Generally, employers are free to choose their employees. However, employment of persons under the age of 15 years and/or of those persons who have not completed their compulsory education is prohibited except for various artistic, cultural, advertising and sports activities as specified in the Employment Act.

Contracts may be for a fixed or an indefinite period of time (i.e. terminable by notice), as the parties think most appropriate. For the purposes of statutory protection, there is little distinction between the position of employees on fixed-term and indefinite contracts, as employers may not treat employees on fixed-term contracts less favourably than similar permanent employees. However, the use of successive fixed-term contracts is restricted. A fixed-term contract between the same parties may be concluded (or extended) for a maximum period of three years. Fixed-term contracts may be renewed/reissued twice only, therefore employment based on fixed-term contracts may not exceed nine years in total (3 x 3 years). If, contrary to the law, an employee has been engaged under a fixed-term contract for a period exceeding three years (or six or nine years in case of renewal/re-engagement of the fixed-term contract or employment

commenced within three years of a previous fixed-term contract), the employee may make a written request to the employer that the employment continue for an indefinite period.

There are exceptions to the above limitations on the use of fixed-term contracts in certain cases, i.e. where:

- (a) the use of a fixed-term contract is required by specific legislation (e.g. the Employment Act in respect of employment of non-EEA citizens);
- (b) employees working under an agency employment; or
- (c) the employee's regular place of work is outside the Czech Republic.

Either the employer or the employee may seek a court decision regarding the fulfilment of the above statutory conditions for a fixed-term contract within two months of the termination date of the original fixed-term contract.

### 5.2 Form

An employer is obliged to conclude an employment contract in writing. However, failure to reduce the contract to writing does not invalidate the employment.

An employment contract must specify the type of work, the place of work and the date of commencement of the employment. If an employment contract does not specifically stipulate particulars of the employee's rights and duties arising out of the employment (e.g. the holiday entitlement, the length of termination period, the level of wages and the mode of payment, the schedule of weekly working hours, etc) an employer is obliged to provide the employee with a written document containing such details within one month of commencement of the employment.

### 5.3 Trial Periods

An employer and employee may agree on a trial (probationary) period of up to three months, or six months if the employee is

going to work as a manager. In any case the trial period may not exceed half of the length of the employment. The agreement must be in writing before the commencement of the employment (or at the latest on the same day) and once agreed upon, the trial period cannot be subsequently extended (except for days when an employee did not perform the work due to whole day impediments or because s/he was on holiday). During the trial period, the employment can be terminated immediately, by either the employer or the employee, for any reason or without stating the reason.

#### **5.4 Confidentiality and Non-Competition**

Although there are generally no applicable statutory rules governing confidential information in employment, there are particular statutory rules governing treatment of confidential information that apply to specified categories of employees. In general, employees of state administrative authorities and local authorities are obliged to keep confidential all facts and information which they learn whilst carrying out their duties and which, in the employer's interest, should not be communicated to another person. All other employees are bound by a general duty of good faith and a duty not to disclose the employer's confidential information. The extent of these general duties is not in all cases well defined and a prudent employer may, depending on the nature of the business, consider including an express confidentiality provision in the contract of employment. Express confidentiality provisions are permissible and often used in the contracts of employment.

An employer is obliged to issue all employees whose employment has terminated a confirmation of the former employment and a reference (if requested by an employee). Without the employee's consent, an employer may not communicate any other information concerning the employee.

An employer and an employee may conclude a non-competition agreement whereby the employee may not, for a certain period not exceeding one year after the termination of the employment, engage in gainful activity identical to the employer's scope of business, or any other activity which would compete with the business activities of the current employer. The non-compete undertaking may only be assumed by the employee if such an obligation is justifiably required from the employee given the nature of the knowledge and information the employee will have gained during the employment. The non-compete clause may be included in the employment contract or it may be entered into by separate agreement in written form. The employer must pay the former employee compensation of at least half of his/her average monthly earnings for each month of the period of the restrictive undertaking. The agreement may also include a penalty that the former employee must pay to the employer in the event that he breaches his/her obligation not to compete. Upon payment of the penalty the employee's duty not to compete terminates. The employer may terminate a non-competition agreement only during the course of the employment. Provisions concerned with preventing competition by a former employee are likely not to be enforced by the courts if the courts consider that it would be unjustified and in restraint of trade having regard, amongst other things, to the position of the former employee and the nature of the information/knowledge acquired during the course of employment.

#### **5.5 Intellectual Property**

Broadly speaking, unless the employment contract stipulates otherwise, if intellectual property is created by an employee during the course of employment, the intellectual property rights belong to the employer. Additional compensation will only be payable to the employee if the

employee's ordinary salary is disproportionately small in comparison to the employer's profits derived from the intellectual property created. However, this rule applies only to a limited extent in relation to computer programs, databases and cartographic works.

## **6. Pay and Benefits**

### **6.1 Basic Pay**

A wage may not be lower than the national minimum wage, which is determined by a Government Decree and is currently CZK 8,000 per month or CZK 48.10 per hour.

Lower-grade workers in the Czech Republic are generally paid a monthly wage, often determined by reference to an hourly rate, although in some industries it is customary for workers to be paid "piece-rates" according to the amount of work done. Overtime at a premium rate must be paid in respect of additional hours worked and work performed on bank holidays and/or weekends. Senior employees (managers) are normally paid monthly in arrears.

It is not common for pay to be index-linked and, subject to the national minimum wage, there are no legal obligations on employers to increase wages.

### **6.2 Pensions**

In the Czech Republic employees must take part in the mandatory public social security system including a public retirement and old-age pension scheme. However, anyone may choose to take part in a private pension plan in addition to the mandatory scheme by entering into a contractual relationship with any of the licensed private pension funds. The employee, however, usually receives state contributions to his insurance premiums paid to a private pension plan.

From 2013 a capital pension plan system is being introduced in the Czech Republic. The capital pension plan system represents a hybrid between a

mandatory public security system and a private pension plan system, as it allows for part of the mandatory contribution to the social security system to be transferred to the private pension fund but participation in the capital pension plan is voluntary.

Although private pension plans may be agreed as employer-sponsored occupational pension schemes, they are absolutely independent of the particular employment of the person taking part in such pension plans. Therefore, an employer bears no responsibility towards its employee or her/his contractual private pension funds, except for paying the agreed contributions (if applicable). The employer's contributions made under the private pension plan are classified as tax-deductible costs.

### 6.3 Incentive Schemes

Share schemes are not specifically provided for under Czech law and are implemented mostly in foreign owned companies as a part of their global incentive schemes.

### 6.4 Fringe Benefits

More senior employees' employment contracts may include fringe benefits; typically free use of a mobile telephone, a computer and a car for the duration of the employment. As benefits are usually contractual, the agreement should resolve the mode and timing of return if the employer proposes to withdraw the benefit.

### 6.5 Deductions

Although generally employers are prohibited from making deductions from pay, they are obliged to deduct income tax and employees' social security contributions (which are paid monthly by the employer both for itself and on behalf of the employee). They are also obliged to deduct employees' contributions to the mandatory health insurance system. Otherwise, the employer may be obliged to make deductions pursuant to a valid court resolution on deductions from

employees' salaries. The list of these deductions and their order is given in the Czech Code of Civil Proceedings Rules (N° 99/1963 Coll.).

## 7. Social Security

### 7.1 Coverage

The single state-administered social security system provides benefits by way of pensions, unemployment benefits, family-based benefits and support for individuals with a low income. Employers should be aware of the administrative burden (i.e. paperwork) connected with the contributions to some of these state benefits (for example, statutory sick pay).

Type of Insurance	Paid by Employer (%)	Paid by Employee (%)	Total (%)
Social Security	25.0	6.5 (or 8.5 <sup>1</sup> )	31.5 (or 33.5 <sup>2</sup> )
Health Insurance	9.0	4.5	13.5
Total	34.0	11.0	45.0 (or 47 <sup>3</sup> )

1 In case of participation in the capital pension plan system.

2 In case of participation in the capital pension plan system.

3 In case of participation in the capital pension plan system.

The contributions for these benefits are included in the social security contributions of the employer and the employee (see 7.2 below). The employer, therefore, does not have to pay these benefits as they are provided by the relevant state authority. Note however that during the first 14 calendar days of the sick leave (and in 2013 during the first 21 calendar days of the sick leave), except for the first three days of the sick leave, sick pay must be paid to the employee by the employer.

Mandatory health insurance is provided by specially licensed health insurers, the major one being the state owned VZP (Všeobecná zdravotní pojiš ovna). It is the employer's obligation to deduct an employee's compulsory contribution from his/her gross salary and send it to the health insurer of that employee's choice. However, anyone may choose to take part

in a private health insurance plan in addition to the mandatory scheme by entering into a contractual relationship with any of the licensed health insurers and pay additional contributions for extra services.

### 7.2 Contributions

Employers must deduct from their employees' gross salaries social security and health insurance contributions payable by employees and make an employer's contributions in respect of each employee. Employers and employees must contribute the following percentages of the employee's income to social security and health insurance:

## 8. Hours of Work

Hours of work must not exceed 40 hours per week (employees under the age of 18 shall not work more than eight hours per day). Specific limitations are imposed by the Labour Code on the hours worked each day and each week by persons working underground in mining professions and persons in the three-shift and non-stop working regime, whose working hours must not exceed 37.5 hours per week, and in the two-shift working regime, whose working hours must not exceed 38.75 hours per week. Further reduction of hours of work without an attendant reduction in wages may be provided for in a collective agreement and/or an internal instruction.

The employer decides on the mass scheduling of weekly hours of work and starting times for work after discussion

with the trade unions. Hours of work are generally scheduled into a five-day working week, however flexible working hours may be introduced after discussions with the trade union, if applicable.

An employee is entitled to a break (for food and rest) of at least 30 minutes for every six hours of continuous work (and for every 4.5 hours of continuous work in the case of employees under the age of 18). Breaks for food and rest are not counted as part of the hours of work.

The employer is obliged to schedule hours of work so that employees will have:

- (a) an uninterrupted period of daily rest of at least 12 consecutive hours between the end of one shift and the beginning of the following shift within a 24-hour period; and
- (b) an uninterrupted period of at least 35 consecutive hours (or of at least 48 hours in the case of employees under the age of 18) every week.

The Labour Code contains exceptions where the uninterrupted period of rest may be reduced below the hours set out above.

Generally, overtime work prescribed by the employer must not exceed eight hours per week and 150 hours per calendar year. Overtime work exceeding these limits may be performed only exceptionally and with the employee's consent. However, the average number of overtime working hours must not be more than eight hours per week during a reference period of 26 weeks or 52 weeks if agreed in a collective agreement. It is possible to agree with managers that their salary covers up to 416 hours overtime per year and/or with the "regular" employees that their salary covers up to 150 hours overtime per calendar year (managers are employees who are entrusted with the management of individuals, and are authorised to determine and assign work to

subordinates as well as to organise, manage and supervise work and give binding instructions).

Night workers (i.e. where hours of work are worked between 10pm and 6am) are workers who work during the night on average, not less than three hours within 24 consecutive hours at least once a week.

An employer is obliged to keep records of hours of work, overtime work, standby duties for operating emergencies and work at night, in respect of each employee.

The Labour Code provides for several types of flexible employment arrangements: the uneven spread of working hours, flexible working hours, reduced working hours, and an account of working hours.

If the nature of work requires an uneven collective schedule in individual weeks, then the employer may, after a discussion with the trade unions, decide on an uneven spread of working hours throughout a period of 26 weeks or 52 weeks, the latter only if agreed in the collective agreement. In this period, the average weekly working hours may not exceed the standard weekly limit of working hours (i.e. 40) and the length of one shift may not be more than 12 hours.

Flexible hours may be agreed to meet the interests of employees' personal needs, after discussion with the trade unions, if applicable. An employee chooses the start and/or the end of his working day while the employer can stipulate specific times of the day during which an employee must perform his duties. The total length of an individual shift may not exceed 12 hours.

Reduced working hours may be worked by agreement between the employee and the employer. The agreement can allow for an employee to work for fewer hours each day or only on certain weekdays.

The employee is paid only for the hours actually worked.

An account of working hours arrangement is used by employers who have fluctuating needs for a work force (e.g. in relation to unstable sales) and therefore employees have an uneven spread of working hours. Unevenly distributed working hours must at the end of the reference period of 26 weeks (or 52 if approved in the collective agreement) in aggregate equal the number of working hours which would have been worked if the employee had worked regular working hours (i.e. 40 hours a week). The employer must keep a record of the working hours and salary for each employee. If approved in the collective agreement, overtime work of up to 120 hours may be recorded as hours already worked in respect of the subsequent reference period. The record of working hours arrangement can only be introduced under the auspices of a collective agreement or an internal regulation.

## 9. Holidays and Time Off

### 9.1 Holidays

There are 12 statutory public holidays per annum in the Czech Republic. However, if they fall on a weekend they are not replaced, so the number of public holidays varies each year. In addition, all employees are entitled to a minimum of four weeks' (five weeks at state administrative bodies) paid annual holiday per year, which accrues on a *pro rata* basis from the first day of employment. Money may not be paid in lieu of untaken statutory holiday entitlement except on termination of employment.

The employer shall determine the period in which employees can take their holiday in accordance with a schedule of holidays and with the prior consent of the trade unions and/or work councils (if applicable), so that the employee will, as a rule, be able to take the holiday at once and before the end of the calendar year in which the entitlement has been

generated. If an employee is granted holiday in several instalments, at least one of the instalments must be not less than two weeks long, unless the employer and employee have agreed otherwise.

If the employer does not specify to the employee when the holiday should be taken (or does not approve the requested holiday) by 30 June of the calendar year following the year in which the entitlement has been accrued, the employee has the right to decide to take the holiday.

Where holiday has not been taken by the end of the subsequent calendar year because the employee has been recognized as temporarily unfit for work or as a result of taking maternity or parental leave, the employer must permit such leave to be taken after the obstacle(s) to working have gone.

## 9.2 Family Leave

The Labour Code stipulates that a woman is entitled to 28 weeks' maternity leave (37 weeks if the mother gave birth to more than one child). In addition, if either the mother and/or the father so requests, the employer is, after the maternity leave period of 28 (or 37) weeks (or after the birth of the child in case of the father), obliged to grant her/him additional parental leave until the child reaches the age of three years. For the maternity leave period of 28 (or 37) weeks the employer is obliged to retain for the employee an identical position (at the same place of work). However, during additional parental leave the employer is only obliged to retain a vacant position in accordance with the employee's employment contract.

During maternity/parental leave an employee is not entitled to his wages but receives a statutory maternity pay or a parental allowance. The parental allowance may be provided even after the termination of the additional parental leave, but until the child reaches four years of age at a maximum. However, the

employer is not obliged to retain the job for the parent during the fourth year.

Adoptive parents are entitled to take paid maternity leave for a period of 22 weeks (31 weeks if the adoptive parent has adopted more than one child) up until the child(ren) reaches the age of one and parental leave is available until the child reaches the age of three. If the child was adopted between the ages of 3 to 7 parental leave of up to 22 weeks must be granted.

## 9.3 Illness

Employees who are absent from work by reason of sickness or injury have a right to receive statutory sick pay. During the first 14 calendar days of the sick leave (and in 2013 during the first 21 calendar days of the sick leave), except for the first three days of the sick leave, sick pay must be paid to the employee by the employer. After the first three or two weeks (as applicable) the sick pay is paid by the Czech Social Security Authority.

In this respect, some employers agree to pay employees an amount greater than statutory sick pay for a limited period, the length of which will vary depending upon the custom of the industry and the status of the employee.

# 10. Health and Safety

## 10.1 Accidents

The Labour Code lays down the general principles to be followed by an employer in relation to health and safety. Employers are under a duty to have regard for the health and safety of their employees while at work (but not travelling to or from work), and are obliged by law to maintain insurance against liability for injury and disease arising out of employment. A failure to comply with the provisions of the Labour Code may result in liability. An employer is obliged to investigate the cause of any accident, report any accident to the relevant authorities and keep records of all accidents in the work place. In addition to the general principles laid down by the Labour Code, there are

numerous specific Acts and regulations governing certain types of workplace and certain types of work activity (e.g. Act on Protection of Public Health No. 20/1966 Coll., Act on Accident Insurance No. 266/2006 Coll., Act on Further Requirements on Occupational Health and Safety No. 309/2006 Coll., etc).

## 10.2 Health and Safety Consultation

Employers in the Czech Republic are under an obligation to consult with their employees on health and safety matters. Consultation must be carried out through: (i) a representative nominated by a trade union; (ii) an elected representative responsible for safety and protection of health at work; or (iii) directly with employees, if neither of the elected bodies at (i) or (ii) exists. Specified information must be made available by the employer. A representative responsible for safety and protection of health at work may be elected, but such election is optional. Should a representative be elected, the employer must then inform and consult this representative in matters relating to safety and protection of health at work. The employer can have both a representative responsible for safety and protection of health at work and a trade union/work council. Depending on the nature of the employees' resolution when establishing such representative bodies, the employer may have an obligation to consult in relation to health and safety issues with a representative responsible for safety and protection of health at work and to consult with the works council/trade unions in relation to other matters.

Where there is neither a trade union, works council nor representative responsible for safety and protection of health at work, the employer is obliged to inform and consult with the employees directly.

# 11. Industrial Relations

## 11.1 Trade Unions

The Collective Bargaining Act is a legislative scheme providing for recognition of a trade union by an

employer. In principle, an employer must recognise any trade union legally established in the business. In order to establish a trade union, three employees of the relevant workforce suffice (there is no requirement for the workforce to be of a specific size). If a trade union is established, it becomes an authorised representative of the employer's employees. Once established, the trade union must try to conclude an agreement with the employer regulating their relationship and determining the matters that should be the subject of negotiation. In the absence of an agreement, a standard model procedure applies.

Besides the trade union, employees can elect a works council and/or a representative responsible for safety and protection of health at work. Employees working for an employer who has over 1,000 employees with at least 150 employees in two different EEA countries may also establish a European Works Council.

Each of the various employee representative bodies mentioned above can exist simultaneously.

### 11.2 Collective Agreements

Collective agreements between employers and trade unions are most usually found in the industrial sector or in the health services and often regulate matters such as pay, working hours, holidays, dispute procedures and procedures to deal with redundancy. Such collective agreements may have direct legal consequences for the employer, since certain terms in such agreements may become incorporated (either expressly or by implication) into individual employee's contracts of employment and where this happens such terms become directly enforceable in court (for example collectively agreed wage rates). Furthermore, in some industries unionisation remains sufficiently strong for industrial pressure to prove an effective means of securing observance of otherwise legally unenforceable

provisions contained in collective agreements. Basically, collective agreements can be negotiated on two levels, either as house collective agreements (binding on a single employer and the trade union operating with that employer), or as sectoral collective agreements (binding on all employers and trade unions operating with those employers in a whole economic sector).

### 11.3 Trade Disputes

In general, trade disputes usually concern the conclusion of a collective agreement and the fulfilment of obligations arising from a collective agreement (except those obligations relating to the claims of an individual employee).

Contracting parties may agree to appoint a mediator to act in the settlement of their dispute. If the parties fail to agree on the mediator, he/she shall be appointed by the Ministry of Labour and Social Affairs, acting on the basis of an application made by either of the contracting parties.

If the proceedings before the mediator are unsuccessful, the contracting parties, if they so agree, may apply in writing to an arbitrator to decide their dispute. The proceedings before the arbitrator commence on his/her receipt of such application.

The Czech Republic does not have a comprehensive "strike/lockout law." Rather, businesses, individuals and trade unions are granted certain limited statutory protection from liability, which they would otherwise incur, when taking industrial action pursuant to a trade dispute. The Collective Bargaining Act deals with employees' rights to strike only with the aim of concluding a collective agreement, provided that the collective bargaining procedure and subsequent mediation and/or arbitration processes have been exhausted without success. It follows that if a collective agreement is not concluded even after proceedings before a mediator and/or arbitrator, or the

contracting parties do not apply for an arbitrator's award regarding their dispute, a strike (partial or full interruption of work by employees) or lock-out (partial or total cessation of work by the employer) may be used as the last resort, unless the industrial action is declared illegal by the court at the request of the other party. An employee who takes industrial action loses the right to pay during that period and is not entitled to receive unemployment benefits and/or sick pay. It is unfair to dismiss an employee who is taking "protected" industrial action.

### 11.4 Information, Consultation and Participation

Employers have obligations with respect to consultation and the provision of information to employees either directly or to their appropriate representatives (these are usually either a trade union or a works council). There are some differences as to the scope of the employer's obligation with respect to consultation and the provision of information vis-à-vis a trade union and a works council. In general, a trade union has a privileged position and must be informed and/or consulted in all matters like a works council, and also in matters related to health and safety at work, which would otherwise be discussed with a representative responsible for safety and protection of health at work, if elected (see above).

An employer is obliged to provide information in relation to:

- (a) the employer's economic and financial situation and probable development;
- (b) the employer's activities, their probable development and their impact on the environment, and ecological measures related thereto;
- (c) the employer's legal status and changes in such status, internal organisational structure and the person authorised to act in the name and on behalf of the employer

- in labour (industrial) relations, the prevailing activity of the employer with the relevant code according to the Economic Activities Classification and changes in the employer's business activities;
- (d) fundamental issues concerning working conditions and their changes;
  - (e) matters in respect of which the employer has consultation obligations (see further below);
  - (f) measures taken to secure equal treatment of employees and the prevention of discrimination;
  - (g) details of any open-ended employment vacancies which would be suitable for employees currently engaged under fixed-term contracts;
  - (h) occupational health and safety protection; and
  - (i) any issues coming within the scope of consultation obligations set out in a European Works Council agreement or some other agreed procedure for transnational information and consultation of employees or other procedure specified by the Labour Code.

The duties under subsections (a) and (b) do not apply to employers employing less than 10 employees.

An employer is obliged to consult employees in relation to the following:

- (a) the probable economic development of the employer;
- (b) envisaged structural changes within the employer, rationalisation or organisational measures, any measures that may have an impact on employment, in particular measures in connection with collective dismissals;
- (c) the latest number of employees and structure of the workforce,

proposed employment developments, fundamental working conditions and any changes to them;

- (d) the automatic transfer(s) of employees;
- (e) occupational health and safety protection; and
- (f) any issues coming within the scope of consultation obligations set out in a European Works Council agreement or some other agreed procedure for transnational information and consultation of employees or other procedure specified by the Labour Code.

The duties described at (a) to (c) do not apply to an employer employing less than 10 employees.

The employer's obligations with respect to the participation of a trade union include safety and working conditions and workload as well as other measures which relate to a larger number of employees.

The European Works Council Directive has been implemented in the Czech Republic, and while the initial establishment of the employee negotiating body is quite clearly regulated, subsequent negotiations are generally up to the parties to regulate.

## 12. Acquisitions and Mergers

### 12.1 General

Upon the transfer of an undertaking, employees are provided with protection in that their entire contract automatically transfers from the transferor to the transferee. Employees who do not wish to be transferred may serve notice to that effect on the transferring employer. The employment of such employees terminates on the day preceding the day when the transfer takes effect at the latest. Aside from the right to serve such notice, employees have no right to

object to their automatic transfer and its legal consequence (and may not insist on for example, the continuation of employment with the transferor). Dismissals based solely on the transfer, or changes to existing terms and conditions of employment (i.e. contract of employment or collective agreements), by reason of the transfer are void, even if agreed to by employees.

Where notice of termination is given by an employee within two months of "the effective date of transfer of rights and obligations arising from employment relations" or within two months of "the transfer effective date of performance of rights and obligations arising from employment relations" or where, within the same time-limit, the employment relationship is terminated by agreement, the employee may ask the court to determine that the employment relationship was terminated as a consequence of a substantial deterioration in working conditions in connection with the transfer. This is a new provision introduced by the Czech Labour Code and at the time of writing it was unclear what the distinction between the first two triggers is. Where termination is held to be for this reason, the employee is entitled to standard severance pay (see section 13 below).

Termination of employment is possible in the context of envisaged restructuring, as there are no specific rules prohibiting dismissal of employees prior to, during, or after the transfer (however it is not advisable to dismiss employees during the transfer of the undertaking because of a higher risk of the dismissals being challenged). The transfer of business itself, however, can never serve as a reason for dismissal and all of the general rules mentioned below, which are applicable to terminations of employment, must be complied with, i.e. termination of employment must be based on the grounds explicitly determined in the Labour Code.

## 12.2 Information and Consultation Requirements

Regardless of the numbers of employees involved, employers have information and consultation obligations to a trade union or a works council (if established). The transferor and the transferee are obliged to inform and to consult about the following:

- (a) the fact that the relevant transfer is to take place, including the established or proposed date of the transfer;
- (b) the reasons for such transfer;
- (c) the legal, economic and social implications of the transfer for the employees; and
- (d) the envisaged measures (if any) which the transferor and the transferee envisage in connection with the transfer and in relation to the employees.

The employer must fulfil his information/consultation duty 30 days before the envisaged transfer, at the latest. In this respect, the information and consultation process does not have to lead to a mutual agreement between the parties. The absence of any such agreement cannot affect the validity of the transfer.

Where neither a trade union nor works council operates in the company, the transferor and the transferee employer shall inform (but not consult) the employees, who will be directly affected by the transfer in relation to the above items 30 days before the effective date of the transfer at the latest.

## 12.3 Notification of Authorities

There is no obligation on an employer to supply information and/or consult or negotiate with any governmental or regulatory body.

## 12.4 Liabilities

In the event of a failure to comply with the consultation and information obligations,

the Work Inspectorate may impose a fine of up to CZK 200,000 (approximately €8,000), however the validity of the transfer cannot be affected. No compensation is payable to employees and it is not possible to obtain an injunction or other judicial remedy.

## 13. Termination

### 13.1 Individual Termination

An employer wishing to terminate the employment relationship must be careful to ensure compliance with both the statutory and any contractual requirements with regard to reasons for and procedures leading to dismissal.

An employment relationship may only be terminated by one of the following:

- (a) an agreement between the employer and the employee;
- (b) a notice of termination (given by the employer or by the employee);
- (c) an immediate cancellation (effected by the employer or by the employee); or
- (d) a cancellation during the trial period (by the employer or by the employee).

As far as the top level managers (within the meaning of the Labour Code) are concerned, if agreed in the employment contract the employer may remove the top level manager from the position provided that the top level manager may resign from the position. The top level manager's position then terminates the day following receipt of written notice of termination/resignation, unless a later termination date is specified. The Labour Code provides, however, that the employment relationship between the top level manager and the employer does not terminate upon the top level manager's removal/resignation from the position. As soon as the top level manager is removed from the position or resigns, the employer agrees with the top level manager on her/his reassignment to

another position within the employer's organisation. The employment with the employer will be terminated only if the employer is unable to offer the top level manager another suitable position or the top level manager refuses the offered position; such a situation would allow the manager's employment to be terminated on the grounds of redundancy. The top level managers are entitled to severance pay only if they are removed because their position ceases to exist due to organisational changes.

### 13.2 Notice

To be valid, any notice given by either the employer or the employee must be in writing and delivered to the counterparty. The delivery of the notice must also comply with the procedural rules set out in the Labour Code. The minimum notice period is two months (with the exception of notice served by employees who do not wish to be transferred to the new employer in which case the notice period may be shorter (see 12.1 above)). A longer period can be agreed, however it must always be the same for both parties. The notice period begins to run on the first day of the month following the month in which the termination notice was given.

### 13.3 Reasons for Dismissal

An employee may at any time serve a notice of termination upon his employer to terminate the employment for any reason, or without stating a reason. An employer, on the other hand, may serve a notice of termination on an employee only for a good cause expressly listed in Section 52 of the Labour Code, as follows:

- (a) closure or relocation of the employer or its part;
- (b) the employee's redundancy as a result of the employer's decision to change the goals of the enterprise or to reduce the number of employees in order to increase work efficiency;

- (c) if a relevant medical expert considers that the employee must cease to perform the current work due to a work-related injury or ill-health or the relevant public health authorities consider that the employee has attained the maximum permissible limits of exposure (e.g. to dangerous substances, underground work, etc) in the workplace;
- (d) if the employee has been certified as incapable of performing his work for a prolonged period as a consequence of a medical condition;
- (e) if the employee does not fulfil the legal or regulatory prerequisites for the performance of the work;
- (f) if the employee fails to meet the standards required by the employer and has failed to improve his performance within a stipulated time frame after a written warning from the employer to do so;
- (g) grounds for immediate termination or if the employee has committed serious breaches of his/her obligations arising from the legal rules and regulations related to the work performed. In the event of a continuous, less serious breach of an obligation arising from the legal rules and regulations related to the work performed it is possible to give the employee notice of termination, if within the preceding six months the employee was warned in writing of the possibility of dismissal in relation to such a breach;
- (h) if an employee who should be on ill-health absence fails to comply with the terms of his temporary incapacity to work e.g. by failing to remain at home.

The employer must prove that one of the above reasons existed at the time of the dismissal and that it acted fairly and reasonably in deciding to dismiss the

employee. The employer must, therefore, be careful to ensure not only that there is a permissible statutory reason for dismissing the employee, but that a fair and reasonable procedure has been followed in implementing the dismissal.

If the employer terminates the employment for grounds (a) or (b) above, the employer has an obligation to pay the employee compensation (severance pay). The severance pay is calculated as follows:

- (a) employee's average monthly salary where the employment relationship lasted less than one year;
- (b) twice employee's average monthly salary where the employment relationship lasted at least one year and less than two years;
- (c) triple employee's average monthly salary where the employment relationship lasted at least two years;
- (d) triple employee's average monthly salary plus amount specified under (a), (b) or (c) as appropriate where the employee works under a record of working hours arrangement where hours worked are transferred to the next period.

An employee's reference period of employment also takes into account a preceding period of employment with the employer provided that the gap between the two periods of employment did not exceed six months. For calculation of the severance pay the average salary is calculated on the basis of total remuneration paid to the employee during the previous calendar quarter. Severance pay where the reason for termination is ground (c) above will be a minimum of 12 months' salary.

The severance pay must be paid by the employer not only in the event of a notice served by the employer, but also in cases where the employer and the employee have concluded an agreement on termination of employment for grounds (a), (b) or (c).

If an employee is dismissed without good cause and the employee insists on being further employed, the employment continues to exist and the employee is entitled to salary compensation, provided that the employee has successfully filed an action at court. The employee may file an action for unjust dismissal within two months from the alleged unjust termination of the employment. If the employee's action is successful he may receive compensation in the amount of his salary and benefits which the employee would have received if the employment had continued or during the notice period which would have been triggered by a lawful termination. Where a total period for which the employee should be entitled to salary compensation exceeds six months, the court may, based on an application made action by the employer, reduce the amount of the salary compensation for the period in excess of six months.

#### **13.4 Special Protection**

Special rules apply to dismissals connected with, for example, pregnancy or maternity/family leave, the duties of employee representatives, asserting a statutory right, trade union membership or activities, transfers of undertakings and public interest activities. The Labour Code sets out in detail the situations in which the employer is not allowed to serve a termination notice on the employee at all (pregnancy, maternity leave, sick leave, etc). It also contains a number of complex exceptions under which these restrictions do not apply.

#### **13.5 Closures and Collective Dismissals**

Redundancy constitutes a good statutory reason for dismissal and although it may be applicable to individual termination (for example, if one employee's specific job disappears), it is commonly associated with the partial or total closure of a business.

A collective dismissal arises if a specified number of employees are dismissed or their employment is terminated by

agreement for specified reasons within a specified period of time provided that, in the latter case, at least five employees are served notice. The specified period is 30 calendar days, the specified reasons for dismissal are closure or relocation of the employer or his branch and employees' redundancy, and the specified number of dismissed employees varies according to the size of the employer and is as follows:

- (a) 10 employees if the employer employs from 20 to 100 people;
- (b) 10% of employees if the employer employs from 101 to 300 people;
- (c) 30 employees if the employer employs more than 300 people.

This statutory rule is to prevent employers from circumventing their statutory collective dismissal duties by dismissing their employees on the basis of "formal" termination agreements instead of dismissal.

No later than 30 days before serving the notices the employer must:

- (a) Inform the trade union or the works council (or the affected employees if there are no employee representatives) in writing of the intention to carry out a collective dismissal.
- (b) Inform the trade union or the works council of:
  - (i) the reasons leading to the collective dismissals;
  - (ii) the total number of employees employed by the employer and the roles involved;
  - (iii) the number of those employees to be dismissed and the roles of those employers;
  - (iv) the period within which collective dismissals are planned to take place;

- (v) the criteria proposed for selecting employees to be made redundant; and
  - (vi) the severance pay and, if relevant, other rights of the employees being made redundant.
- (c) Discuss the intended action with the trade union or the works council. During such discussions the following issues should be addressed:
    - (i) measures that could prevent or limit the collective dismissal; and
    - (ii) measures that could mitigate the adverse consequences for the dismissed employees, in particular the possibility of their relocation to other positions within the employer's business.
  - (d) Provide the trade union or the Works Council with information and data to allow them to be prepared for the discussions. The content and the amount of such information is not specified by the Labour Code and will depend on the actual situation and on the reasons leading to the proposed collective dismissals.
  - (e) Notify the Labour Office of the intended dismissals in writing (one copy of such notification needs to be provided to the trade union or the Work Council), and in the notice include especially the following information:
    - (i) the reasons leading to the collective dismissals;
    - (ii) the total number of employees to be dismissed;
    - (iii) the number and list of occupations of those employees to be dismissed;
    - (iv) the period of time during which the collective dismissals will take place;

- (v) the criteria for selection of the employees to be dismissed; and
- (vi) the date of commencement of discussions with the trade union or the works council.

The employer is obliged to deliver to the Labour Office a written notice containing its decision to carry out a collective dismissal and inform the Labour Office about the results of negotiations with the trade union or Works Council and deliver a copy of the notice to the trade union for its comments. The employment will not end until 30 days after this notice is delivered to the Labour Office, unless the dismissed employee does not insist on this extension of the notice period. In this respect, the fact that the employer and the trade union or Works Council do not reach a consensual agreement during their discussions does not have an impact on the validity of the termination notices.

If there is no trade union or Works Councils active within the employer, the employer is required to fulfil the above obligations in respect of each employee to whom the collective dismissal applies.

## 14. Data Protection

### 14.1 Employment Records

The collection and processing of employees' personal data by their employers (prospective, current and past) are regulated by the Data Protection Act (as amended), which implements the EU Data Protection Directive.

Essentially employers, as data controllers, are under an obligation to ensure that they process personal data about their employees (whether held on manual files or on computer) in accordance with specified principles including the following: a requirement to ensure that data is accurate, up to date, and is not kept longer than is necessary; a prohibition of pooling of personal data collected for different purposes; and a requirement that information is stored

securely to avoid unlawful access or accidental destruction or damage to it. If the employer processes the personal data of its employees in a manner beyond that which is legally necessary for the employment relationship, written consent must be obtained from the employees and the Data Protection Office must be notified.

Under the Data Protection Act, disclosure of personal data is considered a form of data processing and is therefore subject to the general principles under the Act. Data controllers must protect personal data and the entire database system against accidental or illegal access, destruction of data, changes to or loss of data, illegal disclosure or processing of data, and other forms of misuse of data. Employers are obliged to ensure and evidence that they have a document retention policy in place (including technical and organisational measures) and to ensure that staff are aware of their data protection obligations. Employers must also define conditions under which, and the extent to which, personal data will be processed by employees or by other persons under an agreement with the employer. In general, employees and other individuals who process data under an agreement with the employer or who come into contact with personal data when exercising a statutory right or duty are under a duty of confidentiality and are prohibited from disclosing the personal data to third parties.

#### **14.2 Employee Access to Data**

Employees, as data subjects, have the right to request information on the processing of their personal data. The employer as a data controller must, without undue delay, provide to any employees who make a request, information concerning the processing of their personal data. The information that

must be provided includes, amongst other things, the personal data or categories of personal data processed, the purpose of the processing, the source of the data and the recipients or categories of recipients of the data. The data controller is permitted to require a reasonable fee for the provision of this information; however this should not exceed the necessary costs incurred in providing it.

#### **14.3 Monitoring**

Under the Labour Code, the employer may not, without good cause related to the nature of the employer's activities, encroach upon employees' privacy in the workplace (including communal areas) by means of open or covert monitoring of employees, including the recording of telephone calls, checking their email or post.

Moreover under Article 13 of the Human Rights Charter of the Czech Constitution, citizens' rights to confidentiality of messages sent by post or other means of communication is guaranteed and under the Czech Penal Code, it is a criminal offence to breach the confidentiality of private communications.

Monitoring of employees may be carried out without the employees' consent, in all other cases the consent of the employees is necessary. It is advisable to regulate the scope of monitoring in employment contracts and in internal regulations communicated to the employees. Additional notification e.g. via computer screen warnings is helpful.

Under Czech law employees may not, without the employer's consent, use for their personal needs the employer's production equipment and other facilities necessary for the performance of their duties, including computers and telecommunication equipment. The

employer is authorised to check, in an appropriate manner, compliance with this prohibition. Permission granted to employees by the employer to use its equipment for private purposes does not release the employer from its obligation to respect the employees' right to privacy.

#### **14.4 Transmission of Data to Third Parties**

An employer who wishes to disclose employee personal data to third parties must do so in accordance with the Data Protection Act principles and processing conditions. In many cases it may be necessary to obtain the express consent of the employees concerned to such disclosure in the absence of a statutory or legitimate business purpose for the disclosure and depending on the nature of the personal data in question and the location of the third party. Transfers of personal data from the Czech Republic to other EU Member States are not restricted. However, where the third party is based outside of the EU it should be noted that the Data Protection Act prohibits the transfer of data unless such transfer is permitted by: (i) international treaty binding on the Czech Republic; (ii) a decision of the European Union's body; or (iii) one of the exceptions listed in the Data Protection Act. These exceptions include, for example, transfers made with the employee's consent or transfers necessary for the purposes of a significant public interest or transfers to countries with an adequate level of protection for personal data (by adducing adequate safeguards for the protection of the transferred personal data). Even if one of these exceptions arises, authorisation by the Office for the Protection of Personal Data is required for international data transfers other than to other EU Member States.

*Contributed by Clifford Chance, Prague*

# Denmark

## 1. Introduction

The Constitution, legislation, collective agreements, individual contracts of employment and customary practices are the main sources of employment law in Denmark.

Collective agreements are by far the most important source of labour law. There is a strong tradition whereby the rules regulating employment contracts are formulated in the first instance by the parties to collective agreements. These agreements are then interpreted by labour Courts and arbitration boards which formulate customary practice rules. Most collective agreements regulate working conditions and industrial relations.

Individual labour law is made up of general rules of contract law and provisions of legislation which protect employees. Legislation on this subject can be divided into two categories: the first category includes laws which regulate particular types of employees like salaried employees, apprentices, agricultural workers, civil servants etc. The second category of laws regulate certain employee rights like holidays, leave of absence, wage protection in case of insolvency etc without targeting specific classes of employees.

Labour disputes are resolved through the ordinary Courts on the one hand and labour Courts and arbitration boards established by trade union organisations on the other hand. Ordinary Courts have jurisdiction over the interpretation of legislation and individual contracts, while labour Courts and arbitration boards deal with cases relating to individual and collective labour rights derived from collective agreements as well as certain disputes over legislation which give jurisdiction to the labour Courts.

## 2. Categories of Employees

### 2.1 General

Employees can be divided into two broad categories: salaried employees and

workers. Salaried employees (funktionaerer) are employees carrying out mainly non-manual work. Their employment status is governed by labour law and principally by the 1938 Act – last amended in 2008 – on Employers and Salaried Employees (Funktionaerloven). Workers carrying out principally manual work have no particular legislation applying to them and their employment relationship is mainly governed by collective agreements and customary practice.

Unless specific reference is made to one category, the word “employee” is used in this section to cover both types of employment.

### 2.2 Directors

Senior employees or directors belong to a special category. Their working conditions are governed exclusively by individual contracts and no specific rules apply to them.

## 3. Hiring

### 3.1 Recruitment

Employers are free to recruit as they wish provided they do so on a non-discriminatory basis.

### 3.2 Work Permits

All foreign citizens are, in principle, required to obtain a visa to enter and stay in Denmark, although citizens from a large number of countries have been exempted from that requirement. For example, citizens of the US and Japan do not require a visa to enter and stay in Denmark for an initial three-month period. Staying in Denmark for more than three months will require permission.

All foreign citizens also need to obtain a work permit before they take up employment with a Danish employer. Normally, professional or labour market considerations must warrant a residence and work permit, for example, if there is a lack of persons in Denmark who can carry out work of a specific type. However, a number of schemes have been designed in order to make it easier

for highly qualified professionals to get a residence and work permit in Denmark.

Nordic citizens do not need a residence permit but are free to enter, live and work in Denmark.

EU/EEA as well as Swiss citizens can reside freely in Denmark for up to three months. If the person is seeking employment during his/her stay, he/she can stay for up to six months.

If the stay exceeds the three- or six-month limit, the person needs a proof of registration from the Regional State Administration. Unlike a residence permit, which is issued under the regulation of the Danish Aliens Act, a proof of registration is simply proof of the rights the person already holds according to the EU regulations on free movement of persons and services.

## 4. Discrimination

Comprehensive legislation operates to prohibit discrimination on grounds of sex, age, race, marital status, military status, disability, sexual orientation, religion, political belief etc. Discrimination legislation is allowed to protect certain categories of people such as pregnant women or disabled persons.

According to the Law on Equal Wages (Lov om Ligeloen), men and women must receive equal pay for equal work. This right cannot be contracted out of and it is for the employer to demonstrate that the pay system is not discriminatory.

The Act on Equal Treatment of Men and Women (Lov om Ligebehandling) is aimed at preventing discrimination in areas such as hiring, firing, training, and employment terms and conditions. Compensation for dismissal on discriminatory grounds is uncapped, notwithstanding this compensation can be the same as that for unfair dismissal (see below) unless the dismissed employee is pregnant or on maternity or paternity leave in which case the compensation can be considerably

higher. The Equality Council is the body charged with enforcing the legislation on discrimination and rulings made by the Equality Council can be enforced in the ordinary Courts. Claims can also be brought before the ordinary civil courts.

## **5. Contracts of Employment**

### **5.1 Freedom of Contract**

Freedom of contract is a fundamental feature of Danish law. However, because of the detailed regulation provided by legislation and collective agreements, contracts of employment for employees are generally brief. An individual contract cannot provide terms less favourable than those provided by legislation or collective agreements.

### **5.2 Form**

Legislation giving effect to the EU Directive dealing with the information applicable to contracts of employment governs the form of the employment contract and its content. In many cases contracts are modelled on standard contracts agreed between employers' organisations and trade unions. However, as the aforementioned legislation requires the principal terms of employment to be set out in the employment contract, many employment contracts will also often include individual terms.

Contracts are assumed to be for an indefinite period unless specifically stated to be otherwise. There are specific regulations relating to fixed-term contracts. If a fixed-term employment relationship is prolonged or renewed more than once after the expiry of the fixed-term, the contract is assumed to have been converted into a contract for an indefinite period.

### **5.3 Trial Periods**

Any probationary period must be specified in writing and may not be more than three months for salaried employees. There is no general rule on trial periods for workers; however, most

collective agreements provide that a contract of employment can be terminated without notice during an initial period that can sometimes be as long as nine months.

### **5.4 Confidentiality and Non-Competition**

The Marketing Practices Act (Markedsforingsloven) prohibits employees from disclosing business secrets during employment and for three years after its termination. Employers can claim damages when the confidentiality duty has been breached and an injunction may be awarded by a Court preventing violation of the law.

Post termination restrictions, such as further limitations on the exploitation of knowledge gained during the employment or the prohibiting of solicitation of a former employer's customers or clients, are fairly common. Non-competition and non-solicitation clauses can be imposed on salaried employees and compensation equal to at least 50% of the employee's salary is due to the salaried employee during the term of the non-competition and/or non-solicitation clause. Non-competition clauses, however, can only be imposed on salaried employees holding a post of responsibility.

On 1 July 2008 a new Act on non-solicitation of employees (Jobklausuloven) came into effect. The Act applies to non-solicitation of employees clauses concluded between an employer and other enterprises for the purpose of preventing or restricting an employee from taking up employment in another enterprise and agreements between an employer and an employee for the purpose of preventing or restricting other employees from taking up employment in another enterprise.

An employer can only enforce such a non-solicitation clause against an employee if the employer and the employee have concluded a written agreement to that effect and it describes

how the employee's job opportunities are restricted and sets out the employee's right to compensation. The compensation must be at least 50% of the employee's salary and is payable during the period after termination of the employment during which the employee's job opportunities are restricted.

### **5.5 Intellectual Property**

An employer is entitled to ownership of any invention made by an employee during the course of employment, provided compensation is given to the employee. The compensation requirement does not apply when the employee is engaged in research and may in other situations be considered to be included in the fixed salary agreed between the employer and the employee.

## **6. Pay and Benefits**

### **6.1 Basic Pay**

There is no statutory minimum wage, but collective agreements set a minimum wage for a large percentage of the Danish workforce. Those not covered by these agreements are entitled to a reasonable wage or to a customary wage fixed by reference to the trade and industry in which they work.

The automatic adjustment of pay rates in line with the cost of living has been abolished and accordingly there is no rule requiring indexation of salaries.

### **6.2 Pensions**

On top of the mandatory supplementary pension scheme for qualifying employees (the Labour Market Supplementary Plan – ATP), there are an increasing number of private pension schemes. It is customary for both salaried employees and workers to be covered by a pension scheme with the schemes often providing retirement, survivors' and disability benefits. Funding is obligatory and schemes are arranged in the form of individual or collective accounts based on defined contributions.

### 6.3 Incentive Schemes

There are favourable tax provisions which are aimed at promoting individual ownership of shares. A distinction is drawn between profit sharing schemes (where employees may receive shares from their employer tax-free up to a certain value) and stock option schemes (where employees are granted a right to subscribe for shares from their employing company at a discount.)

Pursuant to the Danish Stock Option Act (enacted 1 July 2004) where an employer terminates an employee's employment prior to the employee's exercise of the share purchase or subscription rights granted to him, the employee is entitled to retain such rights pursuant to the exercise terms of the scheme or agreement as if the employee had continued his employment. In addition, the employee is also entitled to receive a share, proportionate to the length of his employment in the accounting year, of the grants to which he would have been entitled according to agreement or custom, had he still been employed at the end of the accounting year or at the date of grant.

Where an employee terminates his employment before exercising the share purchase or subscription rights granted to him, he will forfeit such rights, unless otherwise provided in the terms of the scheme or agreement. Also, the right to receive further grants after termination of the employment will be forfeited.

The Stock Option Act applies only to grants made after 1 July 2004. Employees who were granted stock options prior to 1 July 2004 are entitled to retain all rights to these, regardless of whether the termination of employment was voluntary, involuntary for cause or not.

### 6.4 Fringe Benefits

It is common for company cars and supplementary pension benefits to be provided for senior employees and a staff

canteen with subsidised meals for the entire workforce.

### 6.5 Deductions

Employers are entitled to make deductions from employee's wages in certain circumstances, for example, employee's contributions to subsidised meals. However, all deductions must be agreed with the employees.

Employers are required to deduct taxes and employee social security contributions that are imposed from employees' pay.

## 7. Social Security

### 7.1 Coverage

The state social security system provides a comprehensive range of benefits: retirement pensions, survivors' pensions, medical care, sickness and maternity benefits, disability benefits, family allowances and housing allowances.

On top of the basic flat rate pension, the ATP covers all employees over the age of 16 and provides a supplementary pension based on the contribution period.

Various unemployment insurance funds have been set up under the control of the Minister of Labour. They cover a large percentage of the workforce, mostly trade union members. Membership of these funds is not compulsory and anyone who claims benefits from these funds must have been a member of these funds for a minimum period of one year in aggregate within the past three years and paid contributions equal to one year's contributions, must demonstrate membership of a fund during that time and willingness to take new employment. Benefits payable under such schemes are equal to a maximum of 90% of monthly salary up to a ceiling whilst employed. Both the employee and the state contribute towards the funds.

In case of industrial injuries and occupational diseases, benefits are

provided by insurance companies under the supervision of the National Social Security Office and funded by employers' contributions.

### 7.2 Contributions

Contributions to the social security system are levied through the tax system except in respect of ATP, education and industrial injury.

Both employers and employees contribute to ATP. Employers' contributions equal DKK 2,160 (in 2009-2012) per year per full-time employee and full-time employees contribute DKK 1,080 (in 2009-2012) annually. The employer's premium to the industrial injury scheme (AES) varies annually from approximately DKK 182 for salaried employees and up to DKK 697 for workers. The size of the premium is dependent on the number of employees in the company and the sector in which the company operates. The employer's premium to the employers' apprentice refund (AER) equals DKK 2,926 per year per full time employee.

Private and/or foreign employers must pay a Financing Contribution (FIB) equivalent to DKK 240.50 per quarter per full-time employee (2012).

In addition, contributions must be paid into a Maternity Fund. The annual contribution for a full time employee is DKK 819.60. The contribution is payable for employees in relation to whom the employer contributes to ATP. Apprentices below the age of 25 and who are registered for AER are exempted.

A tax is also on gross wages levied to provide revenue for allowances paid to the unemployed and for education, training and sickness (AM-bidrag). Currently, the tax on gross wages is 8%.

## 8. Hours of Work

There is no general legislation on normal working hours. However, the Danish Act

on Implementation of the Working Time Directive provides that the average working hours per week, including overtime, may not exceed 48 hours. Furthermore, the Working Environment Law provides for most employees to have an 11-hour break in any 24-hour period and at least one day off in every seven day period.

Hours of work are usually regulated by collective agreement or the individual contract of employment. Most private sector employees work 37 hours a week. In the case of night work, the maximum average working hours may not exceed eight hours during any 24-hour period. There is no ban on Sunday work, but work on Sundays and public holidays is regarded as overtime if there is no other stipulation in the collective agreement.

Young people under the age of 18 cannot work more than the agreed hours for the industrial sector subject to a maximum limit of eight hours a day and 40 hours a week.

Most collective agreements contain provisions relating to overtime pay and Courts have interpreted them as giving employers the right to require employees to work overtime. If there is no collective agreement, by customary practice there is an obligation on the employee to work overtime provided this right is not misused by the employer. However, an employee may refuse to work overtime if the obligation to work overtime is not stipulated in the employment contract or for personal reasons which must be communicated to the employer. A collective refusal by employees may be treated as a breach of contract.

## **9. Holidays and Time Off**

### **9.1 Holidays**

The Holiday Act (Ferielloven) provides a statutory right to 2.08 days' paid holiday per calendar month or five weeks' holiday after one year's work.

Salaried employees receive normal salary during the vacation period, together with a holiday supplement equal to 1% of annual salary. When a salaried employee leaves the employer, the employer has to make a payment in lieu of holiday known as "holiday allowance" equal to 12.5% of the salary. Workers receive holiday pay in place of their salary, which equals 12% of the previous year's salary.

An employee and employer may agree that the employee take educational leave for a period determined according to the type of education. During a period of such educational leave, the employee may be entitled to an allowance payable by the Government.

### **9.2 Family Leave**

Pregnancy leave can be taken four weeks before the expected date of birth. The mother has 14 weeks of maternity leave after the birth. In addition, the father is entitled to two weeks' leave to be taken during the first 14 weeks after the birth. After the 14th week after birth, each parent is entitled to an additional 32 weeks' leave which may be taken by the parents consecutively or concurrently. This parental leave may be increased by an additional 14 weeks. The employee is entitled to postpone either the parental leave or the additional parental leave by between eight and 13 weeks.

During the pregnancy and maternity leave from four weeks before the expected birth date and until 14 weeks after birth, a female salaried employee is entitled to 50% of her salary to be paid by her employer but many employers pay full salary during this period. A number of collective agreements provide for the payment of partial or full salary during the pregnancy leave for up to four weeks before the expected time of birth, during maternity leave for up to 14 weeks and during paternity leave for up to two weeks. Finally a number of collective agreements provide for the payment of full salary for up to six weeks following

the maternity/paternity leave. If the employee is not entitled to salary during the pregnancy, maternity and two weeks' paternity leave, the parents are entitled to a fixed weekly allowance to be paid by the Municipality. During the parental leave after the 14th week from birth, the parents are entitled to a fixed weekly allowance to be paid by the Municipality for a period of up to 32 weeks. A number of collective agreements grant leave for various other family reasons.

In addition, the Danish Act on Absence for Special Family Reasons (Lov om fravær af saerlige familiemaessige aarsager) affords employees unpaid leave in certain circumstances, such as where such absence is necessary for compelling family reasons, i.e. the employee needs to care of a family member due to illness or accident.

### **9.3 Illness**

Salaried employees are entitled to full pay during absence because of illness. The employer is responsible for the payment but, after the first 21 days of sick pay, the employer is entitled to a refund of a fixed allowance for up to 52 weeks of absence in an 18 calendar month period.

Workers are entitled to a fixed weekly allowance paid by the Municipality. However, a number of collective agreements provide for full salary during any period of absence due to illness, but after 21 days of sick pay, the employer is entitled to a refund of a fixed allowance for up to 52 weeks of ill-health absence in a period of 18 calendar months.

For both types of employee, the cost of absence due to illness or family leave is borne by the tax system.

### **9.4 Other time off**

Employees may at any time request flexible working arrangements and/or part-time employment. However, employers are not obliged to comply with such a request.

## 10. Health and Safety

### 10.1 Accidents

Employers must be insured against accidents at work with an insurance company recognised by the state. Employers may also be held liable for negligence.

### 10.2 Health and Safety Consultation

The Working Environment Act (Arbejds miljøloven) has been amended with effect from 1 January 2012. The Act aims to ensure safe and healthy working conditions in the workplace. To this end, the Act provides that in workplaces with up to nine employees, health and safety issues shall be dealt with between the employer and the employees. In undertakings employing more than 10 but less than 35 employees, the employer is obliged to establish a work environment organisation with one or more work environment representatives, who are responsible for attending to the daily and overall health and safety tasks in the company.

In undertakings employing more than 35 employees, health and safety is addressed at two levels. Daily tasks are handled by one or more groups consisting of a supervisor and an elected working environment representative while overall health and safety planning and coordination is dealt with by one or more committees.

## 11. Industrial Relations

### 11.1 Trade Unions

A large percentage of Danish employees are members of a trade union, most of which are affiliated to the Landsorganisationen ("LO") (by tradition linked to the Social Democratic Party). A congress is held every four years to determine LO policy.

There is little legislation on collective labour relations. The General Agreement (Hovedaftalen), last amended in 1993, between the LO and the biggest

employers' association ("DA") regulates the right to join a trade union and to take part in its activities. Local trade unions which are co-ordinated at sectorial level have legal personality. These local unions are organised at national level and most of their statutes do not allow local unions to conclude collective agreements without the consent of the national union.

Closed shop agreements have been prohibited by law.

### 11.2 Collective Agreements

Collective agreements are legally binding on both parties and their members, and are also applicable to employees who are not members of one of the signatory unions provided the employer was a party to the agreement. Collective agreements can cover all aspects of the employment relationship including wages, working hours, holidays and termination and are automatically transferred on the sale of a business. Collective agreements are usually signed for a period of four years. They cannot be extended by administrative decree to employers and their organisations or their members who were not parties to the agreement.

### 11.3 Trade Disputes

Industrial action tends to be more infrequent than in other jurisdictions as Danish law has developed an efficient system to resolve disputes.

There is a right to strike if there is a conflict of interest (interesse-konflikter), i.e. where parties disagree about wages or the working conditions applicable to a particular job and where no collective agreement is applicable. Such a conflict may arise, for example, when a collective agreement falls due for renewal, or when the contract of employment provides for an opportunity to renegotiate pay. It is unlawful, on the other hand, to strike if there is a conflict of right (rets-konflikter) i.e. during the period of validity of a collective agreement when there is a breach of a collective agreement or a dispute over the interpretation of such

agreement. In this case, strike action is unlawful and there is an obligation to refer the dispute to an industrial arbitrator or, if this fails, to the industrial Court. The Courts have power to fine both parties to an agreement and their members if there is a breach of it. No sanction can be imposed on an employee who refuses to do the work usually done by persons taking part in industrial action.

Where a conflict of interest arises, the matter may be referred to the Conciliation Board (Forligsinstitutionen) at the request of either party in accordance with the Law on Mediation Procedures. The Public Conciliator will lead negotiations, put forward proposals for a settlement and may also order the postponement of strike action for up to two weeks if there is a chance of a settlement.

In cases where there is no alternative to a strike and such action is on the face of it legal, 14 days' notice of any strike should normally be given to the employer.

### 11.4 Information, Consultation and Participation

Information, consultation and participation is required at various levels:

- (a) The Companies Act allows employees to elect representatives to the board of directors of companies with at least 35 employees. The number of employee representatives on the board is up to half the number of board members elected in general meeting subject to a minimum of two. These representatives have the same rights, duties and liabilities as the other members elected in general meeting.
- (b) Work environment representatives, groups and committees must be consulted on all matters related to health and safety.
- (c) The Agreement on Co-operation Committees between LO and DA (samarbejdsaftalen) requires

companies that are party to the collective agreements in the LO and DA area to be managed in a way that ensures maximum co-operation between employer and employees. To this end, companies with more than 35 employees must set up a Work Council consisting of equal numbers of employee and employer representatives. The Council has a role in the decision-making and the planning processes in relation to working conditions and day-to-day production. It may intervene in other areas such as training methods, wage systems, introduction of new technology etc. Employee representatives are elected for two years and the time spent on Council matters is treated as normal working time.

- (d) The Act on Information and Consultation of Employees (lov om information og høring) implements the Employee Information and Consultation Directive. Pursuant to the Act, any company employing more than 35 employees, and which is not part of any collective agreement that provides for equal rules on information and consultation, is obliged to inform and consult the employee representatives or the employees with any relevant information regarding the employees' working conditions. The employee representatives must be informed and consulted as early as possible to allow the employees' opinions, views and proposals to be taken into consideration when the company makes its final decisions.
- (e) Employees in a European company are covered by the rules in the Act on Information and Consultation of Employees in European Companies (lov om medarbejderindflydelse i SE-selskaber). The Act implements the Workers Participation Directive in respect of employee involvement

in the affairs of European companies. The rules on employee representation in SE-companies are very complicated. Basically, when a Danish SE-company is established, a special negotiation body of employee representatives must either (i) commence negotiations and draw up a plan for employee involvement; (ii) decide not to open negotiations; or (iii) terminate negotiations already commenced. If the special negotiation body draws up a plan for employee involvement, this plan will set the guidelines for employee representation. If the special negotiation body decides not to open negotiations, the act on employee representation contains a set of standard rules, which will apply. If the special negotiation body terminates negotiations already opened, they will have to rely on the Danish rules on employee representation. Regardless of whichever set of rules apply, the employee representatives are entitled to information and consultation before important decisions concerning the employees' working conditions are made.

- (f) Pursuant to the Danish Act on European Works Councils (Lov om Europaeiske Samarbejdsudvalg), which implemented Directive 94/45/EC Community Scale, a community-scale undertaking is required to establish a European Works Council following the written request of at least 100 employees or their representatives in at least two undertakings or establishments in at least two different EU member states. A community-scale undertaking means any undertaking with at least 1,000 employees within the member states and at least 150 employees in each of at least two member states. The European Works Council is mainly

intended to deal with cross-border issues of significant importance to the employees in more than one member state. For the purpose of establishing the European Works Council and negotiating an agreement regarding information and consultation procedures, a special negotiating body must be established. If the central management of community-scale undertaking reaches an agreement with the special negotiating body, the agreement will govern the information and consultation. If an agreement cannot be reached, the procedure outlined in the Danish Act on European Works Councils must be applied instead.

The Act also applies to a community-scale group of companies, meaning a group with: (i) at least 1,000 employees within the member states; (ii) at least two group undertakings in different member states; or (iii) at least one group undertaking with at least 150 employees in one member state and at least one other group undertaking with at least 150 employees in another member state.

## 12. Acquisitions and Mergers

### 12.1 General

On the sale of a business, all the transferor's rights and liabilities connected with the transferor's employees are assigned to the transferee in accordance with the Employees' Rights on Transfers of Undertakings Act (Lov om Loenmodtageres retsstilling ved virksomhedsoverdragelse). The transferee is not entitled to dismiss employees because of the transfer unless the dismissal is for economic, technical or organisational reasons.

### 12.2 Information and Consultation Requirements

A transferor is obliged to inform employees of any intention to sell the business and if the transferor or the

transferee envisages measures in relation to his employees, the transferor must negotiate ways of safeguarding their position with a view to seeking an agreement. The transferor must inform and negotiate/consult with the company's employee representatives. If there are no employee representatives in the company, the information must be supplied to all employees. In addition the transferor is obliged to inform and consult the employee representatives from the co-operation committee if the company is party to a co-operation agreement. This will apply to companies with more than 35 employees, which are party to collective bargaining agreements. In addition, companies who are not party to any collective agreement are bound by the Act on Information and Consultation of Employees (see above). Thus, there are three sets of rules governing the information and consultation procedure when a business is sold.

The information must be given to the employees within a reasonable time before the transfer of the business. There is no definitive case law on the meaning of "within a reasonable time". In some situations, information pursuant to the Act can be given after the signing of an agreement, but before the actual transfer of a business, provided that the employees are given reasonable time to consider the consequences of the sale. This will, however, in most situations be too late. If the transferor is afraid that the information given to the employee representatives will have an adverse impact on his ability to reach an agreement on the sale of his business, the transferor is entitled to impose a duty of confidentiality on the employee representatives.

The Danish Employees' Rights on Transfer of Undertakings Act does not contain any minimum requirements regarding the length of the information/consultation period. Normally, the duration of such a period depends on the speed in which the parties reach results in their negotiations.

The transferor and the transferee are entitled to complete an agreement on the sale of a business regardless of whether the employees have been informed or consulted. Thus, an infringement of the rules of information and consultation does not affect the validity of such an agreement.

None of the obligations outlined above are affected if redundancies are contemplated prior to or after the business transfer. The obligation to inform and consult the employee representatives exists regardless of whether the business transfer involves redundancies or not. However, other sets of rules may delay the process if the business transfer involves redundancies of more than 10 employees (see below).

### 12.3 Notification of Authorities

There is no obligation under Danish law to inform, consult or negotiate with any governmental body, but some collective agreements contain rules saying that the negotiations must take place with the trade unions before the transfer of a business. If a transferor fails to comply with this obligation it may be fined for breaching the collective agreement.

### 12.4 Liabilities

If the transferor fails to comply with the information and consultation rules it will face criminal sanctions. Thus, any failure to comply with the rules may, in theory be sanctioned with a fine, however, there are not yet any reported cases of a fine having been imposed.

## 13. Termination

### 13.1 Individual Termination

The right of employers to terminate contracts of employment is limited by legislation and collective agreements. Different rules apply for terminating the employment contracts of salaried employees and workers.

### 13.2 Notice

The termination of employment of workers is regulated by the applicable

collective agreement. Most agreements link the length of notice with seniority and age. In general, employers must give notice of between 14 and 120 days.

The law provides minimum notice periods to be given to salaried employees. These vary according to length of service. They amount to one month for employees with one to six months' service and three months for those with six months' to three years' service. An extra month's notice has to be given for each third year of service starting from the fourth year of employment up to a maximum of six months.

Regardless of the reason for dismissal, salaried employees with 12, 15 and 18 years' service are entitled to severance pay of one, two or three months' salary respectively. There is no equivalent for workers.

When the contract of a salaried employee has been wrongfully terminated without notice, the employee is entitled to a payment equal to the notice period. However, if the notice period exceeds three months, payment in excess of the three months is only due if the employee's loss exceeds three months' salary. Workers whose contracts have been terminated without notice are entitled to damages equal to salary in lieu of notice.

If the contract of employment is not covered by legislation or a collective agreement and there is no express provision in the contract dealing with termination, Courts will apply the customary practice for the industry sector.

### 13.3 Reasons for Dismissal

Where the employee is in serious breach of contract, the agreement can be terminated without notice or compensation.

Workers with more than nine months' service are entitled to know the reasons for the dismissal if they request it. The

same rule applies to salaried employees regardless of their length of service.

When the dismissal of a salaried employee with at least one year's service is considered unfair and where no collective agreement is applicable, compensation can be granted.

The dismissal will be considered unfair if it is not justified by the conduct of the salaried employee or the circumstances of the employer.

In general, if a dismissal is caused by restructuring or redundancy, the salaried employee will not be entitled to any compensation because the fairness of the salaried dismissal will normally be considered justified by the circumstances of the employer. In the case of dismissal for economic reasons, the law does not lay down any specific selection criteria. However, good industrial relations may dictate that an employer formulates a redundancy policy.

If a dismissal is based on the employee's circumstances, such as performance attitude, it is generally required that the salaried employee receives a warning before a dismissal. In order for a warning to constitute sufficient grounds for termination, the warning must specifically address the unacceptable circumstances and the behaviour required from the employee. Furthermore, the warning must state that the employee's non-compliance will result in disciplinary consequences, including dismissal.

The following compensation limits apply:

Age	Length of Service	Compensation
Under 30	1 year	Maximum of half the salary for the relevant notice period
Over 30	1 to 10 years	Maximum of 3 months' pay
	10 years	Maximum of 4 months' pay
	15 years	Maximum of 6 months' pay

For workers with at least nine months' service, compensation for unfair dismissal is regulated by the General Agreement between DA and LO. This Agreement provides a procedure of negotiation when the dismissal is considered unfair by the worker.

As a general rule, the dismissal will be considered unfair if it is not justified either by the conduct of the worker or the circumstances of the employer.

If a worker is not covered by a collective agreement, no general rules on unfair termination exist, (however, note that there are certain rules on various types of discrimination, see comments below).

The maximum compensation for unfair dismissal is fixed at 52 weeks' pay. A permanent Tribunal on Dismissals deals with dismissal claims.

#### 13.4 Special Protection

Several categories of employees are specially protected against dismissal. An employer cannot terminate the contracts of pregnant women or employees on leave in connection with birth because of their physical condition or because of the employees' pregnancy, maternity, paternity and/or parental leave. If the employer cannot prove that the contract has been terminated for reasons other than pregnancy or leave in connection with birth, compensation can be awarded. The maximum limit on such compensation has been removed. Case law indicates that the compensation awarded typically equals 6-12 months' remuneration depending on the

employee's length of service and on the circumstances of the specific case.

An employer is not allowed to discriminate against employees or applicants in respect of recruitment, dismissal, transfer, promotion, salary or working conditions because of age, disability, race, religion, political or sexual orientation, national, social or ethnic origin.

Persons who are discriminated against are entitled to compensation. The employer has the burden of proof in discrimination cases if the employee can establish facts that may give rise to the presumption that discrimination has taken place.

Employee representatives on Health and Safety Committees, Works Councils, shop stewards and on boards of directors are protected in accordance with the applicable collective agreement. Employee representatives who are elected to participate in a co-operation committee pursuant to the Act on Information and Consultation of Employees and employee representatives who are elected to participate in the special negotiation body pursuant to the Act on Information and Consultation of Employees in European Companies are entitled to the same protection as shop stewards.

If a salaried employee has been ill for a total of 120 days within a year, he or she may be dismissed on one month's notice provided there is a provision to that effect in the contract. Some collective agreements provide that workers with more than nine months' service cannot be dismissed during the first four months of illness.

Under the General Agreement, trade union members who claim unfair dismissal can first require negotiation at company level between employee representatives and employer. If the parties do not reach any agreement, the case may be brought to the Dismissals Board.

### 13.5 Closures and Collective Dismissals

The rules on collective dismissals will apply if, within 30 days, the following changes are planned in relation to the workforce:

Size of workforce	Minimum number of employees to be dismissed
More than 20 and less than 100 employees	10 employees
More than 100 and less than 300 employees	10% of the workforce
More than 300 employees	30 employees

In those circumstances, employers are obliged to consult the employees or their representatives and a special procedure must be followed.

The purpose of the relevant regulations is to ensure that negotiations take place with employee representatives in order to limit the number of dismissals or the consequences of them. In case of infringement of the applicable law, fines may be imposed and compensation of 30 days' salary is due to each employee; any payment in lieu of notice may be set off against this compensation.

## 14. Data Protection

### 14.1 Employment Records

The collection, storage and use of information held by employers about their employees and workers (prospective, current and past) are regulated by the Danish Act on Processing of Personal Data (Lov om behandling af personoplysninger) (the Act), which implements the EU Data Protection Directive. Infringement of data protection law can lead to fines and the employer may be obliged to indemnify any damage caused by any processing contrary to the Act.

Broadly speaking the Act requires the processing of personal data to be reasonable and lawful, that data collection takes place for specified explicit and legitimate purposes and that data shall not be further processed in a manner incompatible with these purposes. Accordingly the employer may only handle personnel information that is necessary for the employer to maintain a proper employment relationship.

In addition, the employer may, in general, only process personal data if the employees have given their consent. The employees' consent must take the form of an express consent to the employer's processing of data contained in the personnel file, and consent may be withdrawn at any time. The employer is obliged to specify to the employees what the data will be used for. For the avoidance of doubt, irrespective of any consent the processing must fulfil the basic requirements mentioned in the previous paragraph, i.e. be reasonable, lawful, etc.

The Act does not prevent employers from maintaining ordinary personnel files to the extent necessary for the employer to maintain a proper employment relationship or where the employer's interests outweigh the employees' interests. Accordingly, ordinary personnel files may only include basic information such as name, address, next of kin information, tax information, bank account details, the education details, career details, normal curriculum vitae information and references. The employer may also process information that arises out of the employment relationship such as details of duties, salary, pension arrangements, sickness absence, warnings and appraisals, unless it is sensitive personal data.

In order to process other information, including sensitive personal data and strictly private data, the employer must obtain express employee consent. Sensitive personal data includes

information relating to an employee's health, alcohol and drug abuse, trade union membership, criminal offences, dismissal without notice, personality tests and the employee's race or ethnic background, political, religious or philosophical belief, sexual orientation or material social problems. Examples of strictly private data are personal data on criminal actions, significant social problems, disciplinary issues and the result of a personality test.

If an employer processes any kind of sensitive and/or strictly private personal data, it must notify the Danish Data Protection Agency (Datatilsynet) and obtain the Agency's permission before such processing is carried out.

### 14.2 Employee Access to Data

Employees, as data subjects, have the right to make a subject access request. This entitles them to be informed about the data held about them, the purpose of the registration, to whom it is disclosed and from where the information is obtained.

If the employee does make a subject access request and has requested written information, the employer may charge DKK 10 per page. However, the total amount is limited to a maximum of DKK 200.

Furthermore, the employees have certain other rights according to the Act.

As a general rule, any collection of personal data requires notification of the data subject(s). The notification must be given no later than 10 days after the collection. It is required that the notification includes information on:

- (a) the identity of the controller;
- (b) the purposes of the processing for which the personal data is intended;
- (c) any further information which is necessary, having regard to the specific circumstances in which the

personal data is collected, to enable the data subject to safeguard his interests, such as:

- (i) the categories of recipients;
- (ii) whether replies to the questions are obligatory or voluntary, as well as possible consequences of failure to reply;
- (iii) the rules on the right of access to and the right to rectify the data relating to the data subject.

The duty of notification only applies to the extent that the data subject has not already received such information.

Other data subject rights are laid down in the Act, including the right to rectify personal data, withdraw consent, file a complaint to the DPA, etc.

### **14.3 Monitoring**

The monitoring of employee email, internet, telephone usage and Closed Circuit TV monitoring is regarded as data processing for the purposes of the Act and, therefore, any monitoring must

comply with the provisions of the Act and the Act on TV Monitoring.

An employer may not, however, monitor conversations and the like as part of any Closed Circuit TV monitoring. In addition, an employer may not make any automatic monitoring of the phone numbers called by its employees without a prior special permission from the Danish Data Protection Agency.

The employee's express consent to monitoring is not usually required, however, the employees must be expressly informed about the fact that monitoring is being carried out and the purpose for which it is being conducted pursuant to the Danish Act on Processing of Personal Data.

### **14.4 Transmission of Data to Third Parties**

An employer who wishes to provide employee data to third parties may do so in accordance with the principles and processing conditions of the Act. The transfer of personnel files from an employer to a third party is covered by the Act. Accordingly, such transfers either

require the consent of the employee or must be authorised under the Act.

Where the third party is based outside the EEA, it should be noted that the Act prohibits the transfer of data to a country outside the EEA unless that country ensures an adequate level of protection for personal data or one of a series of limited exceptions apply. As a general rule, such transfer requires employee consent or a prior permission from the Danish Data Protection Agency. Transfer of non-sensitive personal data to the US can be based on the US recipient being safe harbour certified.

In the context of commercial transactions, where employee data is requested, care must be taken to comply with the Act. Where it is possible, anonymous data should be provided. Where this is not possible, the recipient should be required to undertake in writing that it will only use it in respect of the transaction in question, will keep it secure and will return or destroy it at the end of the exercise.

*Contributed by Kromann Reumert*

# Estonia

## 1. Introduction

Employment relations are regulated mainly by the Employment Contracts Act (“ECA”) and a number of additional related laws.

The ECA deals with the formation, suspension, modification, termination and invalidity of employment contracts including respective rights and obligations, and sets out the rules of settlement of employment disputes as well as regulations concerning remuneration, holidays, working hours and time off. Government regulations regulate a number of areas including the issue of work permits to foreign employees, the employment of minors under 15 years of age, outlawing the performance of hazardous labour by minors, and provides guidance on the calculation of the average salary.

Employment contract terms that are less favourable to employees than those prescribed by law, administrative legislation or a collective agreement are invalid. Trade unions do not have a significant influence in Estonia. Therefore, collective agreements do not generally have a significant impact on employment relations and are considered voluntary and have been concluded in a limited number of economic sectors and companies only.

## 2. Categories of Employees

### 2.1 General

Employees can work full-time (i.e. eight hours per day and 40 hours per week) or part time.

Part-time employees cannot be treated in a less favourable manner than full-time employees. Part-time employees have the same rights and obligations arising from the employment relationship as full-time employees.

### 2.2 Directors

The ECA does not apply to the relationship between management board

members and a company. Therefore, it is essential to draw up a comprehensive agreement between the company and a management board member clearly identifying the tasks and duties of the management board member, as well as the remuneration and benefits, holiday entitlement, liability of the management board member for breach of duties, and grounds and means of terminating the contract.

## 3. Hiring

### 3.1 Recruitment

Employers are free to recruit at their discretion. However, an employer is prohibited from discriminating against applicants for employment on a number of grounds including sex, racial origin, age, ethnic origin, level of language proficiency, disability and sexual orientation (see further section 4 below). In cases of such discrimination the prospective employee may be entitled to compensation (for economic and non-economic damage sustained) but has no right to insist on being employed.

### 3.2 Work Permits

In order to work in Estonia, a non-EEA national must obtain a work and residence permit from the Citizenship and Migration Board of Estonia. The procedure for non-EEA citizens takes up to six months and the state fees are as follows:

- (a) on applying for a work permit or extending it - €47,93 (£ 39);
- (b) on applying for a residence permit for employment or extending it - €63,91 (£52).

Various conditions must be satisfied so there is no guarantee that a residence or work permit will be granted. Upon recruitment the employer must check that the individual has the relevant permit (in cases where the employer has not participated in the application process itself). The employer is not allowed to conclude an employment contract with a person who does not hold a valid permit and must terminate the employment

contract with an employee who does not hold a permit for employment in Estonia.

## 4. Discrimination

All employees have the right to equal work, fair remuneration and fair, safe and non-hazardous working conditions. Employers may not, at any stage of the employment relationship (including at the recruitment stage), discriminate, directly or indirectly, against employees on the grounds of sex, racial origin, age, ethnic origin, level of language proficiency, disability, sexual orientation, duty to serve in defence forces, marital or family status, family-related duties, social status, representation of the interests of employees or membership of workers' associations, political opinions or membership of a political party or religious or other beliefs. Treating part-time and fixed-term employees or temporary agency workers in a less favourable manner than comparable full-time or permanent employees is also unlawful.

However, the law permits the preferential treatment of some employees, including employees who are pregnant, on maternity or paternity leave or who are carers for minors or incapacitated adult children.

## 5. Contracts of Employment

### 5.1 Freedom of Contract

The terms of the employment contract, as well as terms established by unilateral decisions of employers, cannot be less favourable to the employee than the provisions of the ECA, administrative legislation or the provision of the collective agreement.

However, in certain circumstances as prescribed by law, the employer or employee may require changes to the employment terms. An employee may request temporary amendments to working conditions or a temporary transfer to another position on the grounds of health based on a doctor's certificate. An

employer may require adjustments to the employee's working terms if necessary and reasonable for both parties. In addition, an employer can temporarily change the employee's remuneration in connection with unforeseeable and unavoidable changes in production (3-12 months). Employees can terminate their employment contracts if they do not consent to such amendment relating to remuneration. In the event of termination on these grounds the employer must pay compensation to the employee. In the case of an employment agreement entered into for an indefinite period, compensation is equal to one month's average salary and in the case of a contract concluded for a fixed period compensation is equal to the average salary until the expiry of the fixed term.

## 5.2 Form

Employment contracts can be concluded either orally or in writing. Employment contracts concerning work periods in excess of two weeks must be concluded in writing.

Employment contracts may be entered into for an indefinite or fixed term. However, fixed-term employment is allowed only for a good reason, for example, for the performance of a specific task, the replacement of an employee who is temporarily absent, a temporary increase in the volume of work or for the performance of seasonal work. The maximum aggregate term of a fixed-term employment contract is five years. In addition, where a fixed-term contract for the performance of the same work is concluded on more than two consecutive occasions or if it is extended more than once in a period of five years, the contract will be deemed to be of an indefinite duration.

## 5.3 Trial Periods

Use of a probation period is common in practice. A probation period may not exceed four months, excluding temporary employee incapacity and holidays. In the case of a fixed-term contract of less than

eight months, the probation period may not exceed more than half the duration of the contract.

An employee can terminate the employment contract during the probation period by giving 15 calendar days' notice. An employer can terminate the employment contract at any time during the probation period on the grounds of unsatisfactory performance by giving 15 calendar days' written notice. The notice must include a description of the unsatisfactory performance. In the case of severe breach termination is possible without following the advance notice process.

## 5.4 Confidentiality and Non-Competition

According to the ECA an employee must refrain from competing with the employer without the employer's permission if terms to that effect are included in the employment contract. An employee can also be subject to such non-competition restrictions following the termination of employment if a written agreement to that effect is entered into with the employer, pursuant to which the employee receives monthly compensation from the employer of a reasonable amount. The duration of the aforementioned provision may not exceed one year. A contractual penalty in the event of breach of a non-competition clause may be agreed on.

Pursuant to the ECA an employee is obliged to maintain the business and production secrets of the employer. Post-termination confidentiality restrictions apply without the need for a specific agreement, but the employer must determine the scope of the confidential information beforehand. A contractual penalty in the event of breach of a confidentiality restriction may be agreed on as well. This is typically in the region of two to eight months' salary, but there is no general rule. Case law provides that the duration of a post-termination confidentiality provision must be for a 'reasonable' period. The reasonableness

of the limitation period depends on the nature of the information the employee has received during his employment and the level of possible loss that the competition might cause to the company. The limitation period could be six months in some cases and unlimited if the information is very sensitive.

## 5.5 Intellectual Property

Generally, if an employee creates a work that is subject to copyright during the performance of his employment duties, all economic rights attached to the work are transferred to the employer for the purpose and to the extent prescribed by the employment duties unless otherwise prescribed by the contract. If the employee wishes to use the work for an independent non-work related activity, he may do so. If a work is used in such a manner, specific reference must be made to the name of the employer.

It is recommended that the employment contract contains a provision pursuant to which the employee grants a gratuitous, perpetual, irrevocable and worldwide licence of all moral rights to the employer. This includes *inter alia* the right to change the created work.

## 6. Pay and Benefits

### 6.1 Basic Pay

An employee's remuneration may not be less than the minimum pay limit established by the Estonian government, which is €290 (£235) per month and €1.80 per hour (approx £1.45). Salaries are paid by bank transfer or in cash.

The employer is obliged to ensure equal pay for equal work and remuneration differentiation on the grounds of sex is prohibited. Remuneration terms which have been agreed in an employment contract may be changed only by agreement of the parties. It is unlawful to increase or reduce remuneration on the grounds of an employee's sex, nationality, colour, race, native language, social origin, social status, previous activities,

religion, political or other opinion, attitude towards the duty to serve in the Defence Forces or other discriminatory reasons. It is also unlawful to reduce remuneration on the grounds of marital status, family obligations, and membership of citizens' associations or representation of the interests of employees or employers.

In the event of an employer's breach of the principle of equal remuneration, the employee has the right to claim compensation based on the duration, extent and nature of the inequality.

The employee is entitled to receive bonus fees, if this is agreed in the employment contract. Generally, the payment of bonus fees is at the employer's discretion.

## 6.2 Pensions

There is a "three-pillar" pension system in place in Estonia. The first pillar is the obligatory state pension; the second pillar is the mandatory funded pension system implemented in 2002 and the third pillar is a voluntary supplementary pension system. There is no obligation on employers to provide private pensions arrangements.

## 6.3 Incentive Schemes

There is no legislative requirement for employers to operate share option or profit related pay schemes. Such schemes are not widely used, although they are becoming more common in contracts with senior employees and managers.

## 6.4 Fringe Benefits

For the purposes of the Estonian Income Tax Act, fringe benefits include any goods, services, remuneration in kind or monetarily appraisable benefits, which are given to an employee in connection with an employment or service relationship. Fringe benefits are common for senior employees and managers and typically comprise the reimbursement of mobile phone expenses, use of company car, laptop etc.

It should be noted that in addition to income tax, the employer is also required

to pay social tax on fringe benefits, thus fringe benefits give rise to a heavy tax burden on the employer.

## 6.5 Deductions

An employer is obliged to withhold 21% of the gross salary paid to the employee by way of income tax contribution. In addition, the employer must deduct 2% of gross salary by way of unemployment insurance and 2% of gross salary as a funded pension payment if the employee has joined the mandatory funded pension system (second pillar). This is obligatory for employees born in 1983 or later. See Section 7.2 below for a more in-depth overview of unemployment insurance tax.

Other deductions, such as monetary claims against an employee, can also be made in certain circumstances.

## 7. Social Security

### 7.1 Coverage

Social tax is a state tax, which is payable by employers and private entrepreneurs operating in Estonia, i.e. by legal entities registered in Estonia and branches of foreign companies and sole proprietors (private entrepreneurs). As the employer must pay the social tax, the exact place of residence of the employee (within Estonia) is not taken into consideration.

### 7.2 Contributions

Social tax is a mandatory monthly tax from which public pensions, social security benefits and health insurance services are financed, in accordance with the Estonian Social Tax Act. The social tax rate is 33% of the gross taxable salary, made up of 20% social security payments and 13% health insurance contributions.

Another monetary instrument for helping guarantee social security is unemployment insurance, which is deducted from an employee's salary. The obligation is shared between the employee and the employer. The employer must withhold the premium at the current rate of 2% of the employee's

gross salary and pay an additional premium equal to 1% of the employee's gross salary.

## 8. Hours of Work

As a general rule, a full-time employee's working hours must not exceed eight hours per day or 40 hours per week. In general the working week is five days - Monday to Friday. The maximum weekly working time for minors is shorter and varies from 15 to 35 hours per week depending on the age of the minor. The maximum weekly working time for school and kindergarten teachers and other educators is also shorter.

Any work performed outside the contractually set hours is considered overtime work. As a rule, the employer must obtain the employee's consent before the employee is made to work overtime. Exceptionally, the employer may require an employee to work overtime in cases such as force majeure, for example to deal with the consequences of a natural disaster or a production accident etc.

Regardless of whether overtime work is performed on a voluntary basis or on account of a compulsory request by the employer, overtime work must be compensated by time off in lieu (preferred) or additional payment. Additional remuneration for overtime must not be less than 50% higher than the employee's hourly rate of pay.

## 9. Holidays and Time Off

### 9.1 Holidays

There are three basic types of leave: annual leave, parental leave and study leave.

The statutory annual holiday entitlement is 28 calendar days. Should the duration of employment be less than a calendar year, the annual leave entitlement is calculated *pro rata*. New employees are entitled to annual leave after six months of employment. If a state holiday falls

during a period of holiday, the holiday is extended by the equivalent number of days. In the event of illness during a period of leave, the employee has the right to take sick leave and postpone the vacation if he provides a relevant doctor's certificate. Unused annual leave has a limitation period of one year commencing from the end of the calendar year the leave was granted in. Annual leave is paid by the employer according to a formula based on the employee's average salary. Part-time employees are entitled to leave according to the same rules as full-time employees.

## 9.2 Family Leave

Parental leave includes pregnancy and maternity leave, child nursing leave and additional child-related leave.

Pregnancy and maternity leave of 140 calendar days (starting at least 70 days prior to the expected birth) is granted to a woman on production of a certificate for maternity leave. During such leave, a benefit equal to the average daily income is payable by the Estonian Health Insurance Fund. A father has the right to paternity leave of 10 working days during the two month period prior to the expected birth of the child and the two month period following the birth of the child. Paternity leave is compensated by the state.

After the pregnancy and maternity leave, one of the parents is entitled to parental benefit. The mother is entitled to parental benefit with effect from the birth for a period of 435 days. The father or a guardian only becomes eligible for parental benefit after the child is 70 days old, for 435 days. Parental benefit is paid by the state and is equal to the employee's average monthly income of the previous calendar year subject to social tax up to a maximum monthly amount equal to three times the average income in Estonia per calendar month.

In addition, a mother or a father may use parental leave at his or her request for

raising a child of up to three years of age. The employee receives a childcare allowance from the local pensions board pursuant to the Estonian State Family Benefits Act.

A mother or father is granted additional child care leave every calendar year at his or her request of three to six days depending on the age and the number of children. The leave is compensated by the state at the minimum salary rate. In certain cases the employer is obliged to grant unpaid leave of absence (of up to 10 working days per calendar year) at the employee's request (e.g. in the event of an employee raising a child under 14 years of age).

## 9.3 Illness

Health care coverage applies in respect of people insured under the social security system either due to contributions being paid by their employer, by themselves as self-employed or by the state. Benefits of varying percentages of the employee's salary will be paid by the Health Insurance Fund to the employee in the event of absence from work due to ill-health for up to 250 days per calendar year. The first three working days of illness are unpaid. With effect from the fourth working day of illness, the employee is entitled to receive compensation equal to 70% of a day's average salary from the employer up to and including the ninth working day of illness. Thereafter the absent employee is compensated by the Estonian Health Insurance Fund pursuant to the Health Insurance Act.

## 9.4 Other time off

Employees are also entitled to be granted study leave in order to participate in education and training. For the first 20 days of study leave the employee is entitled to average salary and the next 10 days are not compensated. In addition employees are entitled to 15 days study leave for the completion of study. They are entitled to be paid minimum salary during such leave.

## 10. Health and Safety

### 10.1 Accidents

The Estonian Occupational Health and Safety Act provides that the employer has a duty to provide a safe working environment, and healthy working conditions. The Estonian Occupational Health and Safety Act also describes how occupational health and safety should be organized in enterprises and sets out the liability for non-compliance with its requirements. There is no general obligation on employers to provide insurance for accidents at work.

### 10.2 Health and Safety Consultation

The employer needs to appoint a working environment specialist in every company and an elected working environment employees' representative in each separate workplace with more than ten employees. Companies with at least 50 employees must have a working environment council with whom to consult on all health and safety matters.

## 11. Industrial Relations

### 11.1 Trade Unions

Trade union membership is generally low in Estonia and the negotiating power of the unions is rather limited. There are two main trade unions:

- (a) The Association of Estonian Trade Unions (EAKL) established in 1990, being the largest, which represents predominantly blue-collar employees;
- (b) The Estonian Employees' Unions' Confederation (TALO) established in 1992, which represents white-collar employees.

The legal status of trade unions is regulated by the Estonian Trade Unions Act. Employees have a general right to join trade unions. Participation in trade unions is not, however, very wide and trade union membership is more common in certain sectors such as shipping, transport, medicine.

### 11.2 Collective Agreements

Collective agreements are usually concluded at a company level, i.e. between a particular employer and a trade union. A collective agreement applies to those employers and employees who belong or whose employer belongs to the organisations that have entered into the collective agreement, unless the collective agreement provides otherwise. Collective bargaining at various levels is still quite weak, as the trade unions are quite young and only a small number of agreements have been concluded. Collective agreements tend to predominate in specific sectors of the economy, such as transport, engineering, wood, medicine and chemicals.

Collective agreements may cover any topic or workplace issue. In practice these deal, amongst other things, with salary and other terms of employment, such as working time, severance payments, retirement age and the procedure for submitting demands in the event of a collective labour dispute. The terms and conditions of a collective agreement, which are less favourable to employees than those prescribed by the Estonian Collective Bargaining Agreements Act or other relevant legislation, are invalid. In the event of a conflict between the provisions of different collective agreements applicable to employees, the provisions that are more favourable to the employees apply.

As a general rule collective agreements do not apply to non-parties to the collective agreement. However, a collective agreement entered into between an association or federation of employers and a union or federation of employees and a collective agreement entered into between the central federation of employers and the central federation of employees may be extended by agreement of the parties in respect of certain conditions (salary, working and rest time and working environment).

### 11.3 Trade Disputes

Strikes are permitted in the case of a collective dispute of interests to which the law prescribes certain procedures. A decision to organise a strike must be adopted by a general meeting of employees or a trade union. Strikes or lockouts which are not preceded by negotiations with the opposite party are unlawful. Strike organizers must inform the undertakings concerned, the conciliator and local government of the planned strike in writing at least two weeks in advance. An employer is required to inform the parties with whom it has contracts, other interested enterprises or agencies and the public through the media of any such strike.

Participation in a strike is voluntary and it is prohibited to impede a non-striking employee's ability to work. Where a non-striking employee is prevented from performing his duties because of the strike, he is nevertheless remunerated by the employer.

Employees may not be disciplined or dismissed for taking part in a lawful strike.

### 11.4 Information, Consultation and Participation

Employers are obliged to provide information to the employees and consult with the employees' representatives before taking any measures which can affect the interest of the employees. In certain circumstances, the employer cannot complete a transaction without first consulting its employees, for example in the event of a business transfer, where there is a restructuring of the business and subsequent redundancies.

Employers must take into account the results of the consultation with the representatives of the employees and where it refuses to consider employees' proposals, give reasons for doing so.

The European Works Councils' Directive has been implemented into national law.

## 12. Acquisitions and Mergers

### 12.1 General

The effect of mergers and acquisitions of companies on employment contracts is regulated by the ECA. The rights and obligations arising from an employment contract transfer to the purchaser of the business in which the employees are employed.

The ECA provides that the reorganization, or change in the ownership of a business does not terminate an employment contract nor serve as a ground for termination of the contract. Employees have the right and obligation to continue working at the business formed as a result of a reorganization or following a transfer to a new owner.

### 12.2 Information and Consultation Requirements

The ECA sets out the procedure for informing and consulting the employees' representatives (e.g. trade union) in relation to the transfer of employment contracts or if there are no such representatives, the employees of the company. In the context of a share sale there is no obligation to inform and consult employees.

The consultation obligation is triggered in the event the former or new employer envisages taking 'measures' in relation to the employees in connection with the transfer of employment contracts; the employer is obliged to consult the representatives of the employees on such measures with a view to reaching an agreement. There is no threshold number of employees triggering this obligation.

The current and the prospective employer must provide the representatives of the employees with all relevant information in writing, or in the absence of representatives directly to the employees, in good time, but not later than one month prior to the transfer of the employment contracts.

During the consultation process, the representatives of the employees have the right to meet with the representatives of the employer and the members of the directing bodies of the employer and submit, within 15 days of receipt of the written information, their written proposals with regard to the proposed measures in relation to the employees, unless a longer period is agreed upon. Although employees do not have a right of veto regarding the merger or acquisition of the companies the employers are, nevertheless, required to give reasons for any refusal to consider the employees' proposals.

A sale and purchase agreement of the entity can be signed before the information and consultation process is started, however, closing cannot occur before completion of the information and consultation process; i.e. the employment contracts cannot transfer prior to the process being completed.

### 12.3 Notification of Authorities

There is no general obligation to inform governmental or regulatory bodies about the transfer of employment contracts. However, collective lay-offs may trigger the obligation to notify the Unemployment Insurance Fund etc.

### 12.4 Liabilities

An employer who violates the information or consultation requirement may be punished by a fine of up to €1300 (£1085). As a general rule the employees cannot also claim compensation for damages.

## 13. Termination

### 13.1 Individual Termination

Employers must be convinced that there are suitable grounds for dismissal and ensure that appropriate notice requirements are adhered to.

If the court finds a dismissal unlawful, either party can still claim that the court rules the

employment contract to be terminated at the time of the unlawful termination.

Upon termination of the employment contract by a labour dispute committee, the employer may be ordered to pay the employee compensation of up to three times the employee's monthly average salary. Should the employee be pregnant, a representative of employees or have the right to maternity leave, the compensation may be up to six times the employee's monthly average salary. The labour dispute resolution body has the right to alter the amount of the compensation according to the given circumstances.

If the court finds that an employee has terminated the employment contract unlawfully, the employer has the right to receive reasonable compensation from the employee. One month's salary is generally regarded as reasonable.

### 13.2 Notice

An employer is required to give an employee prior notice of termination of the employment contract in a format which can be reproduced in writing (e.g. letter or email). However, a signed letter is recommended. Different notification periods apply depending on the statutory grounds invoked for terminating the contract. Notice periods vary from 15 calendar days to 90 calendar days depending on the length of employment of the employee.

If an employer fails to comply with its notice obligations, it is required to pay the employee compensation equal to a daily average remuneration for each day of notice not given.

Termination without notice or compensation is permissible only in extreme circumstances where there has been a severe violation of work duties by the employee which has aggravating results, for example conduct that endangers the employer's property,

other employees or third parties or in the event of a loss of trust in the employee.

### 13.3 Reasons for Dismissal

The ECA permits termination of the employment contract by the employer in limited circumstances. These relate in general to the employee's conduct and capabilities, or economic, organisational and technological factors in the undertaking.

An employer is allowed to terminate an employment contract for a good reason, connected with the conduct or capabilities of the employee, and in particular for the following reasons:

- (a) a long-term inability to carry out duties of employment due to a health condition (i.e. four months or more);
- (b) a long-term inability to carry out duties of employment due to inadequacy;
- (c) a repeated breach of duties of employment;
- (d) carrying out duties of employment while intoxicated;
- (e) committing a theft, mischief or some other indication of untrustworthiness;
- (f) inducing a third party to lose trust in the employer;
- (g) wrongfully causing damage to the assets of the employer;
- (h) breaching the confidentiality obligation or a non-competition agreement.

Termination of the contract by the employer is also permissible on the grounds of economic reasons, which include: decrease in the volume of work, organisational changes, liquidation of the enterprise or declaration of bankruptcy of the employer.

The employer must notify the employee of the reasons for dismissal in a format which can be reproduced in writing (e.g. email).

The employee can challenge the ground of termination at the labour dispute body or in court within 30 days of receiving notice of termination. Generally, if the termination of the employment contract is found to be unjustified, the contract can still be treated as at an end (if this is the position of either party) and the employee is entitled to compensation of up to three times the employee's average monthly salary.

#### 13.4 Special Protection

An employer is prohibited from dismissing pregnant women or an employee on parental leave, except in limited circumstances such as the liquidation of the employer, upon the declaration of bankruptcy of the employer, in the event of unsatisfactory performance during a probationary period, a breach of duty by the employee, an indecent act by an employee or loss of trust. An employer is also prohibited from terminating an employment contract on the grounds that the employee has the right to maternity leave, the employee is fulfilling important duties related to family for example taking care of sick family members, the employee is temporarily incapable of performing his duties, the employee does not give consent to switching from full-time work to part-time work or vice versa, the employee is performing duties imposed on him by a state or local government authority, or the employee is representing employees pursuant to a procedure provided by law or a collective agreement.

The employment contract of an employees' representative cannot be terminated without considering the opinion of the employees the person is representing or the Trade Union.

#### 13.5 Closures and Collective Dismissals

If a number of employees (dependent on the number of employees working in the company, from five to 30 employees) are collectively laid off within a 30 day period for economic reasons, the dismissal is classified as a collective dismissal. In the event of a collective dismissal, the employer must follow a procedure prescribed by law in order to properly inform and consult employees, representatives of the employees and Unemployment Insurance Fund.

Prior to a collective redundancy, an employer must inform the employees of the collective dismissal and the reasons for the dismissal. In addition the employer must consult with the employees' representatives with the aim of reaching an agreement in relation to the possibility of avoiding or reducing the number of redundancies, possible measures to alleviate the consequences of the terminations and ways of supporting the dismissed employees in their search for work, re-training or in-service training. During the consultation process the employees' representatives have the right to meet with the representatives of the employer and submit their representations within a period of 15 days after the receipt of the employer's consultation notice.

The employer must notify the Estonian Unemployment Insurance Fund of the collective termination of the employment contracts and provide the relevant information as prescribed in the ECA. The termination of employment may not take effect earlier than 30 days after notifying the Estonian Unemployment Insurance Fund. In the event of earlier termination of the employment agreements the employees may claim unlawful termination, loss of certain compensation to employees paid upon collective dismissals and overall unlawfulness of the collective dismissal.

## 14. Data Protection

### 14.1 Employment Records

Employers must maintain records on all employees in personnel files. The employment contract must be maintained for 10 years from the date of termination of the employment contract. If the activities of the employer are terminated, the employer must transfer the documents to an archival agency. Upon the transfer of a business or part of a business, the employer must transfer the documents to the legal successor of the employer.

The Estonian Personal Data Protection Act applies to the processing of the personal data of employees. The employer is considered to be the chief processor of the personal data as it maintains the personal data of its employees. The employer must appoint a person responsible for processing private personal data (e.g. details of family life and data concerning trade union membership), and in the absence of appointing such person, register itself at the Estonian Data Protection Inspectorate.

### 14.2 Employee Access to Data

At the request of an employee, the employer is required to provide the employee with the employee's personal data collected by the employer. In addition the employer must provide the employee with a certificate of paid remuneration, personal income tax deductions and insurance payments made for the benefit of the employee, at the end of each calendar year and upon the termination of the employment contract.

### 14.3 Monitoring

There is no regulation regarding an employer's ability to monitor an employee's use of email and internet. However the Data Protection Inspectorate has issued instructions regarding data protection in the context of the employment relationship. These provide that the employer should inform

the employee about any such measures taken. Therefore, it is advisable for employers to agree in the employment agreement or stipulate in internal rules that the employer has monitoring rights.

Employers are permitted to place CCTV within the workplace for the purpose of protecting staff and assets where such monitoring activity does not harm excessively the legitimate interests of the employee. Employees should be informed about it.

#### **14.4 Transmission of Data to Third Parties**

Generally, the transmission of personal data to third parties cannot occur without employee consent. However, it is permitted if the person to whom the data is transmitted processes personal data for the purposes of performing obligations prescribed by law, for the protection of the life, health or freedom of the employee or other persons, or if a third party requests information which is obtained or created during the

performance of public duties and access to the information is not restricted. The transfer of data to other countries is not permitted unless there is a sufficient level of data protection.

*Contributed by Sorainen Law Office*

# Finland

## 1. Introduction

The most important concept in labour law in Finland is the employment relationship.

Employment is based on statute, collective bargaining agreements and on the principle of freedom of contract. Freedom of contract is limited both by collective bargaining agreements, when applicable and by mandatory stipulations enacted to protect the employee.

Traditionally central collective bargaining has been the most important factor, and today collective agreements have input from trade unions, employers and the Government. Such agreements are generally at sector or industry level. Agreements at company level have, however, during recent years become an essential part of the collective bargaining process. Even employers who do not recognise trade unions ("non-organised employers") are to a large extent obliged to observe the same terms of generally binding collective agreements, which employers who recognise trade unions ("organised employers") apply.

## 2. Categories of Employees

### 2.1 General

All employees other than a managing director are subject to statutory labour law.

### 2.2 Directors

The managing director of a company is not subject to statutory labour law. The terms of employment of a managing director are governed by the individual contract and general contractual principles provided for by the Contracts Act. The employment of senior executives and directors is subject to statutory labour law. Senior executives working directly under the managing director are, however, exempt from the application of the Working Hours Act.

## 3. Hiring

### 3.1 Recruitment

Under the provisions of the Employment Contracts Act a part-time employee must be given priority when applying for a similar full-time position. An employer who in the previous nine months has dismissed employees by reason of redundancy must enquire at the local labour office whether any of those former employees are registered as seeking work via an employment office. If so, employment has to be offered in the first instance to such former employees. Employers are otherwise free to recruit as they wish on a non-discriminatory basis.

Executives are often recruited by head-hunting firms.

### 3.2 Work Permits

For a non-EU national to work in Finland, he or she must obtain a worker's residence permit from a Finnish Embassy abroad. Depending on the duration and nature of the work a residence permit may be sufficient and for specific categories of short-term assignments no permit may be necessary.

EU nationals and citizens of Iceland, Liechtenstein, Norway and Switzerland can freely work in Finland, provided the work lasts a maximum of three months. Where the duration exceeds three months they must register their right to reside in Finland, but they do not need a special residence permit.

## 4. Discrimination

According to the Employment Contracts Act, an employer must treat employees impartially without any unwarranted discrimination on the basis of ethnic origin, religion, age, health, political or labour union activity, or any comparable reason. The Act on Equality Between Women and Men prohibits discrimination on the basis of gender.

An employer violating these rules may be liable for damages, compensation, fines or imprisonment.

## 5. Contracts of Employment

### 5.1 Freedom of Contract

Individual employment contracts are regulated by the Employment Contracts Act (26.1.2001/55). The provisions are partly optional and partly mandatory. Optional provisions will apply unless the parties have agreed otherwise, or an applicable collective bargaining agreement provides otherwise.

If the terms of an individual employment contract fall short of the requirements of any applicable collective agreement, the terms of the collective agreement apply.

### 5.2 Form

A contract may be agreed orally or in writing. However, an employer must inform an employee of the basic terms of the employment relationship in writing, if the contract is oral or if these terms are not included in a written contract. The provisions of the Employment Contracts Act (implementing the provisions of Directive 91/533/EEC) deal with an employer's obligation to inform employees of the conditions applicable to the contract of employment.

A fixed-term contract can only be entered into in special circumstances, e.g. the temporary nature of the post, training or similar. If the contract is made for a fixed-term exceeding five years, after five years it may be terminated as if it was made for an unspecified period.

### 5.3 Trial Periods

Trial periods cannot normally exceed four months or, with regard to fixed-term employments, half of the duration of the fixed term. They are usual but not compulsory, and are applicable only if expressly agreed.

#### **5.4 Confidentiality and Non-Competition**

Statutory rules provide that the employee is not entitled to disclose or take advantage of his employer's business and trade secrets during the employment relationship. Gross breach of this prohibition may entitle the employer to terminate the employment relationship without notice. A smaller breach may entitle the employer to terminate the employment contract on notice.

Pursuant to the Employment Contracts Act, the employee is not entitled to undertake any activity that competes with his employer during the currency of the employment relationship. Gross breach of this prohibition may entitle the employer to terminate the employment without notice. In less serious situations the employer may still have grounds to terminate on notice.

The employer and the employee may conclude non-compete and non-disclosure agreements when concluding the employment contract or at any point during the employment relationship. A non-compete agreement restricts the employee's rights to engage in competitive activity after the termination of employment. A non-compete agreement may only be concluded for a legitimate reason. When assessing the reason, both the nature of the employer's activities and the employer's need for protection and the employee's position and duties are taken into account.

The maximum term for a non-compete restriction is six months, starting from the end of the employment relationship. If the employee is deemed to have received reasonable compensation for the restrictions imposed by the non-compete agreement, the period of restriction can be one year. The employee may receive the compensation either as a lump sum at the expiry of employment or in instalments during the period of restriction.

It is customary for non-compete agreements to include contractual penalties. The contractual penalty may not exceed the amount of pay the employee has received in the six month period prior to the end of the employment relationship.

The non-compete agreement does not bind the employee if the employment relationship has been terminated due to reasons beyond the employer's control. The restrictions set out above regarding the duration of the non-compete agreement and the amount of contractual penalty do not apply to employees who, by virtue of their duties and position, are deemed to be engaged in the executive management of the enterprise, corporate body or foundation or an independent part thereof or to have an independent status comparable to such managerial duties.

A non-compete agreement is null and void to the extent that it contravenes any of the restrictions set out above. The courts may adjust a non-compete agreement in favour of the employee if it is considered unreasonable.

There are no specific restrictions regarding the use of non-disclosure agreements, either in relation to duration or in terms of contractual penalties. However, non-disclosure agreements or provisions may be adjusted by the courts in favour of the employee if considered unreasonable.

#### **5.5 Intellectual Property**

Statute provides that the title to inventions created by employees during employment vests in the employer. The employee is, however, entitled to reasonable compensation.

Copyright issues are not dealt with under statute and thus the terms of the employment contract must regulate the question of ownership of copyright material. There is, however, a customary rule stating that should the employment

contract lack provisions dealing with copyright ownership, employer ownership is presumed if it is in the nature of the employment relationship to create copyright material. In addition, there are special rules in relation to computer programs. These rules, which are incorporated into the Copyright Act and which are the result of implementation of the Directive 91/250/EEC, state that the copyright belongs automatically to the employer if not otherwise agreed in the employment contract.

## **6. Pay and Benefits**

### **6.1 Basic Pay**

There is no defined statutory minimum wage, but most collective agreements set a minimum wage, which is normally negotiated yearly or every two years. The employee is, however, entitled to a reasonable and normal remuneration for the work performed.

Unless otherwise agreed, salary must be paid in cash at or near the place of work. In practice, the salary is usually paid to the bank account of the employee.

### **6.2 Pensions**

It is a legal requirement that all employers provide a minimum level employment pension plan. All pensions are reviewed annually and adjusted according to an index taking into account prices and wages. During 2012, 5.15% of the gross salary of employees under 53 years of age and 6.50% of the gross salary of employees aged 53 years or over was contributed by employees towards the cost of the plan, the average total cost being 22.8%. Employers meet the balance of the cost. Some companies provide additional pension coverage for their employees, especially in management positions. The pension contribution percentages will remain unchanged in 2013.

### **6.3 Incentive Schemes**

Various bonus arrangements or result-oriented salaries are a common means of

incentivisation in several business fields. Share schemes are typically used for management level employees and select key-employees.

## 6.4 Fringe Benefits

Common fringe benefits provided by employers may typically include a lunch benefit, mobile phone and company car (particularly for more senior employees). The employer may also support employees' sport and cultural activities. More valuable benefits, for example housing, may be provided by the employer, in certain cases.

## 6.5 Deductions

Employers are obliged to make income tax deductions prior to the payment of salary. Other deductions include employer's unemployment insurance contributions and pension contributions.

## 7. Social Security

### 7.1 Coverage

The state social security system provides a comprehensive range of benefits: retirement pensions, unemployment benefits, survivors' benefits, disability pensions, industrial injury benefits, cash sickness benefits, health insurance, maternity benefits and family allowances.

### 7.2 Contributions

The employer's basic contribution during 2012 was 2.12% for all employers. In 2013, the employer's basic contribution will amount to 2.04%.

It is a legal requirement that all employees shall be covered by unemployment insurance. During 2012 employees contributed 0.60% of their gross salary to the insurance. The employer's contribution was 0.80% of the gross salary up to €1,936,500.00 and thereafter 3.20%. The contribution rate varies annually. In 2013, the percentages of employer's and employee's contributions will remain unchanged. With respect to the employer's contribution, the monetary

threshold will be increased to €1,990,500.00 after which the employer's unemployment insurance contribution will amount to 3.20%.

## 8. Hours of work

Detailed laws exist on hours of work; the normal maximum is 40 hours a week, eight hours per day. However, based on collective bargaining agreements the length of a working week is usually between 37 and 39 hours.

There are specific provisions relating to overtime. The Working Hours Act, the principal statute relating to working hours, provides that daily overtime must be compensated at a rate equal to an increase of 50% on normal pay for the first two hours of overtime and 100% on normal pay for any extra hours. Work performed on Sundays or on public holidays must also be compensated with double pay. The parties can agree that overtime work is compensated by time off. The length of the time off is calculated as described above.

## 9. Holidays and Time Off

### 9.1 Holidays

Statutory holiday is four to five weeks per year, depending on the length of service of the employee (two working days per month, if the length of service is less than one year at the end of the holiday accrual year; otherwise 2.5 working days per month, Saturdays being considered as working days). There are also several public holidays. Collective bargaining agreements usually provide for a bonus of 50% of holiday pay for statutory holiday.

### 9.2 Family Leave

The Social Insurance Institution of Finland provides allowances in the event of sickness and for maternity, paternity and parental leave. There are specific statutory provisions concerning employees' rights to take time off to pursue education, union activities or to

take care of children. Female employees are entitled to 105 days' maternity leave (inclusive of Saturdays, but not Sundays) and male employees are entitled to 18 days' paternity leave. In addition, the mother or the father may take parental leave after the maternity leave.

The paternity leave regime was amended with effect from 1 January 2013 so that the father is entitled to a maximum of 54 working days paternity leave. As under the previous regime, a maximum of 18 working days of the paternity leave can be taken simultaneously with the mother, with the rest of the leave being taken after the maternity and parental leave. The paternity leave will have to be taken before the child turns two.

The parental leave ends 263 days after the first day of the maternity leave. Depending on the taxable income of the parent in question, an average of 65% of gross salary is paid by Social Security during maternity, paternity and/or parental leave. Many collective bargaining agreements include an obligation on the employer to pay salary during the first weeks or months of the maternity leave.

### 9.3 Illness

The employer is liable to pay wages during the employee's sick leave. The Statute provides that the sick pay must be paid until the end of the ninth weekday following the day the employee's sick leave began. Collective agreements commonly provide for considerably longer periods of paid sick leave. It is customary that the sick pay period is adjusted according to the length of the employment relationship.

The Social Insurance Institution of Finland will pay a sickness allowance after the disability has lasted for nine weekdays. The employer is entitled to receive the sickness allowance paid to the employee, if the employee has received pay from his employer during the same period.

#### 9.4 Other time off

Other flexible working arrangements include an employee's right to take unpaid child-care leave in order to care for their child until the child reaches the age of three. Further, an employee who has been employed by the same employer for a total of at least six months during the previous 12 months is entitled to take unpaid partial child-care leave up to the end of the second year during which the child attends elementary school.

In the case of sudden illness of a child under 10 years of age, the parent may take up to four working days off, unpaid. In practice under the terms of many collective bargaining agreements employers will pay salary during such leave.

### 10. Health and Safety

#### 10.1 Accidents

Health and safety in the workplace is governed by strict rules, to ensure that the working environment is suitable for the nature of the work to be carried out. All employers are obliged to take out insurance to cover personal injury and disease suffered by their employees during, or because of, their employment.

#### 10.2 Health and Safety Consultation

The law requires, among other things, that there are health and safety managers in every company and elected health and safety delegates in all companies with more than 10 employees. Companies with 20 or more employees must have a health and safety council (75% of the members of which must be employee delegates) to be consulted on all health and safety matters.

### 11. Industrial Relations

#### 11.1 Trade Unions

About 80% of Finnish employees are members of a trade union.

The main employees' unions are:

- (a) SAK, the Central Organisation of Finnish Trade Unions, representing

mainly blue-collar and low grade salaried workers;

- (b) STTK, the Confederation of Technically Skilled Employees, representing technically skilled employees and mainly professional supervisors; and
- (c) AKAVA, the Confederation of Unions for Academic Professionals representing highly educated and academically skilled employees.

The Act on Co-operation within Undertakings (2007) and the Representation of Personnel within the Management of Undertakings Act (1990) give employees the right to be consulted on decisions which affect their employment. These regulations also enable employees to influence decision-making to some extent. According to the Act on Co-operation Within Undertakings, employers with 20 or more employees must consult the employees or their representatives prior to making decisions on matters such as enlargement, redundancy, working time organisation, changes to job specification, employee transfers and change of location. In companies with 150 or more employees the employer must arrange employee representation on the supervisory board, on the board of directors or in a corresponding organ, if the employees so request.

According to the Act on Co-operation within Undertakings, employees' representatives also have the right of access to full statements of accounts and to information about the company's financial situation.

#### 11.2 Collective Agreements

Collective bargaining agreements are made between employers and trade unions generally at industry or sector level but also at company level. The agreements usually have effect for one or two years, and cover a wide range of issues, including minimum pay, employee

and employer co-operation and health and safety matters.

Collective agreements bind not only the parties to the agreement, but also any association of employers and employees that are, directly or indirectly, members of either signatory parties.

Generally binding collective bargaining agreements also bind "non organised" employers. A collective bargaining agreement is declared generally binding when the number of employees working in companies bound by the collective bargaining agreement is approximately 50% of all the employees in that sector of business.

#### 11.3 Trade Disputes

Collective bargaining agreements impose an obligation to refrain from industrial action, such as strikes, go-slows or lockouts. Such action is, however, forbidden only if the purpose of the industrial action is to induce change in collective bargaining agreements or the Collective Bargaining Agreement Act. However, this obligation does not apply to individual employees.

Procedures and bodies exist in Finland to deal with disputes which arise between employers and unions.

The National Conciliators' office deals with disputes which arise during collective bargaining. The two parties are free either to reject or accept the proposals of the conciliator.

If a dispute arises from the interpretation of a collective bargaining agreement, it is dealt with by the Labour Court whose decisions are final. The Labour Court has the power to impose penalties for breach of a collective bargaining agreement.

#### 11.4 Information, Consultation and Participation

The Co-operation within Undertakings Act includes provisions on the employer's

obligation to inform or consult with the employees or their representatives prior to taking final decisions on different matters covered by the Act.

## 12. Acquisitions and Mergers

### 12.1 General

The effect of acquisitions and mergers on employment contracts is regulated by the Employment Contracts Act implementing the relevant directives of the European Union.

The transfer of shares of a limited liability company does not have any effect on employment contracts and does not generate any consultation or information obligations on the part of the employing entity.

The Employment Contracts Act provides that when a business is transferred, all the employees within that business are transferred with it. The transferor's rights and obligations are automatically assigned to the transferee. The transfer per se does not give the new employer the right to dismiss employees, the employer must have a valid ground for dismissals, for example, financial and production related reasons and organisational restructuring of the business due to the transfer. The employer has to justify the dismissal.

In the context of a business transfer the employees of the business are entitled to terminate their employment relationships with effect from the date of transfer regardless of their notice obligation or the duration of employment, if they have been informed of the transfer not less than one month before the date of transfer. If the employees are informed of the transfer later than that, they are entitled to terminate their employment relationship with effect from the date of transfer, or, on a later date provided it is within one month of having been informed of the transfer.

The information, consultation, negotiation and notification obligations outlined below are equally applicable in the context of mergers, the merging company assuming the transferor's obligation and the receiving company assuming those of the transferee.

### 12.2 Information and Consultation Requirements

Companies employing at least 20 employees (on a regular basis) are obliged to supply information and/or consult or negotiate with the employees affected by the transfer of a business or a merger, or their representatives by virtue of the Act on Co-operation within Undertakings (30.3.2007/334 as amended).

The transferor and the transferee are obliged to provide the employee representatives with specific information in relation to the business transfer. The transferor has to inform the employee representatives in good time before the transfer is executed. In practice the transferor has no obligation to inform the employee representatives prior to the signing of the transfer documentation, but should inform them without delay after the signing. The transferee should provide the corresponding information to the employee representatives no later than seven days before the transfer. The transferee is also obliged to allow the employee representatives the opportunity to ask questions, once they have received the information. The transferee is obliged to respond to any questions raised. In practice the information sessions of the transferor and the transferee may be organised simultaneously.

The co-operation procedures set out in the Act on Co-operation within Undertakings must be followed in the event of any post-transfer changes to full-time contracts of employment into part-time contracts, lay-offs and termination of contracts. If the transferee intends to execute such measures a separate notification and co-operation

procedure must be carried out prior to a final decision being taken in relation to the measures.

### 12.3 Notification of Authorities

The employer has no obligation from a labour law perspective to inform any governmental body of a merger or transaction.

### 12.4 Liabilities

A person belonging to the group management, the employing entity, employer or a representative of either, who intentionally or through carelessness fails to observe the information obligations will be liable to a fine, and possibly to pay compensation in case the transaction causes lay-offs. Failure to observe the information obligations does not, however, prevent the transaction from completing.

## 13. Termination

### 13.1 Individual Termination

An employment contract for an indefinite period can only be terminated with immediate effect during a trial period or because one party has committed a "serious offence". In addition, an employer may be entitled to rescind the contract if the employee is permanently disabled or persistently fails to fulfil his obligation to work, and an employee may be entitled to rescind the contract if the employer fails to pay remuneration or provide sufficient work. If the employer has terminated or wishes to terminate the employment contract with immediate effect, he has to show that there are or were sufficient grounds justifying the dismissal. The burden of proof as to whether there are or were grounds justifying a summary dismissal is on the employer.

An employment contract made for a specific period is terminated without notice when the period expires.

An employer failing to comply with the rules concerning termination of employment is liable to the dismissed

employee for damages and/or compensation. The amount of compensation varies between 3-24 months' salary of the employee. The amount is determined on a case-by-case basis taking into account all the relevant circumstances.

**13.2 Notice**

If no "serious offence" has been committed, an employment contract can only be terminated on the giving of notice. Under the Employment Contracts Act, employer's notice periods are as follows:

Employee Service	Period of Notice
Less than 1 year	14 days
1-4 years	1 month
4-8 years	2 months
8-12 years	4 months
More than 12 years	6 months

unless (i) otherwise agreed by the parties; or (ii) the applicable collective agreement stipulates otherwise.

If the employee wishes to terminate the contract the period of notice is: (i) two weeks if the employment has lasted less than five years; or (ii) one month if the employment has lasted over five years, unless otherwise agreed by the parties.

Unless otherwise provided for in the applicable collective bargaining agreement, the parties can agree on notice periods not exceeding six months and may provide that the notice to be given by the employee may never be longer than that to be given by the employer.

**13.3 Reasons for Dismissal**

Even with notice an employment contract for an indefinite period cannot be terminated by an employer unless there is an "especially weighty reason". Such reasons are specified in the Employment Contracts Act but in a negative manner

only, that is, the Act states grounds that cannot be regarded as especially weighty. The listed grounds are the following: illness (if it has not caused a substantial and permanent reduction of working capacity in the employee); participation in a strike or other industrial action; political, religious or other views and activities in public or in any association and exercising a statutory or other legal right. It is for the employer to justify a dismissal.

**13.4 Special Protection**

Statute prevents the termination of employment because of compulsory or voluntary military service. Termination of employment during (or because of) pregnancy or during maternity, paternity, parental or childcare leave is with certain minor exceptions prohibited.

**13.5 Closures and Collective Dismissals**

An employment contract for an indefinite period can be terminated on the grounds that there has been a major reduction in the amount of work for economic or related reasons, provided the reduction is not just temporary. However, dismissal is deemed to be unjustified in the following circumstances: if prior to or after the dismissal a new employee has been recruited to perform the same or corresponding duties to those performed by the former employee or any reorganisation of duties which does not in reality reduce the amount of work to be done. The employer has to be able to show sufficient grounds for a dismissal.

If the Act on Co-operation within Undertakings is applicable, the employer must consult the employees or their representatives prior to the dismissals. The notice of these consultations must be given in writing. The period of notice is five days. The minimum duration of the negotiations depends on how many employees are going to be made redundant. If the termination of contracts involves less than 10 employees the negotiation period is a minimum of 14 days. If it involves 10 or more

employees the negotiation period is six weeks. The parties to the negotiation have the right to agree on other and even shorter negotiation periods.

The manpower authorities have to be informed about planned measures to reduce personnel. The information has to be delivered to the manpower authorities no later than the commencement of the negotiation process. A separate notification to the manpower authorities must also be made following the actual terminations of employment on collective grounds, regardless of whether the dismissals were subject to the co-operation proceedings.

If the employer fails to comply with the co-operation obligations outlined above, whether deliberately or by negligent omission, an employee may be entitled to compensation from the employer of up to €30,000.

**14. Data Protection**

**14.1 Employment Records**

The principal piece of legislation governing data protection in Finland is the Personal Data Act 1999 ("FDPA"), which implements the Data Protection Directive. The Act on Protection of Privacy in Working Life 2004 ("WLA") and the Act on Co-operation within Undertakings 2007 also regulate data protection. The FDPA regulates the collection, storage and use of information held by employers about their employees. The Data Protection Ombudsman and the Data Protection Board, among others, supervise the interpretation of the law.

An employer, as the data controller, is under an obligation to ensure that it processes all personal data in accordance with the provisions of the FDPA. The collected data must be: required for a specific purpose, accurate, up to date, and not stored longer than necessary. In addition, the personal data must be stored securely to avoid unlawful

access or accidental destruction or damage. Sensitive data may only be processed in accordance with the specific provisions of the FDPA. The WLA includes separate provisions concerning processing of data on the use of drugs. In certain circumstances an employer is entitled to process data entered in certificates on drug tests.

The data controller must keep a record with details on the nature of the data held and the purpose for which it is processed. The record must be held available for the employees.

#### **14.2 Employee Access to Data**

Employees have the right to make an access request concerning the data stored about them by the employer. The right to access includes also a right to be given details of whom the data has been disclosed to. The information requested by the employee shall be provided without unnecessary delay. If the information has not been provided within three months of the request, it is classified as a refusal of the subject

access request. The matter may then be brought to the Data Protection Ombudsman. A reasonable fee may be charged if employees make requests more often than once a year. The fee cannot exceed the actual expenses incurred by the employer.

#### **14.3 Monitoring**

Technical monitoring of email (i.e. where the contents of emails are not monitored) by the employer must be discussed with the employee representatives in accordance with the Act on Co-operation Within Undertakings prior to the introduction of such monitoring. Emails belonging to the employer can be opened and read by another person with the employee's consent according to the rules agreed at the working place. If the employee does not give his/her consent, the WLA includes provisions setting out the procedure to be followed in order to retrieve and open email messages belonging to the employer. This procedure is detailed and multi-phased and is aimed at ensuring and protecting privacy. Prior to embarking on such a

procedure an employer must have offered the employee an alternative option to be used in case of absence.

The WLA also regulates the use of camera surveillance in the work place.

#### **14.4 Transmission of Data to Third Parties**

An employer who wishes to provide personal data to third parties must do so in accordance with the FDPA principles and processing conditions. Transmission within the EEA is allowed. The transfer of data to a third party based in a country outside the EEA is permissible only if the country ensures an adequate level of data protection or one of a number of other specific provisions are satisfied. Such transfers are permissible, however, where the employee gives his express consent to the transfer of personal data to third parties outside the EEA.

*Contributed by Hannes Snellman  
Attorneys Ltd*

# France

## 1. Introduction

Employment relationships in France are principally regulated by the Labour Code (*Code du travail*), the numbering of which was altered by a law of 21 January 2008 and a decree of 7 March 2008. Collective-bargaining agreements, internal regulations and practices are also very important. In the event of a conflict between the terms of the various sources subject only to legal requirements which are matters of public policy, the terms that are most favourable to employees will generally prevail.

The Labour Code is intended to grant individual and collective rights at work. It is not possible to contract out of most of its provisions. The system is intended to allow trade unions to supplement and build upon the Code through legally enforceable collective-bargaining agreements (*conventions collectives*) negotiated for each sector of industry and for each region.

Collective-bargaining agreements are legally binding between the employers and unions in the relevant industrial sector. Successive Governments have “extended” the provisions of collective-bargaining agreements to all employers in a particular sector, even if they were not signatories to a collective-bargaining agreement in that sector, therefore virtually all sectors of the economy are covered by these agreements.

Labour Courts (*Conseils de prud’hommes*) have exclusive first instance jurisdiction in individual employment disputes. Cases are heard and judged by laymen, elected employer and employee representatives, and not by professional judges. Appeals (in so far as they are possible) are made to the labour sections of the local Court of Appeal and then to the Supreme Court (*Cour de Cassation*). Professional judges sit in these two higher Courts.

First instance courts (*Tribunal d’instance* and *Tribunal de Grande Instance*) have

exclusive jurisdiction in relation to collective litigation involving staff representatives and trade unions.

Labour Inspectors (*Inspecteurs du travail*) have various responsibilities with regard to enforcing employment regulations. Although they concentrate most of their activities on industrial undertakings, an employer can expect a prompt visit in the event of, for example, an accident at work, or a lengthy and detailed investigation when an employer wishes to dismiss employees due to economic reasons or organisational changes.

## 2. Categories of Employees

### 2.1 General

Legislation and collective bargaining agreements make a distinction between executives (*cadres*) and other categories of employees. “*Cadres*” are employees who have the responsibility of managing other employees below them. Broadly speaking, higher-level white-collar employees and senior executives are considered “*cadres*”.

This status is of particular significance in the context of the working time regulations (see further below).

### 2.2 Directors

Office holders such as Chairmen, Board Members, Managing Directors and Managers (*Gérants*) of limited companies (*Société Anonyme – SA, Société par Actions Simplifiée – SAS, or Société à Responsabilité Limitée – SARL*) are normally considered to be company officers and not employees. Company law, not employment law, governs their relationship with the company.

Generally, except on the incorporation of a company, a director may not become an employee (whilst remaining a director) but an employee may become a director (and remain employed). A company officer may only perform salaried duties in addition to his director’s duties if he was already employed by the company,

continues his technical duties as a salaried employee (i.e. duties that are clearly separate from the management of the company that he assumes as a company officer), receives remuneration and exercises his duties under the supervision and control of another person. When an employee becomes a company officer, he or she may retain his/her salaried functions. If those, however, are not separate from the company office, the contract of employment is normally considered suspended and is then revived when the directorship ceases.

## 3. Hiring

### 3.1 Recruitment

Employers can recruit from a variety of sources. The employment service run by the state (*Pôle Emploi*) provides a free recruitment service for employers and job seekers but employers do not extensively use this. Executive recruitment agencies may be used for senior or specialist staff. Employers for direct recruitment use the local and national press. Advertisements for staff must be in French even when an employer is looking to recruit senior staff with foreign-language ability.

In the event that specific techniques are used in the framework of the recruitment process, there is a legal requirement that the candidate is informed of the use of such techniques. The results of the possible recruiting tests must be kept confidential and communicated to the candidate. There is also an obligation to inform the Works Council (*comité d’entreprise*), if any, of such recruiting techniques.

There is a requirement for companies employing at least 20 employees that a percentage of positions be reserved for disabled persons (currently 6%). Failure to comply with this requirement obliges the employer to contribute to a specific fund dedicated to the development of employment for disabled persons (AGEFIPH).

### 3.2 Work Permits

Non-EU nationals cannot usually be employed without a work permit (*autorisation de travail*). A work permit should be obtained outside France by submission of the appropriate documents, including the proposed employment contract, to the Ministry of Labour via the local French Consulate.

If residence of a non-EU national exceeds three months, a residence permit (*carte de séjour*) is required. This is obtained from the local representatives of the French Home Secretary (*Préfectures*, in Paris *Préfecture de Police*).

Failure to renew a permit constitutes a “real and serious” ground for dismissal i.e. can justify a dismissal.

## 4. Discrimination

The Labour Code prohibits discrimination on the grounds of sex, sexual orientation or identity, lifestyle, race, age, physical appearance, religion, political opinions, union activities, etc.

When discrimination is alleged, the employee only needs to assert the fact that in his view, the act complained of constituted direct or indirect discrimination. The employer then has to prove that it has not acted in a discriminatory manner and that there were objective, non-discriminatory reasons for its behaviour. Failure to prove this will lead to an award of damages by the Labour Court (*Conseil de prud'hommes*).

Enforcement of the anti-discrimination rules is carried out through the work of Labour Inspectors who may report infringements to the Public Prosecutor.

Civil action may be taken by aggrieved employees before the Labour Courts. Direct criminal action may also be taken by employees before a Police Court.

Discrimination is a criminal offence sanctioned by a fine of up to €45,000

and/or a maximum three-year prison sentence for the legal representative of the company and a fine of up to €225,000 for the company itself. These sanctions are increased in certain aggravating circumstances (e.g. perpetration in a public place or by a representative of the state).

In addition, there exists a general principle of equal pay and treatment for employees doing the same work.

Where at least 50 people are employed in the company, the employer must prepare an annual report on equal opportunities. The report reviews the measures taken to achieve equality at work for both men and women and sets objectives for the following year.

Sexual harassment and mental harassment at work are prohibited and constitute a criminal offence.

The law defines moral harassment as: *“Repeated actions of harassment which are aimed at or trigger damage to the employee’s work conditions in a way that his/her rights or dignity, physical or mental health could be altered, or his/her professional perspectives damaged.”*

The law provides that *“no employee should be subjected to situations or acts of sexual harassment.”*

Sexual harassment is defined as the *“repeated infliction of sexually connoted words or behaviour affecting a person’s dignity because of the degrading or humiliating nature of the words or behaviour, or give rise to an intimidating, hostile or offending situation for the person”*

The following also constitutes sexual harassment: *“any type of serious pressure, including one-off acts, inflicted pursuant to the actual or apparent purpose of obtaining an act of a sexual nature, regardless of whether such act is designed to benefit the harasser or a third party”*.

The French Labour Code provides that both sexual and mental harassment are a criminal offence in France, sanctioned by a fine of up to €45,000 and/or a maximum two-year prison sentence for the legal representative of the company and a fine of up to €225,000 for the company itself. These sanctions are increased in certain aggravating circumstances (e.g. where the victim is a minor or vulnerable person, etc).

The employer may, in addition, take disciplinary action against the harasser.

The Labour Code provides for damages to be awarded against the harasser and the employer. As the employer has an absolute obligation to maintain the safety of employees it is accordingly always liable for any harassment carried out by its employees.

Discriminatory measures against the victims or witnesses of sexual or moral harassment are also sanctioned by a fine of up to €3,750 and a prison sentence of up to one year.

## 5. Contracts of Employment

### 5.1 Freedom of Contract

French employment law is extensively regulated but where it is not, employers and employees are free to agree the terms they wish. Nevertheless, an employee may not, in advance, contract out of or waive his/her statutory rights.

The parties to the employment relationship are theoretically free to choose the law applicable to the contract of employment.

However, as a result of Articles 8 and 9 of the EU Regulation n°593/2008, dated 17 June 2008 (*Rome I*), a contract of employment cannot seek to avoid the application of local mandatory regulations that are more favourable to the employee in the country where the work is

performed. These mandatory regulations are as follows:

- (a) Regulations regarding Minimum Wage (*SMIC*);
- (b) Working Time regulations (notably work at night and on Sunday);
- (c) Health and Safety at Work regulations, Occupational medicine;
- (d) Public Holidays;
- (e) Paid Holidays;
- (f) Rules regarding the termination of the contract of employment. For instance, on termination of the employment contract, each employee is entitled to notice (except in the case of gross or serious misconduct), accrued paid holiday rights not yet taken, and severance pay (*indemnité de licenciement*). Moreover, a specific termination procedure must be complied with (notably a pre-dismissal meeting and a written notice of termination sent by registered mail after a compulsory cooling-off period).

## 5.2 Form

Since 1 July 1993, as a result of the EU Directive dealing with information to be given to the employee in his contract of employment, employers must deliver written terms and conditions of employment (with a description of work, workplace, salary, etc) within the first two months of employment.

Most sectors of the French economy are covered by collective-bargaining agreements which usually also require a letter or a contract of employment setting out the basic terms of employment. Written contracts are also required for certain categories of employment (for instance, fixed-term or part-time employment).

The norm is a permanent or unlimited-term contract (*contrat à durée indéterminée*). Fixed-term contracts are

only permitted in limited circumstances such as for the carrying out of specific tasks or to cover for the absence of a permanent employee, or in the event that the company faces an increase of its activity, provided however that the fixed-term employment is not used to fill a normal permanent position in the company. In most instances, they may not exceed 18 months. If they do, they will automatically be recharacterised as contracts for an indefinite period. Except in limited cases, the termination of a fixed-term contract usually gives rise to a liability to make a payment of 10% of the total salary paid during the period of employment by way of severance pay.

The law of 25 June 2008 introduced a new fixed-term contract for a specific task or a pre-defined objective (*contrat à durée déterminée à objet défini*). These contracts must have a minimum duration of 18 months and a maximum duration of three years; they cannot be renewed and are limited to engineers and management level. They may only be put in place if a sector-wide or company-wide collective bargaining agreement permits.

## 5.3 Trial Periods

Any probationary or trial period (or its renewal) must be expressly provided for in the employment contract.

In addition, Article L. 1221-19 of the French Labour Code imposes a compulsory maximum duration for a trial period: two months for manual workers and other employees; three months for supervisors (*agents de maîtrise*) and technicians; four months for executives or managers (*cadres*). The probationary period may be renewed once for a period equivalent to the duration of the original probationary period if permitted by the sector-wide or company-wide collective bargaining agreement.

During this period, either party may terminate the contract without having to specify a cause for dismissal.

The trial period may only be terminated following a notice period. The duration of the notice is established by law and varies substantially depending on whether notice is given by the employer or the employee. The notice period may not result in the trial period extending beyond its original duration so that the decision to terminate the trial must be taken before the end of the trial period. (Articles L. 1221-25 and L. 1221-26 of the French Labour Code).

## 5.4 Confidentiality and Non-Competition

An employee owes a duty of confidentiality to the employer both during and after employment. During employment, there is also a duty not to engage in competing activities.

Undertakings not to compete after the end of the employment are permitted and enforceable if they are restricted in scope, term and geographical area, do not act to prevent an employee from continuing to earn a living or practise his/her profession and are commensurate with the company's business needs. Non-competition covenants must provide for financial compensation, failing which they are null and void. If the employee complied with such an unlawful clause, he or she would nevertheless be entitled to receive compensation before the court. Non-competition clauses are fairly common for certain types of employees such as salesmen and executives. "Excessive" non-competition covenants may be held null and void; alternatively, the courts have the discretion to "revise down" such covenants.

Clauses preventing the employee from working with the company's clientele or customers after termination of the employment contract are now deemed to constitute a non-competition clause, and require adequate financial compensation.

## 5.5 Intellectual Property

The French Intellectual Property Code describes in detail the regime applicable

to employee's inventions. Patentable inventions made by an employee at the employer's request in the course of his duties belong to the employer (*invention de mission*). In certain circumstances employees are entitled to additional remuneration for such inventions. It is very common, especially in certain sectors (information technology, chemicals, etc), to include provisions relating to intellectual property rights in the employment contract.

## 6. Pay and Benefits

### 6.1 Basic Pay

There is a national minimum salary (*SMIC*) which is reviewed on 1st January each year by reference to certain indices. With effect from June 2012, the hourly rate is €9.40 i.e. €1,425.67 per month (for 35 hours per week).

However, most collective-bargaining agreements further regulate salaries in their sector. In practice, the nationally agreed rates usually act as starting points for negotiators at the lower bargaining levels.

Linking salaries to the cost of living index is prohibited.

### 6.2 Pensions

The French pensions system is mostly public and state controlled. Ordinary employees benefit from two mandatory pension schemes (the pension scheme provided for by the Social Security and a complementary mandatory pension scheme ("*ARRCO*"). Executives (*cadres*) benefit from the same pension schemes as ordinary employees in addition to another complementary mandatory pension scheme ("*AGIRC*"). All compulsory schemes are on a "*répartition*" basis ("pay as you go").

The use of private pension schemes is fairly exceptional within French companies but is becoming more widespread, especially for Senior Executives "*cadres*". Most of those

schemes are provided by insurance companies or similar institutions and are based on defined contributions.

### 6.3 Incentive Schemes

A mandatory profit-sharing scheme (*accord de participation*) must be concluded in companies and in "economical and social units" employing at least 50 employees. Where the profit permits, the establishment of a special profit-sharing reserve (*réserve spéciale de participation*) can be established for the benefit of the employees; the funds are usually placed by the employer in a fund run by a specialised institution and are blocked for four years, accruing interest for the employees.

Discretionary bonus schemes (*accord d'intéressement*) and savings schemes (*plan d'épargne d'entreprise*) are optional. These schemes have rapidly developed over recent years.

The amounts paid to employees through these incentive schemes are subject to certain limits and circumstances, exempt from social-security contributions and income tax. However, those sums are subject to a fixed taxation (*forfait social*) of 20% with effect from 1 August 2012.

The Amended Social Security Financing Act for 2011 introduced a profit-sharing bonus (*prime de partage des profits*) granted to employees, in the event that, pursuant to Article L.232-12 of the French Commercial Code, the company pays its members or shareholders dividends, whose amount per share has increased in comparison to the average dividends per share paid in respect of the company's two prior fiscal years.

### 6.4 Fringe Benefits

It is common practice to provide senior executives with cars and other benefits in kind. Such fringe benefits are considered as salary and subject as such to social security contributions and income tax.

In most cases, they may not be withdrawn from the employee without his/her prior approval.

### 6.5 Deductions

Employees are responsible for declaring to the tax authorities their own income tax. The employer is not required to deduct tax at source; however employers declare annually to the tax authorities the amount paid to employees and consultants, enabling the tax authorities to crosscheck the information given by the employee on his/her actual income. The tax year runs from 1 January to 31 December.

## 7. Social Security

### 7.1 Coverage

A basic level of benefits is provided by the state system: retirement and survivor's pensions, including the mandatory complementary schemes, AARRCI and AGIRC, disability and sickness benefits, and family allowances, disability and survivors' benefits and unemployment benefits. These schemes are funded by both employee and employer contributions. Those who do not qualify for assistance under one of these schemes are covered by the national solidarity scheme, financed by the state.

### 7.2 Contributions

Both employers and employees are required to make contributions to the social security system and employers must deduct employees' contributions from their pay. Contributions to the basic social security system amount to approximately 28% for the employer and 16% for the employee. The percentage is based on gross salary with various ceilings depending on the type of benefit insured.

Further contributions to the complementary pensions system must be paid to the *AGIRC* fund for executives (*cadres*) and to the *ARRCO* fund for all employees. Minimum contributions

payable vary on the basis of employee category and the level of salary: employees' contributions range from 3% to 8% on average; employers' contributions from 4% to 13% on average.

The total amount of contributions to be paid by the employer is approximately 45/50% of gross salary and 20/25% for the employees, on ordinary remunerations.

## 8. Hours of Work

With effect from 1 January 2002, the duration of the working week was reduced to 35 hours per week for all companies. Subsequent amendments have been made, the last on 20 August 2008, in order to provide greater flexibility for employers.

35 hours per week is not the maximum duration of work but only the number of hours above which employees are entitled to overtime pay.

The working time is not necessarily computed per week. It can be computed on a monthly basis, and in some cases, on an annual basis (often 218 days of work per year). When the working time is computed in days over the year, the employer does not need to check the employee's exact working time, save only for compliance with (i) the daily rest of 11 consecutive hours per working day; (ii) the weekly break of at least 24 consecutive hours; and (iii) the prohibition on working more than six days per week. In addition, the French Supreme Court recently held that working time computed per week must be provided for in the applicable Collective Bargaining Agreements and the company-level working time agreements. The French Supreme Court established very strict conditions in relation to the computation of weekly working time and invalidated the provisions of several collective bargaining agreements on the grounds that they did not ensure compliance with the maximum legal limit on duration of working time and weekly and daily rest.

Computing the working time in days over the year, thus paying the employee a lump-sum remuneration for his/her work, irrespective of his/her actual working time, requires an express clause in the employee's contract to this effect.

Overtime is limited for each calendar year. The law of 20 August 2008 allows the overtime ceiling to be set by a company-level agreement, or failing that, by a collective bargaining agreement at sector level, confirmed by a ministerial decree (Article L. 3121-11 of the French Labour Code). An authorisation from the labour authorities is no longer required in the event the overtime exceeds the allowed limit but works council consultation remains compulsory.

Overtime is paid with an additional 25% premium for the first eight hours per week and a 50% premium thereafter.

In such cases, time-off in lieu (*contrepartie obligatoire en repos*) must be granted to the employee. In the absence of a company-wide collective agreement or a sector-wide collective bargaining agreement for companies with up to 20 employees, the law establishes time-off at an equivalent of 50% per hour and 100% per hour for companies over 20 employees.

Nevertheless, employers must comply with legal limits and ensure that employees do not work in excess of 10 hours per day or 48 hours per week or an average of 44 hours per week in a period of 12 consecutive weeks (although these restrictions do not apply to employees subject to a lump-sum remuneration with a reference to a specified number of days of work per year). Authorisation to exceed these limits can in some cases be obtained from labour authorities.

Only senior management employees in the company (*Cadres Dirigeants*) are exempt from these rules. French case law has defined this category of employee

very narrowly. *Cadres Dirigeants* are executives who have the highest responsibilities within the company (i.e. they must benefit from wide powers of attorney from the management board), a large degree of independence in the organisation of their work schedule, and the highest compensation packages in the company.

Sunday work is in most cases forbidden, and subject to exceptional authorisation from the local authorities.

## 9. Holidays and Time Off

### 9.1 Holidays

There is a basic entitlement to five weeks' paid holiday per year. Collective-bargaining agreements or individual employment contracts may confer rights to additional holiday.

In addition, there are 10 public holidays (equivalent to bank holidays) for which almost all employees get paid by virtue of collective-bargaining agreements.

### 9.2 Family Leave

A pregnant woman is entitled to up to a total of 16 weeks' maternity leave, although this period is extended to 26 weeks for the birth or adoption of a third child and increases further with the number of children. The woman receives up to 80.32% of her salary up to a ceiling paid by a social security institution. In many cases, collective-bargaining agreements require the employer to top this up to full normal pay and the additional remuneration is usually covered by the supplemental health cover in force for the company's employees.

Three days' paternity leave is granted to fathers on the birth of a child and includes entitlement to full pay.

In addition, fathers are allowed eleven days' paternity leave (18 days in case of multiple births). The father is not entitled to full pay, unless more favourable conditions are provided for by a collective-bargaining

agreement or where this is a common practice in the company. During this leave, the father is however entitled to social security benefits.

Mothers and fathers alike are entitled to take time off on a full-time or part-time basis during the first three years following birth of any of their children. This parental leave is unpaid by the employer but the employee is entitled to benefits from the government.

### 9.3 Illness

Sickness normally has the effect of suspending the employment contract and relieves the employer of the obligation to pay the employee. From the eighth day of ill-health absence that is not caused by work-related accidents and illnesses, an employee is eligible to receive 90% of his/her normal salary for 30 days and two-thirds of it for another 30 days. These periods increase with length of service. The cost is borne by the social-security fund. However, most collective agreements provide that the employer is obliged to continue to pay the whole or part of the employee's remuneration during some of the sickness period; this is usually covered by the supplemental health cover in force in the company in favour of its employees.

## 10. Health and Safety

### 10.1 Accidents

Employers are obliged to contribute towards a social security fund to maintain insurance against any liability which might arise as a result of industrial accidents and which are not due to the negligence or gross misconduct of the employer.

The cost of insurance varies according to the size of the company and the history of industrial accidents in that particular undertaking.

### 10.2 Health and Safety Consultation

A Health and Safety Committee (*Comité d'Hygiène, de Sécurité et des Conditions de Travail*) must be set up in all

companies employing 50 or more employees. Its members are designated by the Works Council and the Staff Delegates (*Délégués du personnel*) from amongst all the company's staff. This committee is responsible for ensuring that the employer complies with health and safety regulations and the current tendency is to require their opinion on any matter that may affect the employees' conditions of work, including for instance a redundancy program. When the Works Council is consulted on health and safety matters, it must be informed of the opinion of the Health and Safety Committee in relation to that matter before giving its own opinion.

## 11. Industrial Relations

### 11.1 Trade Unions

French law grants the right to negotiate, the right to be represented by and organised into a trade union and the freedom not to join a union. The French trade union movement has five main federations which used to be automatically representative at all levels since the Second World War:

- (a) Confédération Générale du Travail (CGT);
- (b) Force Ouvrière (FO);
- (c) Confédération Française Démocratique du Travail (CFDT);
- (d) Confédération Française de Travailleurs Chrétiens (CFTC);
- (e) Confédération Française de l'Encadrement-Confédération Française des Cadres (CFE-CGC).

However, the Law of 20 August 2008 introduced major changes in relation to unions' representativeness and the negotiating process. The trade unions listed above are no longer automatically deemed to be representative of the relevant employees but instead have to prove that they are representative of the employees, in accordance with Article L. 2121-1 of the French Labour Code.

This recent legislative change is likely to bring new unions to prominence and to cause some of the older established unions to lose their influence.

Almost all federations are represented in some form at a national level in negotiations with the employers' federation (formerly *CNPF* now named *MEDEF*) and the Government.

### 11.2 Collective Agreements

Although less than 10% of the workforce are members of a trade union, around 95% of employees are covered by some form of collective bargaining agreement (for the reasons explained in the Introduction).

Employers must bargain every year over rates of pay and working hours in companies where there is at least one trade union representative (*délégué syndical*).

They must also negotiate on an annual basis on the equality between men and women and on the employment (engagement and continued employment) of senior staff.

With effect from 1 January 2009, the conclusion of a company level agreement depends on two conditions being satisfied: first, the agreement must be signed by a trade union that obtained at least 30% of votes cast at the last elections; secondly, the unions that obtained the majority at the last vote cast must not object to the signature during the eight-day period following signature.

### 11.3 Trade Disputes

The French constitution recognises the right to strike, whereas lockouts are only legal in exceptional cases. Picketing is prohibited if non-striking employees are prevented or deterred from working. Short strikes in industry at factory level are quite common but statistics show that the number and length of strikes is diminishing (except in the public sector and particularly in the transport sector).

#### **11.4 Information, Consultation and Participation**

Whenever 11 or more employees are employed in a company or establishment, the employer must organise elections for Staff Delegates.

In any company employing 50 people or more, the employer must organise elections for a Works Council.

For purposes of calculating the number of employees, employees of consultants and secondees may also have to be taken into consideration.

The unions may appoint a representative in the company and also to the Works Council.

In the event there are no candidates for the election, the Works Council or the staff delegates institution cannot be established. However, elections must still be organised every four years, or at any time in-between at the request of any employee.

Where a Works Council exists, the employer is required to pay a subsidy equal to 0.2% of the wage bill for the functioning of the Works Council, in addition to one for the organisation of social and cultural activities for employees. There is no subsidy for the unions of the staff delegates nor the health and safety committee.

In the case of companies employing 50 employees or more, the Works Council has the right to appoint representatives to their board meetings or to the supervisory board meetings (depending on the form of the company) and to the shareholders meeting. The number of representatives will depend on the size of the company: they cannot be less than two or exceed more than one-third of the board membership.

They have a right to attend and discuss but no voting power. However, company law allows for articles of association to

provide employees on the boards of companies with full voting powers.

Companies or groups of companies with at least 1,000 employees in the EU and with employees in France and at least one other EU Member State may be required to establish a European Works Council or a procedure for informing and consulting employees at the European level.

Staff delegates must be informed on a range of matters and the employer must meet with these representatives at least once a month. The principal function of the staff delegates is to present individual and collective complaints to management.

The Works Council is both an information forum and a consultative body and must meet every two months (once a month in companies with at least 150 employees). It must be consulted on both employment and certain economic matters. Information on relevant matters must be supplied to the Council.

The Works Council must be informed and consulted on: questions relating to the organisation; the management and the general running of the company and in particular on the measures which may affect the volume or the structure of the staff; the duration of work; the conditions of engagement and employment and the training of the staff (Article L. 2323-6 of the French Labour Code). The Works Council is informed and consulted on the modifications in the economic or legal organisation of the company, in particular in the event of merger, sale, important modification of the production structures, as well as on acquiring or selling subsidiaries (controlled by the Company). The employer must also consult the Works Council when it takes a share in a company and inform it when it has knowledge of a new shareholding in its company (Article L. 2323-19 of the French Labour Code).

The Works Council must be consulted in many different situations including

acquisitions, mergers and collective redundancy situations (see further below).

## **12. Acquisitions and Mergers**

### **12.1 General**

French law complies with the EU Acquired Rights Directive: upon a business sale, the employment contracts are automatically transferred to the transferee on the same terms and conditions pursuant to Articles L. 1224-1 et al. of the French Labour Code. Dismissal is normally only allowed in limited circumstances and redundancies are forbidden before transfer.

Articles L. 1224-1 et al. of the French Labour Code apply in the event of a merger, sale, restructuring of the business or of the company or whenever part of the business is transferred through an asset sale when such sale corresponds to the transfer of any autonomous economic entity as defined by European case-law and the case law of the French Cour de Cassation.

### **12.2 Information and Consultation Requirements**

As is always the case when the Works Council needs to give its opinion on a given project, the consultation must take place before any decision on the transaction is taken (i.e. sufficiently in advance and, in any event, before signing/closing). Both the seller and the buyer of the business must inform and consult their respective Works Councils, if any.

A detailed memorandum of information on the operation itself and on its consequences for the company and the transferred employees must be prepared and disclosed sufficiently in advance to the Works Council, so that it can be in a position to make its opinion on the contemplated operation, if need be after having consulted its expert (a lawyer or auditor in most cases).

One meeting may be sufficient, but in practice the Works Council may ask for more details and further meetings. The Works Council may also ask for the appointment of an outside expert. Therefore, this consultation process can take from two weeks to four months or more, and depends on the type of relationship that has been established between management and the Works Council members/trade-unions, the risks which the employees perceive they may sustain as a consequence of the proposed operation, and whether an expert is appointed.

The sale by the shareholder of the majority of the capital it holds in a French company will often require prior consultation of that company's Works Council pursuant to Article L. 2323-19 of the French Labour Code, as the sale of the capital equates to a sale of the business, according to the French Cour de Cassation.

Specific works council information provisions must also be complied with where a company is involved in a "concentration" transaction (implying an anti-trust notification), with regard to French competition law (Article L. 2323-20 of the French Labour Code).

In all these situations, the Works Council must be consulted in all instances prior to the decision being made, which means that the Works Council must deliver a formal vote on the basis of detailed (written) information provided by the employer sufficiently in advance. Again, the Works Council may ask for the appointment of an expert.

### 12.3 Notification to Authorities

There is an obligation to notify and obtain the prior authorisation of the Labour Inspection in the event of a partial transfer of a business before staff representatives may be transferred to the purchaser.

### 12.4 Liabilities

Failing to consult the Works Council in due time when legally required to do so is a criminal offence punishable by a fine of up to €3,750 and/or a prison sentence of a maximum of one year (the prison sentence is in principle not applied for a lack of consultation). Liability for the criminal offence falls on the manager personally (the president of the company or his duly appointed representative) and will appear on his criminal records in France. It should be noted that criminal liability will arise not only for failing to consult the Works Council, but also for going ahead with the proposals under consultation after meeting with the Works Council if the latter has not given its view on the proposals. In addition, the legal entity itself also incurs criminal liability for such conduct; if it is found guilty, the fine can be as high as five times the maximum fine for its legal representative in addition to a number of ancillary administrative sanctions.

The Works Council may also obtain injunctive relief and obtain a stay of the proposed prospect/transaction pending full consultation.

## 13. Termination

### 13.1 Individual Termination

Employees must give notice of termination to their employer in accordance with the relevant legislation, collective-bargaining agreement or individual contract and respect the required notice period.

The employer may dismiss or make an employee redundant provided that it has sufficient grounds for doing so.

The procedure for an individual dismissal, whether for personal cause or redundancy, requires the employer to formally invite the employee in writing to attend a pre-dismissal meeting.

The employee may be accompanied by another employee, an employee representative or, in the absence of

representative institutions in the company, by an outside person chosen from a list published at the town hall and the Labour Inspection.

Dismissals must be notified in a letter sent by recorded delivery not earlier than two clear days following the day of the meeting in the event of dismissal for personal cause, seven days in the case of redundancy and 15 days in the event of a redundancy of a "cadre".

The dismissal letter must expressly set out the reason for dismissal that was alleged and discussed with the employee during the pre-dismissal meeting. No other reason for dismissal can then be asserted before the court in the event of a claim.

When a redundancy is envisaged, the employer must, in addition, implement redeployment actions, depending on the number of employees working in the company or the group:

In companies and groups with less than 1,000 employees, the employer has to obtain documents from the unemployment organisation to provide the employee with advanced training and assistance (*Contrat de Sécurisation Professionnelle – CSP*) and give them to the employee at the pre-dismissal meeting. If the employee accepts the CSP, the contract will be terminated at the end of a 21-day period with no notice period being worked. The employer will then fund the system by paying:

- (a) three months of the notice pay to the unemployment organisation (*Pôle Emploi*) and the balance if any to the employee;
- (b) the amount needed to meet the employee's individual training rights.

In companies and groups with 1,000 employees or more, all employees made redundant are entitled to a leave of absence in order to participate in a "redeployment program" (*Congé de*

*reclassement*). The employee made redundant must be informed of the nature of this redeployment program (i.e. in his/her dismissal letter). The length of the redeployment program (i.e. between 4 to 9 months, notice period included) is determined by the employer according to the financial means of the company or the group. With effect from the reception of his/her dismissal letter, the employee benefits from an eight day period in order to accept, or not, the redeployment program. The employment contract is then terminated at the end of the redeployment program.

In certain cases, the employer is also obliged to discuss with local authorities the effects of a collective redundancy on local employment, and find an agreement with the local representative of the State in order to compensate for the effects of the collective closure or redundancy.

In cases where an employer has failed to observe the procedural requirements or is unable to show that there were sufficient “real and serious” grounds (whether of a personal or economic nature) for the termination of employment, or that there was no serious or fundamental breach, the Court may consider the dismissal to be unfair (“abusive”).

If the company has at least 11 employees, the judge must award damages to the employee of not less than six months’ gross pay provided the employee has more than two years’ continuous service. In other instances, the damages will be in accordance with the employee’s actual loss. It is unusual for the Courts to grant damages in excess of 24 months’ salary.

The Court will also order repayment by the employer to the *Pôle Emploi* (see above) of up to six months’ unemployment benefit received by the employee. The Courts do not normally order reinstatement of the employee save in exceptional circumstances.

The law of 25 June 2008 introduced the concept of a Termination by Agreement (*Rupture Conventionnelle*). This new form of termination requires a special procedure and approval by the Labour Authorities. It enables the employee to receive severance pay and obtain unemployment benefits, although the termination is not a dismissal or a resignation.

A Termination by Agreement is also useful to negotiate the termination of staff representatives who usually contest their termination unless a financial agreement is reached to their satisfaction. The *Rupture Conventionnelle* does not remove the special protection of staff representatives, and in particular the need for specific authorisation from the labour inspector, but the latter will not check the validity of the dismissal but only that the agreement reached between the parties on the termination was effected correctly.

### 13.2 Notice

If the reason for the dismissal (whether economic or personal) is not classified as relating to serious or gross misconduct (*faute grave* or *faute lourde*) on the part of the employee, the employer must give notice to the employee before the dismissal takes effect or must pay the employee compensation in lieu of notice.

The length of the notice period will depend upon the length of service and the category, and sometimes the age of the employee concerned.

Unless more favourable terms are provided in the collective-bargaining agreement or in the individual’s contract of employment, the minimum notice is equal to one month for an employee with six months’ to two years’ service in the same company and two months for an employee with at least two years’ service. It is three months for executives and management level staff.

The employer may release the employee from having to work his/her notice,

subject to payment of an indemnity in lieu of notice.

### 13.3 Reasons for Dismissal

The dismissal of an employee must be based on “real and serious” grounds, whether of a personal or economic nature.

The existence of personal reasons for dismissal is a matter of fact to be decided by the Courts. A strict procedure must be followed by the employer, whereby the employee must be summoned in writing to discuss the reason for the proposed dismissal.

Dismissals on economic grounds, for redundancy or resulting from the employee’s refusal to accept a proposed modification of the employment contract, are strictly defined by law and include the reorganisation or restructuring of the employer’s business or a change in the geographical location of the business, etc. The law provides that the employer must define the criteria for selection after having consulted the staff representatives. The criteria must however take account of the number of family dependants, seniority, the personal difficulties of the employee (any physical handicap, for instance) and the professional abilities of each category, subject to any specific provisions in the applicable collective agreement.

Furthermore, a dismissal for redundancy will only constitute a valid cause for termination if the employer can produce evidence that there are no other positions available within the group worldwide that are suitable for the employee and that, in addition, it has made very substantial efforts to redeploy the employee before finally deciding to terminate the contract.

### 13.4 Special Protection

Several categories of employees, such as employees incapacitated by reason of sickness, employees having suffered a work-related disease or a work accident, women on maternity leave, union delegates, employee representatives on

various bodies and Works Council members, enjoy special protection against dismissal.

Dismissals of staff representatives will only be allowed after following a special procedure which includes obtaining an official authorisation from the Labour Inspection.

Severance pay is payable to any employee with at least one year's service unless he is being dismissed for serious or gross misconduct. In addition the minimum severance pay provided for by law has increased to one fifth of the gross monthly salary for each year of service, plus two fifths of the same salary for each year of service beyond 10 years (these amounts are the same whether the employee is terminated for dismissal or redundancy). Collective-bargaining agreements or individual contracts often provide for higher levels of severance pay.

### 13.5 Closures and Collective Dismissals

Business closures and collective dismissals are included in the scope of dismissals for economic reasons. If more than one employee is to be dismissed for "economic reasons", the rules relating to collective dismissals will apply. These rules include consultation with the Works Council or, in the absence of such a Council, the staff representatives.

When collective dismissals affect ten or more employees, over a 30-day period, in an undertaking with more than 50 employees, the employer has an obligation to prepare a social plan (*Plan de Sauvegarde de l'Emploi*) (formerly called a "*Plan Social*") in consultation with the Works Council which may cover issues such as voluntary part-time work, professional appraisal, guidance in seeking employment and early retirement. The social plan must also include provisions regarding the "CSP" or Redeployment Program. If the labour authorities consider the plan unsatisfactory, they may require the

employer to start the procedure again, including consultation and the drafting of a new plan. In addition, if labour court judges consider the plan unsatisfactory, they may declare all the dismissals null and void (which is the toughest sanction available in French labour law, except for criminal charges, which may be laid for example for failure to respect staff representatives' prerogatives or health and safety requirements).

A social plan mass-redundancy program will last a minimum of three months but in practice may take between 6 and 12 months before notification of the dismissals may be sent out. It is a time-consuming and costly procedure but if managed correctly in a constructive manner by the local management without undue haste, the employer will reach its goal within a reasonable time-period.

## 14. Data Protection

### 14.1 Employment Records

The French law of 6 January 1978 known as "*Informatique et Libertés*" (technology and freedom), modified by a law of 6 August 2004, governs the collecting, storing, processing and use of personal data in France as well as the international transfer of personal data collected in France.

Data controllers such as employers, must comply with a number of formalities and declarations to the "*Commission Nationale de l'Informatique et des Libertés*" (*CNIL*), an independent governmental agency, prior to collecting data for an automated personal data processing operation. The *CNIL* then delivers a written acknowledgement of receipt.

The law develops the means of control of the *CNIL* and particularly the access of its agents to the premises of companies (refusing the access of the company's premises to the *CNIL* agents is a criminal offence sanctioned by an imprisonment of up to one year or a fine of up to €15,000).

### 14.2 Employee Access to Data

Employees, as data subjects, have the right to make an access request. The data subject has to prove his identity before the requested information can be communicated. No charge may be levied and the data must be communicated in clear and intelligible language and the data subject is entitled to a copy of the requested information.

The data subject may require the employer to modify, complete, clarify, update or erase the information as appropriate. If the access request is refused, the data subject has a right to challenge the employer's decision before the Courts.

### 14.3 Monitoring

In general, French law does not prohibit or limit the monitoring of the employees' level of activity at work, but merely requires prior notice to be given to employees and a prior consultation with the Works Council. Although an employer may, as a general principle, monitor the employees' use of Internet and emails, it must at all times, comply with the general principle of proportionality (Article L. 1121-2 of the French Labour Code).

Every monitoring measure must be justified by the nature of the business activity of the employer's entity and be respectful of the employees' rights and liberties, including the right to a private life and privacy of correspondence.

French case law considers that, for the protection of the right to privacy of correspondence, an employer cannot systematically access the content of all emails and attached documents of either employees generally or specifically targeted employees.

Email correspondence is deemed to be professional but the employer may not totally forbid the use of the technology (whether phone, fax, email, internet etc) for personal reasons. Furthermore, the employer may not access emails which

are expressed to be private, filed in a file of any sort marked private or which merely appear to be private by reason of their subject or recipient.

#### **14.4 Transmission of Data to Third Parties**

The notice filed at the *CNIL* must specify all destinations for international transfers, and all international transfers require the prior authorisation of the *CNIL*. The *CNIL* may oppose any international transfer to a country that does not afford adequate data protection to its subjects.

The European Commission Decisions regarding “adequacy” have full effect in France, and are recognised by the *CNIL*.

Infringements of the Law may constitute criminal offences and be sanctioned by a fine of up to €300,000 and, in theory, up to five years’ imprisonment for the company’s legal representative.

Under Article 226-24 of the French Criminal Code, organisations may be liable for such breaches. Fines are five times higher for organisations, and specific sanctions may apply, such as a

prohibition from carrying out professional activities.

In addition, email correspondence is protected under certain conditions by additional provisions of the French Criminal Code. Infringements of these provisions may lead to punishment by imprisonment of up to one year or a fine of up to €45,000. Individual data subjects can also claim damages in respect of any infringement of his/her privacy.

*Contributed by Clifford Chance, Paris*

# Germany

## 1. Introduction

Although there is no single statute governing the individual and collective aspects of employment, labour law in Germany is highly regulated and codified. In practice, terms and conditions of employment as well as the nature of labour/management relations are moulded primarily by collective bargaining agreements between trade unions and employers or collective agreements between works councils and employers and to some extent by custom and tradition. However, employment contracts must be negotiated within the strict confines of labour legislation, regulations and case law. Side by side with statutory regulation, a number of ancillary principles have been developed, such as the employee's duty of loyalty and the employer's duty of care.

Employee participation in the workplace is well developed. There are "co-determination" rights conferred on works councils, the latter being a significant factor in areas such as hiring and dismissing employees, health and safety and HR planning. Collective agreements are legally binding and a high percentage of the workforce have some terms and conditions of employment provided by collective agreements. Disputes, both collective and individual, are handled by special labour courts.

The Federal Government was and is still determined to work on legal projects within the field of labour law. Currently, the introduction of minimum wages for specific industries or even for employment relationships in general is under discussion. To date there has been one statutory minimum wage. It has applied for the nursing services sector since August 2010. In general, minimum wages have been established by collective bargaining agreements which were declared binding on the entire industry sector (*allgemeinverbindlich*) or implemented by way of an ordinance (*Rechtsverordnung*), irrespective of whether the affected

employers are members of the relevant employers' associations or unions. Such agreements or ordinances currently apply in the construction and construction related services industry sectors, the building cleaning sector, the painting and varnishing sector, industrial laundry services, waste management, special mining services, security services and training and qualification services. A minimum wage in the temporary employment sector was introduced in 2011.

Industrial relations themselves continue to be generally good. In some business areas the practical co-operation between the social partners is quite close.

## 2. Categories of Employees

### 2.1 General

The German system of labour law recognises various categories of employees and has traditionally drawn a distinction between white collar workers (*Angestellte*) and blue collar workers (*Arbeiter*). After this general distinction was declared unconstitutional several years ago, only a few provisions differentiating between the two categories continue to exist, most of which are found in collective bargaining agreements, for example with regard to notice periods.

### 2.2 Directors

Certain protective laws do not apply to board members or managing directors (*Vorstandsmitglied* in an *AG* and *Geschäftsführer* in a *GmbH*) and only partly to senior executives (*Leitende Angestellte*). The distinction between senior executives and salaried employees is in practice often not an easy one to draw. Senior executives are not represented by a works council (*Betriebsrat*) and they have a statutory right to form their own committee (*Sprecherausschuss*). These committees have broadly similar powers to works councils in relation to dismissals and redundancies.

### 2.3 Other

German statutory law includes the principle that part-time employees should receive the same protection as full-time employees. There must be justifiable reasons for an employer to treat part-time and full-time employees differently. On engaging a part-time employee, the number of working hours per week should be agreed between employer and employee. If this is not expressly agreed, 10 hours a week will be implied. In the case of part-time contracts without general agreement on the working days and work hours, the employer must give four days' notice of the work he requires to be done. Furthermore, if the contract does not contain any provisions with regard to the number of working hours per day then the employer is obliged to provide at least three consecutive hours of work a day.

After six months of employment, employees generally have a right to demand a reduction in their working time. The employer is obliged to comply with this request unless he can prove the existence of business or operational reasons justifying an objection to such a reduction. Employees are, however, only entitled to part-time employment, if the total number of employees in the company exceeds 15. If part-time employees wish to increase their working time, employers are obliged to offer vacant full time posts to these part-time employees first.

Similar provisions apply to employees on parental leave. A parent is entitled to part-time employment (15 to a max. of 30 hours per week) during the parental leave, provided that the employment relationship has been in existence for more than six months and the total number of employees exceeds 15. The employer may only refuse such a request, if urgent operational reasons justify the refusal.

Marginal employment is deemed to exist whenever the employee earns no more

than €450 per month (regardless of the number of hours worked) or whenever the duration of the work is characteristically limited to two months or 50 days per calendar year, unless the nature of the work is professional and the total payment exceeds €450 per month (i.e. €5,400 per year). For the purpose of assessing whether an individual is engaged in marginal employment, the payment and duration of several periods of employment must generally be aggregated during one year. Whenever an employment relationship is classified as marginal employment, the employer is only required to make a lump sum contribution of a total of 30% of salary to the social security system (15% for pension, 13% for health insurance and a further 2% for income tax). Following a change in the law, marginally employed employees must, in the future, be fully insured in the statutory pension insurance scheme, but will have to pay the 3.9% top up to the 15% pension contributions themselves. Marginal employment relationships must be notified to the social security authorities in the same manner as full-time employment relationships.

### 3. Hiring

#### 3.1 Recruitment

Employers must consult with the works council (where there is one) about general personnel planning. In companies with more than 20 employees, the employer must, *inter alia*, consult with and obtain the consent of the works council before hiring. An employer with 20 or more employees must reserve 5% of jobs for disabled employees or pay the authorities a compensation tax (*Ausgleichsabgabe*) of between €105 and €260 a month for each disabled person he is obliged to, but does not in fact, employ. In addition to paying the compensation tax, the employer may be fined up to €10,000 for not fulfilling the quota.

#### 3.2 Work Permits

As a general rule, all non-EEA nationals who wish to work in Germany must apply

for a visa before entering Germany for the first time. However there are exceptions, for example the rule is not applicable to US nationals and nationals of some other countries. The visa will be issued by German embassies based overseas. Once in Germany, all non-EEA nationals have to apply for a residency and work permit (*Aufenthaltstitel*) with the locally competent public offices for aliens (*Ausländerbehörden*). After obtaining the approval of the competent Federal Employment Office (*Bundesagentur für Arbeit*), the public office for aliens will convert the visa and issue the residency permit. The residency permit amounts in essence to a work permit, as the authority to work is explicitly stated in the residency permit.

The residency permit may only be issued if a concrete job offer exists, the employment does not result in any adverse consequences for the labour market, no German workers are available for the type of employment and filling the vacancies with foreign applicants is justifiable in terms of labour market policy and integration issues. The employer is required to furnish the locally competent employment office (which will in turn pass this information to the public office for aliens) with information on pay, working hours and other terms and conditions of employment.

Since August 2012, non-EEA nationals can apply for a so called "EU Blue Card" permitting them to stay in the EU for the purpose of taking up gainful employment. The EU Blue Card is issued if the non-EEA national has obtained a university degree or a comparable degree in Germany or a recognised foreign university and earns a gross annual salary of at least €44,800. In certain professions lacking sufficient job applicants (mathematicians, engineers, doctors, IT-specialists) a gross annual salary of at least €34,944 is sufficient.

EEA nationals, as a rule, benefit from the rules granting freedom of movement and labour mobility. They no longer need to

apply for a residency and work permit with the public office for aliens but need only obtain a confirmation of registration from the local public and administration office (*Meldebehörde*). Employees from Romania and Bulgaria, however, will need a residency and work permit in order to work in Germany until 31 December 2013 under the provisions of the so-called 2+3+2-regulation of the EU.

### 4. Discrimination

The General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz*) transposed into German national law several EU directives dealing with anti-discrimination regulations on 18 August 2006. It considerably expands employees' protection against discrimination.

The General Equal Treatment Act protects employees, job applicants and former employees, including pensioners, against discrimination by the employer, other employees and third parties, such as customers or service providers of the employer. It expressly prohibits discrimination on the grounds of race, ethnic origin, gender, religion or belief, disability, age or sexual identity. The General Equal Treatment Act contains provisions specifying which activities constitute a violation of the law, what criteria might be applied in determining a violation and the obligations pertaining to the employer in this context. The employer is obliged to take appropriate measures to protect his employees against discrimination and harassment, for example by informing his staff of the anti-discrimination legislation, by appointing competent persons within his organisation where complaints can be filed, by undertaking precautionary measures where necessary and carefully documenting potential discrimination cases, but also by admonishing or even dismissing employees who discriminate against others. The most significant change from the previous legal situation is the introduction of significant and

uncapped sanctions, together with a reversal of the burden of proof, which puts the onus on the employer to demonstrate that the act complained of was not motivated by discriminatory reasons. As the General Equal Treatment Act does not clarify what intensity certain acts must have in order to constitute discrimination or harassment under the law, the interpretation of the law is the object of disputes and, in their wake, court decisions which provide more concrete criteria to help interpret the law.

The extent to which the General Equal Treatment Act applies to dismissals is not entirely clear. The Act actually excludes the entire Dismissal Protection Act (*Kündigungsschutzgesetz*) from the scope of its application. However, the European Commission has argued that this exception violates European law and has requested that the General Equal Treatment Act is amended. In addition, the Federal Labour Court (*BAG*) has ruled that the protection against discrimination guaranteed by the General Equal Treatment Act also applies to dismissals under the Dismissal Protection Act.

The General Equal Treatment Act also contains exceptions justifying differentiations made on the basis of criteria which normally constitute discrimination. For example, discrimination on the grounds of gender can be justified if the gender is an indispensable prerequisite for the activity to be performed, or, discrimination on the basis of age might be permitted if there are objective reasons for it and a legitimate purpose such as an underlying aim of integration of young persons, older persons and persons with obligations towards dependants into the job market.

In the event of alleged discriminatory activities, the employee or job applicant will only have to substantiate circumstances which raise a presumption of discrimination. Thereafter, the employer bears the burden of proof of demonstrating that either there existed no discriminatory treatment or that it was justified in

accordance with the General Equal Treatment Act. Discriminatory measures will be void and might additionally lead to a claim for damages. The General Equal Treatment Act distinguishes between compensation for financial loss and for non-material damages; liability for non-material damages being independent of the existence of fault or even negligence on the part of the employer.

According to the General Equal Treatment Act, not only discrimination by the employer and representatives of the employer may trigger the employer's liability, but also the activities of third parties, namely customers or service providers of the employer.

Any claim for compensation for damage must be asserted in writing within two months of the claim coming into existence and, unless acknowledged by the employer, court proceedings must be instituted within three months of making the written assertion. The Federal Labour Court as well as the European Court of Justice have ruled that this two-month claim period is consistent with European legislation.

It is advisable for employers to ensure that internal procedures, model employment agreements and applicable collective agreements comply with the General Equal Treatment Act. It is also very important to ensure that managers with personnel responsibilities receive comprehensive training in relation to legal requirements as well as being made aware of the consequences of violating them. Where the employer can demonstrate that it provided managers with appropriate training this will help the employer defend any claim brought under the General Equal Treatment Act.

## 5. Contracts of Employment

### 5.1 Freedom of Contract

Although employer and employee are, in principle, free to set the terms of their

relationship, this freedom is, in practice, limited by mandatory minimum statutory standards. In addition, industry-wide collective bargaining agreements between unions and employers, associations or directly with the employing companies are common. Such agreements are sometimes declared generally binding in relation to certain industries or trades (*allgemeinverbindlich*) and can therefore be legally binding on employers who are not party to the agreements and thus risk being unaware of the agreement's provisions.

In practice, employers often use standard employment terms for all employees. If standard terms are used, the general laws regarding the review of standard terms and conditions apply. In the past few years, many standard provisions formerly deemed acceptable and valid have been deemed invalid by the Federal Labour Court. Caution must therefore be exercised when drafting employment terms and standard employment contracts should be regularly reviewed to ensure compliance with current law and jurisprudence, as applicable from time to time.

### 5.2 Form

Employment contracts should be in writing and an employer is obliged to notify an employee in writing of the essential conditions of his or her employment within one month of the start of the employment in order to guarantee legal clarity and make it possible for the employee to know his or her rights. Non-fulfilment of this obligation does not render the employment contract invalid. However, if conditions of the employment relationship are subject to litigation and the employer has not properly documented the contractual rights and duties, the burden of proof for disputed facts favourable to the employer may lie on the employer.

Fixed-term contracts are subject to the Part-Time and Fixed-Term Employment Act (*Teilzeit- und Befristungsgesetz*). This Act substantially restricts the ability of the

employer to enter into fixed-term contracts. Generally, fixed-term contracts can be concluded without justification only for a term of up to two years and provided that no employment relationship had existed with the same employer (whether under a fixed-term or indefinite contract) at any time in the past. Within this two year period, employers are allowed to extend fixed-term employment contracts up to three times. As an exception to this rule, during the first four years after the establishment of a new company (but not in the case of a merger or transformation of pre-existing companies), it is possible to conclude fixed-term employment contracts for a period of up to four years. In all other cases, there must be a valid reason to justify the agreement being for a fixed term. Justification for a fixed-term contract includes, for example, the replacement of an employee on maternity leave. Fixed-term contracts must be in writing and be signed by both parties before the beginning of the employment. Fixed-term contracts that do not fulfil the legal requirements outlined above will not be rendered invalid but will instead be classified as contracts for an indefinite period.

### 5.3 Trial Periods

Probationary periods are common and maximum periods are often regulated by collective bargaining agreements; they are usually up to four weeks for blue collar workers and three to six months for white collar workers. Probationary periods cannot, in principle, exceed six months and must, in any event, be reasonable.

The minimum notice period during such probationary period is shorter than usual, i.e. two weeks (or even less under applicable collective bargaining agreements). This notice period can, under very limited circumstances, be prolonged by agreement and therefore lead to a de facto extension of the probationary period.

### 5.4 Confidentiality and Non-Competition

In principle, employees are subject to a statutory duty not to compete during the course of employment. Employees who are not covered by this statutory provision are subject to a general duty of loyalty.

Post-termination restrictions on an employee's competing activities must be agreed in writing, must provide for certain minimum payments to be made (essentially 50% of the remuneration formerly received) throughout the period of the restriction and must be for a reasonable period (not exceeding two years). The non-competition rules in respect of a managing director or a member of a board of directors (*Geschäftsführer* or *Vorstandsmitglied*) are different and to some extent less restrictive.

An employee's general duty of loyalty extends to the prevention of disclosure of trade and business secrets during the employment. Disclosure of such information after termination can also be prevented provided this is expressly agreed with the employee. It is possible that disclosure or use of certain trade or business secrets may constitute a criminal offence under unfair competition laws.

### 5.5 Intellectual Property

Inventions made by an employee during the course of employment and in fulfilment of the employee's contractual duties are governed by the Act on Employee Inventions (*Arbeitnehmererfindungsgesetz*) and can be acquired by the employer by way of a declaration. If the employer does not want to acquire the invention, it has to give the employee written notification of this within four months. If the employer acquires the invention, the employee has a claim to reasonable compensation from the employer. There is no specific legislation addressing the issue of copyright and design patents in the employment context.

The German Copyright Act (*Urheberrechtsgesetz*) is based on the

general principle that the employee automatically grants all user rights to the employer whenever the work has been created in fulfilment of contractual duties. With regard to the creation of software as part of the contractual obligation, the employer is entitled to use the copyright exclusively, unless otherwise agreed. The use of the copyright is in these cases covered by the employee's wages. Where employers expect employees to make inventions or to create intellectual property it is nevertheless advisable to conclude appropriate agreements covering these matters.

## 6. Pay and Benefits

### 6.1 Basic Pay

Currently, a statutory minimum wage applies only in the nursing services and in the temporary employment sectors (see above), but the introduction of a minimum wage for specific industry sectors or even in general is under discussion. In any event, collective bargaining agreements currently include minimum wage provisions for various categories of employees. These are legally enforceable if the collective bargaining agreement is applicable, either because:

- (a) employer and employee are members of the parties to the collective bargaining agreement (i.e. the employer's association and the trade union respectively); or
- (b) the collective bargaining agreement in question has been declared generally binding (*allgemeinverbindlich*) or an ordinance (*Verordnung*) has been passed by the Federal Minister for Labour and Social Affairs; or
- (c) the employer and the employee agree individually that the collective bargaining agreement or parts thereof are applicable.

Therefore, even where a company is not covered by a collective bargaining agreement, its wage rates are often influenced by collectively agreed rates.

Annual salary is usually divided into 12 monthly instalments. In addition, a 13th (and sometimes 14th) month's salary or Christmas or holiday bonuses are often paid.

There is no obligation to index link pay. However, a similar effect is often achieved by the annual re-negotiation of wages within the framework of collective bargaining agreements.

## 6.2 Pensions

Many employers provide company pension arrangements. Pensions legislation provides that employees are entitled to demand a company pension from their employer by way of conversion of their remuneration (currently up to an amount of €2,784 per year in the old FRG states and €2,352 per year in the states of the former GDR) into pension contributions. The amount equals 4% of the income threshold for social security contributions and changes annually. The employee has a right to demand a company pension in the form of a direct insurance policy that will mature and pay out upon retirement, unless the employer wants to execute the company pension by way of a pension fund. In addition, employers are, in practice, often obliged to provide company pension plans because of the terms of a collective agreement or simply to attract sufficient labour. Most schemes are non-contributory for employees and their qualifying periods of service to get vested rights can be fairly long (up to five years).

Pension promises made on or after 1 January 2005 by way of a direct insurance or pension fund must be transferred to a new employer at the (former) employee's request (the so-called principle of portability, *Portabilität*). This requires the former employer to pay to the new employer a sum equal to the actuarial value of the pension at the date of termination of employment (up to a maximum amount of €69,600 in the old FRG states (Western Germany) and €58,800 in the states of the former GDR

(East Germany) in 2013) thus resulting in a drain of liquidity at the former employer's pension or insurance fund.

## 6.3 Incentive Schemes

Profit-related pay is often paid to managerial and increasingly also to non-managerial staff. Employers are in certain circumstances legally obliged to set up a savings plan for employees and collective agreements often also require the employer to make a contribution. Equity Award Plans are often applied, usually in international group companies. It is worth noting that their introduction as well as operation might be subject to German laws notwithstanding that the plan rules state that they are governed by the law of another jurisdiction and should thus be aligned with them.

## 6.4 Fringe Benefits

Fringe benefits vary according to the size of the business and may include bonuses, company cars (for more senior or frequently travelling employees), life and/or accident insurance, subsidised canteen or luncheon vouchers. If benefits such as Christmas bonuses, vacation pay or company cars are provided under a collective bargaining agreement or individual contracts, employees are likely to have a right to them as part of their remuneration package unless expressly stated otherwise.

## 6.5 Deductions

Employee's income tax (*Lohnsteuer*) is deducted by the employer at source and then accounted for to the tax authorities. The top income tax rate has in recent years been reduced to 42% and applies to an annual income of €52,882 or more for single employees and €105,764 or more for married couples. The basic tax rate is 15% and applies to income exceeding €7,664 for single employees/€15,328 for married couples. In 2007 a top income tax rate of 45% was introduced for an annual income of €250,731 or more for single employees and €501,462 for married couples (the so called "rich people deduction"). Another

deduction, introduced in 1992 to pay for the re-unification programme, is the "solidarity surcharge". Since 1998 it has been set at 5.5% of the income tax rate. Church tax will also be deducted by the employer if the employee is a member of a tax raising church.

# 7. Social Security

## 7.1 Coverage

The State social security system provides benefits in the case of old age, disability, death, sickness, maternity, industrial injury, unemployment and, where there is a need, for nursing care.

## 7.2 Contributions

The social security system is financed by employee and employer contributions which are based on the employee's salary up to various ceilings. With some exceptions, employers and employees share the contributions equally.

Employees without children pay an increased percentage for the nursing care insurance (of 1.275% rather than 1.025%) and all employees pay in to the health insurance fund an additional amount of 1.025% of their salary up to the ceiling amount.

With effect from 1 January 2009, any person coming within the scope of the public health insurance system (i.e. every citizen of Germany) is obliged to contract for health insurance cover. In the past, only employees earning above a specific threshold amount were able to opt out of the public health insurance system and take out private health insurance. From 1 January 2009, private health insurance has been available to all citizens (i.e. including all employees irrespective of their income). Private health insurance companies are legally obliged to offer insurance for a basic premium not exceeding the premiums of the public health insurance system. Private health insurance companies are required to provide cover for any citizen who wants it; without the ability to exclude high risk

individuals or to charge higher premiums in relation to higher risk individuals.

Self-employed persons are as a rule not members of the social security system (comprising unemployment insurance, public health insurance, retirement insurance and nursing care insurance), but the qualifying requirements for self-employed status are very strict. Furthermore, certain groups of self-employed persons are subject to mandatory membership of the social security system for old age pension insurance.

For the year 2013, the rates are:

	Percentage of the Aggregate Amount	Limit for Basis of Assessment per month	
		West-Germany	East-Germany
Retirement Benefit Charge	18.9%	€5,800	€4,900
Unemployment Insurance (Employment Promotion) Charge	3.0%	€5,600	€4,800
Public Health Insurance Charge	15.5%	€4,350	
Nursing Care	2.05%	€3,927	

Employers (alone) must also contribute to the insurance for accidents at work. The contribution varies according to the specific risk of the business concerned; the average contribution amounts to 1.26% of the total gross remuneration, but may be significantly higher in accident prone industries (e.g. construction industry etc.).

## 8. Hours of Work

The number of working hours per week is usually regulated in a collective bargaining agreement or, if there is no collective bargaining agreement, will be regulated in the individual contract of employment.

Working time is restricted by statute to a maximum of eight hours per day on

average, including Saturdays, which can, in certain circumstances, be increased to 10 hours per day. There is a general ban on Sunday and bank holiday working, except in certain trades like hotels or restaurants or for certain public businesses, like hospitals. Extensions of normal working hours exceeding these limits may be provided for in collective agreements, that is the 10 hour per day limit can be increased, provided the working time comprises significant periods of standby-time. Otherwise, extensions may only be carried out in exceptional circumstances with the approval of the appropriate labour authority. Shop opening hours used to be

strictly regulated, but have been significantly extended and in some regions completely abolished.

Under most collective bargaining agreements the average working week is about 37.7 hours over a five day week. The trend towards a 35 hour week in the 1990s has started to reverse particularly in the past year. In many industries and companies employees now work 40 hour weeks again.

Where a company is experiencing economic problems, it is possible to place employees on short-time hours in order to avoid redundancies. During this time, employees receive a short-time allowance from the Federal Employment Office (*Bundesagentur für Arbeit*). Generally, the maximum period of this

allowance is six months. During the financial crisis in 2009, however, the maximum period was increased to 24 months. In 2010, the maximum period was reduced to 18 months and again in 2012 to 12 months.

Hours worked in excess of the contractually agreed hours of work are as a rule considered overtime. Overtime will frequently be covered by collective agreements and often has to be paid at a premium rate. Where this is not the case, and even though this is not legally required, the payment of premium rates is also often stipulated in individual employment contracts. In line with the trend towards longer working hours, many collective agreements provide for flexible working time with the possibility of periods of time off as compensation for accumulated overtime in order to reduce the necessity to pay premium rates for overtime hours worked.

## 9. Holidays and Time Off

### 9.1 Holidays

There are between nine and 13 public holidays per year depending on the State (*Bundesland*) in question. Statute provides for a minimum of four weeks' paid holiday per year (24 days counting Saturdays as working days), but frequently collective bargaining agreements as well as individual contracts of employment will increase this to five or even six weeks. For senior workers and salaried employees, 25-30 days' (not counting Saturdays as working days) holiday per year is regarded as standard. The Federal Labour Court has recently decided that the increase of the employees' entitlement to annual paid holiday based on age provided for in the collective bargaining agreement for the public service sector (*Tarifvertrag öffentlicher Dienst*) is no longer permitted because it violates the anti-discrimination rules of the General Equal Treatment Act (age discrimination). The arguments on which the Court based its ruling are equally applicable to the private sector and, where necessary, collective bargaining

agreements and individual employment contracts will have to be amended.

## 9.2 Family Leave

Pregnant women are entitled to take maternity leave from six weeks prior to confinement. They are entitled to a further eight weeks after the birth (in some cases 12 weeks). Throughout the maternity leave they will receive payment of up to a maximum €13/day from the health insurance fund while the employer has to pay the difference between the woman's regular net pay and the daily health insurance fund benefit. The amount received from the health insurance fund will be dictated by the employee's former income. Under the Act for Compensation of Employer's Expenses (*Gesetz über den Ausgleich von Arbeitgeberaufwendungen*) introduced in 2006, all employers can now apply for reimbursement of the maternity pay the employer has paid to the pregnant employee and of the employer's share of the contributions paid to the social security system.

After the end of the maternity leave period, either parent has a right to claim parental leave for a period up to three years after the child's birth for the purpose of rearing the child. During this absence no payments have to be made by the employer (unless otherwise agreed in any applicable individual or collective agreements), however, he has to make the employee's position available for the employee upon her or his return to work or to allow them to return to a suitable new position.

In order to encourage parents to take advantage of this provision, the Act on Payment during Parental Leave (*Bundeselterngehalt- und Elternzeitgesetz*), which applies to all children born on or after 1 January 2007, entitles either parent to a monthly payment of 67% of the former regular net pay, up to a maximum of €1,800 per month, if the child is reared by the parent and the parent does not work more than 30 hours a week. This amount will be paid monthly

for a maximum period of 14 months. The parents are free to choose how to split this time between themselves, subject to a maximum of 12 months being taken by one parent. The other two months are reserved for the other parent. In 2011, the monthly payment has been reduced to 65% of the former regular net pay (if it exceeds €1,200).

There are in addition various statutory provisions protecting pregnant women and new mothers/fathers in their daily work and from dismissal.

## 9.3 Illness

Employers must pay 100% of the employee's normal salary for six weeks during any period of ill-health absence. If the employee returns to work and has a subsequent period of ill-health absence, and provided the subsequent ill-health is not the same as that that gave rise to the previous absences, the employee is again entitled to receive up to six weeks' full pay. Separate periods of (different) ill-health are not aggregated. In businesses with not more than 30-employees the health insurance fund will reimburse the employer, in general, 80% of the employee's insured earnings for this period. After this period, a reduced benefit is provided by the local social security fund.

## 9.4 Other time off

The Part-Time and Limited Term Employment Act (*Teilzeit- und Befristungsgesetz*) permits employees to make flexible working requests after six months of employment. The employer must consent to flexible and part-time working unless there are operational reasons for not doing so. Such operational reasons may exist if the reduction of the working time would fundamentally affect the business' organisation, safety or working processes or if the reduction would create unreasonable costs. The employer has to prove the existence of such operational reasons.

In recent years it has become more common for employer and employee to

agree to a sabbatical leave which the employee may use for example for studying or travelling. Sabbatical leave may be unpaid or, where collective bargaining agreements do not provide limitations in this regard (for example because deviations from the remuneration amounts payable as a minimum cannot be validly agreed in individual employment relationships), the employee may receive a reduced salary in the period prior to the sabbatical leave in order to receive payment during the sabbatical leave.

## 10. Health and Safety

### 10.1 Accidents

Employers must provide insurance for accidents at work (see 7.2 above). The amount that can be claimed in the case of accident will depend on the level of cover actually provided. There are detailed requirements as to health and safety at work and the State Business Supervisory Authority (*Gewerbeaufsichtsamt*) may impose additional requirements if the undertaking is changed or expanded significantly.

### 10.2 Health and Safety Consultation

Works councils have rights of inspection, co-determination and to receive information concerning health and safety in the workplace. In addition, certain workplaces are obliged by statute to set up Health and Safety Committees, which must meet every three months to consider health and safety matters. Employers may also be obliged to employ (either full time or part-time) a "safety specialist", depending on the nature and size of the business.

## 11. Industrial Relations

### 11.1 Trade Unions

The right to freedom of association and the right to engage in union activity on an employer's premises are constitutionally guaranteed. An employer must permit union officials to disseminate information and recruit new members on company

premises during non-working hours if the union already represents members of the workforce.

Under the Constitution, employees cannot be compelled to join a trade union and closed shop agreements are prohibited. Trade unions must meet certain criteria of independence and be sufficiently representative in order to be able to conclude collective agreements.

Most trade unions belong to one of the national federations:

- (a) DGB (*Deutscher Gewerkschaftsbund*) – the largest with the most affiliates
- (b) DBB (*Deutscher Beamtenbund*) – for public sector unions

There is a growing trend of so-called sector unions (*Spartengewerkschaften*) which, unlike the classic trade unions, only represent specific groups of employees either in an industry or in certain companies. As such unions tend to organise groups of employees who are key to operations of businesses and are able to apply a high level of pressure on companies even when calling for a strike with relatively few members. Some of the most well-known are, for example, the train conductors union (*GDL*), the air pilot union (*Cockpit*) and the medical doctors union (*Marburger Bund*) but others have already been, or are in the process of being, established.

Employers are generally affiliated to the national employers' associations, the Federal Organisation of Employers' Associations (*BDA* or *Bundesvereinigung der deutschen Arbeitgeberverbände*).

### 11.2 Collective Agreements

Collective bargaining agreements may be concluded between unions on one side and individual employers or employers' associations on the other side. They are usually entered into for particular industries or sectors of industries (for example the chemical industry). They may

be at local, regional, State or Federal level. They must be in writing and are usually negotiated annually or biennially with regard to salary but are applicable for a much longer period if they deal with matters such as, for example, health and safety, working hours and holidays.

Collective bargaining agreements are generally legally enforceable between the parties, provided they are in writing and signed by the authorised representatives. There is a central register of collective bargaining agreements and the parties to a collective agreement are obliged to notify the Federal Minister of Labour and Social Affairs (*Bundesministerium für Arbeit und Soziales*) of the entry into force of such an agreement and any amendment made to it. However, the general public, including interested companies, cannot access the central register to obtain copies of such agreements.

### 11.3 Trade Disputes

The freedom to strike is a basic right granted to trade unions and such action will be lawful provided it is supported by a union, has work-related objectives (as opposed to only political ones) and is the result of a serious breakdown in the negotiation process. During a strike, striking employees are not entitled to receive pay. Provided the strike is not illegal, the employer cannot dismiss striking employees but may in limited circumstances lock-out and suspend striking as well as non-striking employees from working. In practice, German courts permit very extensive strike activity, e.g. sympathy strikes and even flashmob actions are considered to be legal.

### 11.4 Information, Consultation and Participation

One of the most important principles in German industrial relations law is that of "co-determination". This concept can give employees the right to be involved in decision-making at various levels and to various degrees. Thus co-determination can occur at board level or at shop floor level.

Depending on the circumstances, employees and their representatives may be entitled, in connection with particular matters, to:

- (a) receive information from the employer;
- (b) put forward ideas of their own and be consulted; and
- (c) approve or review decisions.

Where a company is required to form a supervisory board – *Aufsichtsrat* (broadly speaking, if the company is either an *AG* or a *GmbH* and employs more than 500 people) – to oversee management decisions, employees have the right to elect a third of the members to this board (or half, if the company or in certain cases group of companies, has more than 2,000 employees).

In establishments with more than five regular employees, a works council (*Betriebsrat*) can be elected at the free discretion of the work force. Works councils have extensive rights to information, consultation and/or mandatory co-determination in respect of most organisational matters. For example, in companies with more than 20 employees in Germany, works councils have a mandatory co-determination right with regard to any measures which might cause redundancies or other significant changes to the company's structure or its operations and might trigger significant (potential) disadvantages for the workforce in Germany. In companies with more than 20 employees in Germany, works councils also have the right to be consulted on decisions regarding individual personnel matters (such as the recruitment or transfer of an employee, dismissals and redundancies) and some individual personnel matters. In addition, and irrespective of the size of the establishment, the works council has to consent on some general personnel matters (such as selection criteria or evaluation principles) and must be

consulted prior to any dismissal. The works council should meet at least once a month with the employer.

Actions taken by the employer violating the works council's rights may be legally invalid and can be punished by imposing fines on the employer for each incident of violation.

Where the works council and the employer are in dispute on a matter on which the works council has a right of co-determination and fail to reach agreement, both parties can require a conciliation committee (*Einigungsstelle*) to be established in order to resolve the issue. The conciliation committee is empowered by law to render a final and binding decision.

An economic committee (*Wirtschaftsausschuss*) is created on a company wide level in companies regularly employing more than 100 employees and is elected by the works council(s). Its function is to regularly discuss the economic affairs of the business with the employer.

## 12. Acquisitions and Mergers

### 12.1 General

The rights of employees and employee representative bodies in the context of acquisition and merger situations differ depending on whether the transaction is done by way of a share purchase or an asset purchase (share deal – asset deal) respectively.

A share deal raises only limited legal issues since the legal identity of the target company as employer does not change upon the acquisition of shares and the purchaser acquires the entity as is. In particular, a share deal is not subject to the provisions regulating the transfer of an undertaking.

In general, a share deal does not, as such, directly affect existing employee

representative bodies such as works councils or economic committees nor the constitution of the supervisory board, if any. Nevertheless, co-determination laws are dictated by the number of regular employees with the consequence that following an acquisition or merger, different rules may apply and changes to the co-determination arrangements may become necessary. This consequence must be borne in mind where the transaction could lead to the overall number of employees being increased beyond the threshold number triggering the obligation to form a supervisory board for the first time or to create additional representation rights. Consequently transaction structures are often influenced by employment law related considerations.

In the event that a business (*Betrieb*) or part of a business (*Betriebsteil*) is sold by transfer of all or the essential tangible and/or intangible economic assets, this constitutes a so-called transfer of undertaking pursuant to section 613a of the German Civil Code (*Bürgerliches Gesetzbuch*), which transposes the Acquired Rights Directive, irrespective of the number of employees affected.

Upon the sale of the business, or part of the business, all existing employment relationships, including those with executives but excluding service contracts with organs of the company (e.g. board members), are automatically transferred to the new owner and all the rights and liabilities of the employment relationship continue to exist vis-à-vis the new employer. The purchaser is also liable for pension commitments made to the employee. Where the employment relationships are subject to applicable collective agreements these may be amended or replaced automatically by existing collective agreements applicable at the new employer. A transfer can have complicated legal consequences amongst other things on the application of collective bargaining agreements and works councils agreements and can result in works

councils being displaced, depending on the precise factual scenario.

### 12.2 Information and Consultation Requirements

In the context of an asset deal, pursuant to section 613a para 5 German Civil Code, the former employer and the new employer are (jointly) obliged to inform each affected employee in writing about: (i) the date or proposed date of the transfer; (ii) the reason for the transfer; (iii) the legal, economic and social implications of the transfer for the employees; and (iv) any measures envisaged in relation to the employees (including, for example, dismissals planned by the new employer). Within one month of receipt of the information, each employee may object in writing to the transfer of his employment relationship to the new employer. If an employee objects to the transfer, the employment relationship will continue unchanged with the former employer. The objection may be declared vis-à-vis the former employer or the new employer.

The German Federal Labour Court (*Bundesarbeitsgericht*) jurisprudence has held that the information can be provided by way of a standard letter, but the employees must also be informed of the particular consequences of the transfer on their employment relationships. The information must not only be sufficiently detailed and legally correct, but, at the same time, comprehensible for a person without any legal education. If an employee is not duly informed, the one-month objection period does not start to run and the employee may object at a later point in time, possibly even years after the transfer. Complying with this requirement is therefore a key consideration, in particular for a seller of a business who will otherwise face the risk of claims by (former) employees long after the sale. In practice, the risk arises where the new employer terminates employees or otherwise causes them to regret that they have transferred to it, in particular in the context of insolvency

scenarios. Where an employee does object he can claim that his employment with the former employer continued and where appropriate can also claim outstanding remuneration or benefits, pension claims etc.

Pursuant to section 106 of the German Works Constitution Act (*Betriebsverfassungsgesetz*), the economic committee must be informed and consulted about a planned asset deal. The company must provide the economic committee with the necessary documents concerning the asset deal as such and describe the planned impact of the transaction on the company and, in particular, potential personnel related consequences provided no trade or business secrets would be jeopardised by doing so. The information must be made in a comprehensive manner and enable the economic committee to prepare for its deliberations with the company. In practice, it is often unclear at what point in time the information must be provided. The information is in any event deemed to have been given late if decisions by the management bodies have already been finalised, e.g. after the assets have been transferred.

The economic committee has no right to block the asset deal, even if no information was disclosed. However, providing insufficient, false, or belated information constitutes an administrative offence, which may result in a fine of up to €10,000 per case.

In general, there are no legal obligations to inform the works council or trade unions about an asset deal; however, it is nevertheless advisable to inform the works council about the planned asset deal. Pursuant to section 111 German Works Constitution Act, in companies regularly employing more than 20 employees, the works council must, however, be promptly and comprehensively informed about a planned separation of a business, which occurs for example if only a part of a

business is transferred to the purchaser (*Spaltung eines Betriebs*). In addition, the company must attempt to conclude with the works council a reconciliation of interests agreement (*Interessenausgleich*) before implementing a separation of the business operation. This reconciliation of interests agreement describes the organisational implementation of the separation. If an agreement cannot be reached, both the employer and the works council can bring this issue before a conciliation board (*Einigungsstelle*) to be established for these purposes. Finally, the company is obliged to set up a social plan (*Sozialplan*) with the works council concerning the mitigation and settlement of financial disadvantages which the affected employees may suffer due to the planned separation of the business. If no agreement on a social plan is reached, the conciliation board decides on the establishment of the social plan.

In the context of a share deal, there is no legal obligation to inform employees of the transfer of shares of their employer before or after the transfer, although this is usually advisable for practical reasons. In principle, and subject to the extended information/consultation duties described below, the same information and consultation duties towards its economic committee exist in a share deal as in an asset deal. There exists no obligation to negotiate a reconciliation of interests agreement and a social plan.

The Limitation of Risks Act (*Risikobegrenzungs-gesetz*), which came into effect on 19 August 2008, extended information/consultation duties towards employee representatives in the case of a share deal. In the event of a takeover which results in the acquisition of the control over a company (deemed to occur when at least 30% of the company's voting shares are acquired), the company's economic committee must be informed in the same manner as described above in relation to an asset deal. However, in addition the management of the target company must also provide the economic

committee with information about the name of the potential purchaser, its intentions regarding the future business activities of the company and their consequences on the employees. In the event of an auction process, the economic committee must be informed by the company's management about all potential purchasers (deemed to be only companies which have tendered a binding offer for the target company) prior to the takeover. If no economic committee exists, the target company is obliged to inform its works council in the same manner as it would have to inform its economic committee.

### **12.3 Notification of Authorities**

There is generally no obligation to notify the authorities of a business transfer.

### **12.4 Liabilities**

Although the works council has no veto right regarding the acquisition or the disposal of a business itself, its procedural right of consultation in relation to redundancies and other significant changes can lead to injunction proceedings in court instituted by the works council and can thus delay a transfer of undertaking in Germany until the legal obligations have been complied with if an agreement is not reached.

Violations of the co-determination rights of the works council represent an administrative offence. In the event of a serious offence, legal proceedings may be instituted against the employer for breach of statutory duties. In these proceedings the employer can be ordered to refrain from committing illegal acts or be ordered to perform specific acts, and the court may order that in the event of repeated violations administrative fines of up to €10,000 may be imposed per case.

## **13. Termination**

### **13.1 Individual Termination**

The rules in relation to termination of employment contracts are complex and an employer must ensure it complies with applicable contractual, legislative

and/or collective agreement or works council agreement provisions in relation to such termination.

### 13.2 Notice

Except for cases of gross misconduct, in which case the employer can dismiss the employee without notice (*fristlose Kündigung aus wichtigem Grund*), the employer must comply with the applicable notice periods. These may be found in a collective bargaining agreement, contract of employment and in applicable legislation. Minimum notice periods provided by law (which may be varied by collective bargaining agreements or in individual contracts of employment) are as follows:

- (a) in the first two years of employment, four weeks (to the 15th of the month or end of the calendar month);
- (b) for employment between two and 20 years, the notice period is on a sliding scale from one to seven months (to the end of the calendar month).

Termination is not hindered by the employee being ill or absent from work.

Notice of termination has to be given in written form to be effective. The written form prescribed is only satisfied if the termination letter is personally signed by the appropriate representative(s) of the employer and if the original termination letter is issued to the employee. This means that termination letters transmitted by fax or email do not satisfy the requirement that the letter be in writing.

The termination letter must be signed by the legal representative (e.g. the *Geschäftsführer* of a GmbH or a member of the board of directors of an AG) of the employing entity (either alone or if he is not authorised to represent the company alone, together with another legal representative) or by the formally appointed head of personnel. If any other person is to sign the termination letter, this person must

submit at the same time and together with the termination letter a written power of attorney in the original, signed by the legal representative of the employing entity duly authorising him to sign the termination letter. The termination letter does not have to, and should as a rule not, refer to the reason(s) for the termination.

An employee is obliged to register as a work seeker with the competent local employment agency as early as possible after termination, failing which he risks losing some entitlement to unemployment benefits. Accordingly the termination letter should refer to the employee's obligation to present himself personally to the employment agencies immediately after receiving the notice.

Each potential dismissal, whether with or without notice, must be notified to the works council (if any exists) before it can be implemented. The notification must identify the employee concerned and describe the reason(s) for the planned dismissal. The works council then has one week (in the event of a dismissal for cause without notice: three days) within which it can notify the employer if it wishes to challenge the dismissal. Even if the works council does not agree with or objects to the dismissal, the employer can proceed to give the employee notice.

The employee may file a claim with the labour court within three weeks of receipt of the termination letter if he believes the dismissal was unjustified. Where the Court finds that the dismissal was not valid, the employee will as a rule be reinstated in his former position. For the period between the invalid termination of the employment and reinstatement of the employee, the employer will be obliged to pay salary in arrears (default salary) if the employee has not secured an alternative employment income during this period. Only in exceptional cases may the Court terminate the contract of employment on the ground that the terminated employee or the employer does not find it acceptable to continue the employment relationship. In

these circumstances the Court will award compensation of up to 18 months' pay (depending on the length of service, the age and social circumstances of the employee) to the employee.

One notable feature of the German system for dealing with disputes over dismissal is the employee's ability in certain cases, in particular in cases where the works council has objected to the dismissal, to insist on remaining actively employed throughout the period during which the claim is being heard, notwithstanding the eventual outcome of the claim.

### 13.3 Reasons for Dismissal

If the Dismissal Protection Act (*Kündigungsschutzgesetz*) is not applicable, there need not be a reason for termination. The dismissal must nevertheless comply with the provisions of the General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz*).

If the Dismissal Protection Act is applicable, which is broadly the case when the business has more than 10 employees (or if the employment relationship in question started before 1 January 2004, if the business had more than five employees) and the employee in question has been with the business for more than six months at the date the termination letter is issued to the employee, a contract of employment can only be terminated if there is either:

- (a) gross misconduct, e.g. theft from the employer or colleagues, or a material breach of a non-competition covenant, in which case the employer can dismiss the employee without notice (*fristlose Kündigung aus wichtigem Grund*), provided the dismissal notice is issued to the employee within two weeks of the employer knowing of the facts justifying the dismissal ; or
- (b) one of the following justifying reasons ("social justification"): misconduct, character/personality

reasons (such as prolonged illness, drug addiction, loss of a driver's licence where such is required for the performance of the job) or genuine economic business reasons leading to a redundancy (so-called "dismissal for operational reasons").

In the case of a dismissal for misconduct, the employer must have previously given a final warning (*Abmahnung*) to the employee. In cases of termination for genuine economic business reasons, if there were several comparable individuals who could have been dismissed for this particular reason, the employer must show that it selected the employee in accordance with the mandatory legal requirements, taking into account the social criteria i.e. length of service, age, obligations towards dependants and disability (so-called "social choice").

The burden of proof for establishing that the dismissal was socially justified is, if challenged by the employee, on the employer. In practical terms, this is often difficult to establish and the labour courts are known for generally favouring the employee.

### 13.4 Special Protection

Certain employees benefit from special protection from dismissal. For example, the consent of the competent labour authority must be obtained before a severely disabled individual, a pregnant woman or a parent on parental leave can be dismissed. Works council members or candidates in the course of an election to the works council are protected from dismissal throughout their period of membership or candidacy, and for one year thereafter (except in the case of gross misconduct). Special protection also applies to the company's data protection officer as well as to employees fulfilling similar functions required under the law.

### 13.5 Closures and Collective Dismissals

Under the Works Constitution Act, in companies employing more than

20 employees in Germany, the employer is obliged to inform the works council of any planned closures, collective dismissals or any other business or operational changes (including splits and mergers of businesses) which may result in material adverse effects for the workforce in Germany. Case law provides that a collective dismissal is defined by reference to a clause in the Dismissal Protection Act and based on the total number of employees in the business and the number of employees affected. For example, the dismissal of six or more employees in a business with more than 20 and less than 60 employees, or a dismissal of 10% or 25 employees in a business with more than 60 and less than 500 employees would be deemed a collective dismissal in this context. The employer also has to negotiate with the works council and attempt to agree on measures for a reconciliation of interests plan (*Interessenausgleich*) and conclude a social plan (*Sozialplan*) specifying compensation measures (for example in the case of collective dismissals by determining severance payments to be made to dismissed employees, usually based on a formula taking into account length of service and salary). If the parties fail to agree upon such a social plan it will be determined by the conciliation committee (*Einigungsstelle*) at the request of either party.

Operative changes undertaken by the employer without prior attempt to agree on a reconciliation of interests plan are illegal and may entitle employees to seek damages from the employer for financial prejudices sustained for a period of up to 12 months and severance payments. Dismissals effected in breach of these rules are, however, still valid in relation to the individual employee. Also, the works council may apply to the Labour Court for a preliminary injunction forbidding the employer to proceed with the implementation of its plans in Germany until the co-determination obligations

vis-à-vis the works council have been complied with.

In cases of collective dismissals, the employer must also comply with special provisions of the Dismissal Protection Act. The planned collective dismissals must be notified to the Labour Authority before a termination letter is served on the employee and at least 30 days before the end of the employment relationship. At least two weeks prior to this notification, the works council must be informed in writing of the planned collective dismissals. Compliance with the legal requirements is subject to a review by a competent Labour Court and failure to fully comply with these obligations (including in particular formal requirements) renders all the dismissals invalid.

## 14. Data Protection

### 14.1 Employment Records

The Federal Data Protection Act (*Bundesdatenschutzgesetz*) regulates the collection, processing and use of personal data. Generally, the Federal Data Protection Act allows private persons to process and use personal data when this is permitted or required by statute or when the affected person consents. The Federal Data Protection Act specifically governs data protection in the employment context. However, the German Government has announced its intention to enact an Employment Data Protection Act. For this purpose, the Government has proposed a draft bill which provides for numerous additional limitations and obligations on the employer (e.g. as regards the monitoring of the use of telecommunication media, such as Internet and email by employees); this bill is, however, still pending and unlikely to be passed in the near future.

The Federal Data Protection Act permits the recording, processing and use of an employee's personal data without requiring the employee's individual consent, if this is necessary in order to decide whether to

offer employment or for the execution or the termination of the employment relationship. Whether or not this prerequisite is fulfilled must be determined in each case taking into account the concrete facts and circumstances.

During recruitment the candidate enters into a quasi-contractual relationship with the potential employer entitling it to collect information provided by the candidate or by third parties, for instance by former employers, but only if there is a connection with the targeted employment. Once it has been established that the application of a candidate has not been successful the employer is obliged to delete any personal data collected, unless the candidate has agreed to the future storage and use of such data. Since the General Equal Treatment Act shifts the burden of proof onto the employer in the event discrimination claims are brought against it (see above), keeping personal data on file is deemed justified at least until the two month period for raising discrimination claims in writing and the three month period for lodging claims at court have expired.

During employment the employer is allowed to record, process and use personal data which are covered by the purpose of the specific employment agreement, such as gender, marital status, education and periods of absence etc, without requiring the express consent of the employee. Under certain circumstances, the employer has the right to collect, process and use personal data in order to uncover criminal activity. Upon termination of the employment the employer is generally obliged to delete the personal data except to the extent that it is legally required to store specific personal data for specified purposes or has obtained consent from the employee concerned.

The employer has to ensure that he keeps personal data accurate and confidential. Furthermore, data may only

be used for the purposes for which they were collected.

The works council has a right of co-determination, which includes practically all matters related to the employer's storage, use and processing of personal data as well as monitoring of email and Internet usage. For instance, the processing of work reports is not permitted without the consent of the works council. The Federal Data Protection Act does not constrain information rights of the works council covered by the Works Constitution Act.

In businesses employing more than nine employees in automated data processing, the employer is obliged to appoint a data protection officer who is in charge of ensuring compliance with the Federal Data Protection Act. The employer must support the data protection officer in his functions. The data protection officer enjoys special protection from dismissal.

#### 14.2 Employee Access to Data

The German Works Constitution Act (*Betriebsverfassungsgesetz*) gives each employee the unfettered right to access his employment records during working hours. After termination of employment, the former employee has to demonstrate a specific interest before being allowed to access his employment records.

#### 14.3 Monitoring

The monitoring of telephone usage is, if personal use of the company telephone systems by the employees is not banned, permissible only in very limited circumstances; breach of these monitoring restrictions can give rise to severe sanctions, including criminal sanctions. Even if personal use of a company telephone system is banned, the employer is generally not allowed to listen in and record employees' telephone conversations, unless expressly sanctioned by individual consents, regardless of whether they are private or business-related. If such measures are

necessary for the prevention of criminal offences committed by the employee or significant damage to the employer, such monitoring may as an exception to the rule be permissible even if no prior consent was obtained and even illegally obtained information may be admitted in court as proof if this is deemed appropriate based on a balancing of the interests of employer and employee (e.g. where relevant criminal offences were committed).

The legal position as regards the monitoring of employees' email and the Internet is unclear as only limited precedent case law exists. In all cases where employees are allowed (expressly or tacitly) to use the existing email and Internet infrastructure at work for personal purposes in addition to business-related purposes, whether this is during or outside the employees' working time, it is argued by many legal commentators that virtually no monitoring of email and Internet may be carried out by the employer unless express written consent is obtained from each employee. If personal use of telecommunication media, email and Internet use, is not banned, telecommunications law may apply to employer-employee relationships, to the effect that any violation of the respective legislative provisions risks being classified as a criminal act. It is therefore advisable to address the subject of how the email and Internet infrastructure may be used and to what extent the use will be monitored in appropriate company policies, or works agreements concluded with the works council (if any exists) and to obtain individual consent from the employees as well.

#### 14.4 Transfer of Data to Third Parties

Transfer of employee data to third parties is generally prohibited unless the affected person consents. This prohibition also extends to oral submission of personal data and will also prevail after the termination of the employment contract. The transfer of personal data in the context of outsourcing of certain functions, such as

payroll, for example, may however, be permissible without individual consent in the following circumstances:

- (a) The third party is based within the EEA.
- (b) The employer and the third party contractually agree in writing terms of the processing of data (data processing agreement (*Vereinbarung über die Auftragsdatenverarbeitung*)).
- (c) The data processing agreement contains, amongst others, provisions addressing: the modalities of processing, the use of data and data protection measures.

The employer remains responsible for compliance with the Federal Data Protection Act.

In any case, if the outsourcing does not meet the requirements of a data processing agreement, the express written consent of each affected employee is required before outsourcing the data processing function. Transfer to third parties based outside the EEA or of data not falling within the ambit of EC Law is only permitted by the Federal Data Protection Act if the recipient country provides an adequate level of protection for personal data or one of a series of limited exceptions applies (e.g. a data

transfer agreement is concluded according to the standard form approved by the European Commission).

*Contributed by Clifford Chance, Frankfurt*

# Greece

## 1. Introduction

The standards which apply to employment relationships and the terms and conditions under which an employee works are laid down within a framework of rules created by the Constitution, laws, collective agreements, internal regulations and custom.

In broad terms, labour law regulates matters such as pay, benefits, allowances and other working conditions. Collective agreements and other internal regulations provide regulation on other issues such as annual wage increases, cost of living adjustments, allowances and benefits increases, equal access to promotion opportunities and promotion at work etc.

There is a hierarchy of legal sources of law so that, in general, provisions from a lower source (e.g. a contract), should not conflict with those from a higher source (e.g. a legislative rule), except where the provisions of the lower source are more favourable to the employee. Legislation is a higher source of law than collective agreements, but the provisions of an employment contract cannot contravene an applicable collective agreement, unless that contract is more favourable to the employee.

The Greek Code of Civil Procedure provides a special procedure in relation to employment disputes, whereby the Courts are obliged to attempt to reconcile both parties during the first hearing. In addition, the Code also gives trade unions and professional organisations the right to participate in pending litigation involving one of their members and the right to be party to litigation which concerns the interpretation and application of a collective agreement, with the aim of protecting the common interests of those whom they represent.

## 2. Categories of Employee

### 2.1 General

A distinction used to be drawn between blue-collar employees (carrying out manual

work) and white-collar employees (carrying out office work) in relation to notice periods, redundancy pay, annual holidays, payment of salary etc. This distinction has now been eliminated with regard to most labour issues, except in relation to termination of employment (see below).

Generally, legal provisions protecting employees are equally applicable to the employment of senior executives and directors. However, certain provisions such as those relating to overtime, night work and holiday bonuses are not applicable to senior executives.

Employees may be engaged on a part-time basis. Full-time vacancies must first be offered to part-time employees. Salary and benefits are calculated *pro rata* to those for full-time employees, and a specific social security regime is applicable to part-time employees.

## 3. Hiring

### 3.1 Recruitment

All recruitment by private sector employers must be done through the State Employment Agency (OAED), except if they announce the relevant employment to OAED.

There are quotas for the employment of special categories of protected individuals (e.g. veterans of the Greek Resistance). Greek or foreign undertakings which operate in Greece with more than 50 employees must employ at least 8% of protected personnel, whether or not there is a vacancy.

### 3.2 Work Permits

The General District Secretary must issue an approval of employment where non-EEA nationals are employed. Application for approval of the employment of a non-EEA national, which is submitted to the local Municipality of the place of the employer's place of business, must be accompanied by certain documents and certificates. If the approval is granted, it is then forwarded to the Consulate of the foreign national's place of residence which

then issues the visa for entry into Greece. A residence permit must also be obtained from the local Municipality.

Less stringent provisions apply in relation to certain categories of senior employees, including management level employees, Board Members of multinationals, high-ranking executives of subsidiary companies and branch offices of foreign companies. Such employees are permitted to enter Greece after obtaining a special entry permit from the Greek Consulate in the applicant's country of residence. The application for such an entry permit must be accompanied by a number of specified documents. Upon arrival in Greece, the Prefecture, will issue a work permit upon production of the entry visa, and the employment contract. A residence permit will also have to be obtained from the local Municipality.

## 4. Discrimination

The Greek Constitution, EU legislation, ratified international agreements and various other laws and decrees prohibit discrimination on grounds of sex, nationality, union membership, family status, political belief, religion, disability etc and provide for equal treatment of men and women.

## 5. Contracts of Employment

### 5.1 Freedom of Contract

Contracts of employment may neither derogate from the rules of public policy nor from the provisions of any relevant collective agreement, labour regulation or arbitration decision, except if the provisions of the contract are more favourable to the employee. In practice, the contract of employment creates a framework for the employment relationship, while its content is determined by overriding legislation and collective agreements.

### 5.2 Form

There are no particular legal requirements in relation to the form and the content of

an employment contract. Contracts may be oral or written, except in respect of part-time employment where the contract must be evidenced in writing. Legislation does however impose restrictions on the successive use of fixed term contracts.

By virtue of Presidential Decree 156/1994, which has implemented EU Directive 91/533/EEC, the employer is obliged to inform the employee of the substantial terms of the employment contract. The information in question must include at least the following:

- (a) the identities of the contracting parties;
- (b) the place of performance of work and the residence address of the employer;
- (c) the post or specialisation of the employee, his rank, the category of his employment and the object of his work;
- (d) the date of commencement of the employment contract or the work relationship and its duration, if concluded for a fixed-term;
- (e) the duration of paid leave to which the employee is entitled, as well as the manner and time of its payment;
- (f) the amount of compensation due and the time limits the employer and employee must comply with in case of termination of the contract or of the work relationship with notice;
- (g) the wages of any kind to which the employee is entitled and the frequency of payment thereof;
- (h) the duration of the normal daily and weekly employment of the employee; and
- (i) reference to any applicable collective agreement which defines the minimum terms of remuneration and work of the employee.

An employer will satisfy his obligations if the written employment contract includes the information outlined above.

### 5.3 Trial Periods

Trial periods must not exceed the time needed by the employer to assess the capabilities of the employee concerned. Such trial periods are taken into account for the calculation of severance payments, retirement indemnities, holiday entitlement etc.

### 5.4 Confidentiality and Non-Competition

There is a general duty on employees to keep the employer's secrets confidential. Provisions that prevent employees from working for a competitor for a period after termination must be agreed *ad hoc*, either as clauses of the employment agreements or separately, as long as they are reasonable (in terms of term, geographical application and the scope of restrictions) and they do not harm the employment prospects of the individual concerned. Depending on the nature of the restriction imposed the employer must provide the employee with an indemnity in exchange for the restrictive undertaking. There is no standard rate of indemnity, it is estimated according to the nature of the restriction in question.

### 5.5 Intellectual Property

If an employee creates intellectual property in the course of his employment, the creator remains the initial beneficiary of the real and moral rights to such property. In the absence of an agreement to the contrary, those rights, deriving from the real rights, which are necessary for the fulfilment of the purpose of the contract are automatically transferred to the employer.

Inventions made by an employee belong to that employee except in two circumstances. Firstly, when an invention is the result of an employment contract, the object of which is research and development, it will belong exclusively to the employer. Secondly, when the invention is made during the term of a contract using equipment and information which belong to the employer, 40% of the invention will belong to the employer and

60% to the employee. The employer has priority in the use and exploitation of the invention, but is obliged to compensate the employee according to the value of the invention and the benefits accrued from its exploitation.

## 6. Pay and Benefits

### 6.1 Basic Pay

On 1 April 2014 a new system for formulating the legal minimum salary and minimum daily wage thresholds will enter into force. The new system's formulation will be determined in the first quarter of 2013 by an act of the Council of Ministers.

*From 12 November 2012 until the new system enters into effect, the legal minimum salary is equal to €586.08 per month for employees over 25 years of age and €510.95 for employees under 25 years of age, whereas the legal minimum daily wage is equal to €26.18 for workers over 25 years of age and €22.83 for workers under 25 years of age.*

Prior to these changes, the minimum salary and minimum daily wage were set for most employees by collective agreements negotiated annually by the Federation of Greek Industries (*SEB*) and the General Confederation of Greek Labour (*GSEE*). However, pursuant to the *Medium-Term Fiscal Strategy Framework 2013-2016, and starting from 12 November 2012, the terms of the National Collective Agreement establishing the minimum salary and minimum daily wage are only in force for employees working for employers who belong to the contracting employer unions.*

Employees are entitled to the following bonuses:

- (a) Christmas bonus – one month's salary or 25 days' wages for employees paid on a daily basis;
- (b) Easter bonus – half of a month's salary or 15 days' wages for employees paid on a daily basis; and

- (c) Holiday bonus – half of a month’s salary or 13 days’ wages for employees paid on a daily basis.

The automatic salary increase system is no longer applicable. Minimum salary generally increases twice a year. As a consequence of the recession, minimum salaries and wages have not increased since 2010.

## 6.2 Pensions

Private pension schemes are uncommon, and those that do exist are provided by subsidiaries of multinational companies or by large employers such as banks. The basic rules governing private pension schemes have not yet been systematically dealt with and there is currently no specific legislative provision.

## 6.3 Incentive Schemes

Share participation schemes were introduced by law in 1987. Under these schemes, undertakings can distribute profits to their employees each year in the form of shares.

## 6.4 Fringe Benefits

Cars, enhanced health coverage, mobile phones, laptops, cars and housing facilities are benefits most commonly provided to senior executives.

## 6.5 Deductions

Employers are obliged to deduct income tax at source according to a scale provided by the tax authorities.

# 7. Social Security

## 7.1 Coverage

The majority of Greek employees are covered for basic social security benefits by the Social Insurance Institute (IKA), which covers industrial and commercial workers, and OGA which covers agricultural workers. Fairly generous cover is given in respect of retirement, survivors and disability benefits as well as health care and sickness benefits. The Manpower Employment Organisation (OAED) provides family allowances and

unemployment benefits. In addition, there are a large number of compulsory schemes which provide additional benefits, normally for particular categories of employees within certain industries.

## 7.2 Contributions

Social security contributions are compulsory and payments are collected by IKA from both employers and employees. Contributions are calculated by reference to actual earnings.

Benefits	Employers' contributions %	Employees' contributions %	Total %
IKA benefits			
(a) Pension	13.33	6.67	
(b) Health Benefits	5.10	2.55	
IKA Team	3.00	3.00	
OAED benefits	6.03	2.93	
Other benefits	–	1.35	
Total	27.46	16.50	43.96

# 8. Hours of Work

The law lays down the maximum number of working hours: eight working hours per day and 40 working hours per week (although there are further limits on the working hours of employees after childbirth or during breastfeeding etc). These limits may be varied in certain industries by collective agreement.

In addition, working hours within a business may be re-arranged for a specific period of time into a “period of increased demand” and a “period of decreased demand” by an agreement between the employer and the employee union or representatives in the company, and on condition that certain requirements, procedures and thresholds provided by the law are met.

Legislation provides for special authorised additional work of up to five hours a week

paid at a premium of 20% (over the hourly rate, i.e. the additional work rates will apply to the 41<sup>st</sup>, 42<sup>nd</sup>, 43<sup>rd</sup>, 44<sup>th</sup>, 45<sup>th</sup> working hours).

Greek employment law also provides for overtime work. With effect from 12 November 2012, working hours may be increased by up to two hours per day and 120 hours per year, provided the employer has notified the Employment Office. Overtime is paid at a premium

(over the hourly rate) of 40% for overtime worked up to 120 hours annually, and 60% for overtime worked in excess of 120 hours annually. Employees who work on a Sunday or a public holiday are entitled to an additional premium of 75% of their daily wage.

Despite the fact that unauthorised overtime is subject to severe penalties (a premium of 80% of the hourly rate), non observance of the law is widespread.

By Ministerial Decision, an employer may be granted with special overtime approval where such a request is made on the grounds of exceptional circumstances. In that case, overtime is paid at a premium of 60%.

Depending on their age and the nature of employment, young people are not allowed to work at night.

## 9. Holidays and Time Off

### 9.1 Holidays

Each employee from the commencement of his employment until the completion of 12 months' service, is entitled to pro-rated annual paid holiday on the basis of 24 working days (in the case of a six day working week) or 20 working days (in the case of a five day working week). During the first calendar year the employee is entitled to a pro-rated holiday entitlement.

During the second calendar year the employee is entitled to annual paid holiday proportionate to the duration of his employment. For each subsequent calendar year, as from the 1 January, the employee is entitled to annual paid holiday which is calculated as set out above.

Annual holiday is increased by one working day for each year of service after the first year (up to 26 working days for a six day working week or 22 working days for a five day working week).

After 10 years' service with the same employer or 12 years' service with various employers, there is an entitlement to 25 days' paid holiday (in the case of a five day working week) and 30 days' paid holiday (in the case of a six day working week). After 25 years' service, there is an entitlement to 26 days' paid holiday (in the case of a five day working week) and 31 days' paid holiday (in the case of a six day working week).

Some collective agreements give paid holiday entitlement above the statutory minimum.

There are also five public holidays recognised each year (25 March, Easter Monday, 1 May, 15 August and Christmas). An optional public holiday for the private sector is 28 October while it is a compulsory one for the public sector. Many collective agreements increase the number of public holidays.

### 9.2 Family Leave

The 2000-2001 National General Collective Labour Agreement provides that female employees are entitled to 17 weeks' maternity leave, eight of which must be taken before the birth. The maternity allowance paid by IKA during the leave is 50% of a notional salary (which depends on the classification of the employee and is increased by the number of dependants, however it cannot be lower than two thirds of the actual net wages of the employee). The employer is obliged to pay the difference between social security benefits and the employee's normal salary for half of one month or the whole of one month depending on the seniority of the employee, and for the remaining period the employee is paid the difference by O.A.E.D.

Fathers are entitled to two days' paid family leave upon the birth of a child.

Parents are entitled for 30 months after the end of maternity leave, either to commence or leave work one hour earlier, every day. In agreement with the employer, the parent is entitled to take paid leave in lieu of this right to reduced daily working hours.

Unpaid parental leave of at least four months may be claimed in certain circumstances by both parents after the end of the mother's maternity leave until the child reaches the age of six. Up to four days each year may also be taken on a day-by-day basis as paid parental leave to enable either parent to make arrangements for the child's education. The parents of disabled children are entitled to extra days' special leave each year.

Pursuant to art. 142 of Law 3655/2008, working mothers (who are insured in the national Insurance Body (I.K.A.) are entitled to an additional maternity leave of six months. This leave begins before or after the expiry of Lochia leave (nine weeks after the childbirth) and the completion of the Breastfeeding and Childcare Leave

(in the form of reduced working hours or as a continuous paid leave).

During this additional six month leave, the Employment Organization (O.A.E.D.) pays the maternity leaver the legally defined minimum salary.

This six month additional maternity leave is admeasured to the pensionable years for the employees who are insured at I.K.A. During this period both employer and employee insurance contributions are paid by O.A.E.D.

### 9.3 Illness

An illness allowance/sick pay is paid following the IKA doctor's order/diagnosis of the insured employee's incapacity for work, due to illness.

Directly insured members of IKA are entitled to an illness allowance subject to the following conditions:

- (a) Ill-health incapacity renders them unable to work;
- (b) They have worked for at least 120 working days, within the last year or within the last 15 months prior to the notification to IKA of the employee's incapacity (due to illness). The illness allowance provided by IKA is paid in the event of the insured employee's incapacity for work and is paid from the fourth day of absence.

Subject to having 10 days' service, all employees absent from work on ill-health grounds are entitled to sick pay from their employer of half a month or one month's salary per annum, depending on seniority.

## 10. Health and Safety

### 10.1 Accidents

In most cases employees are covered by IKA in the event of accidents at work. Employers are personally liable with regard to employees who are not covered by IKA insurance or for compensation for moral harm. Whether the employee is

covered by IKA or not, the employer is liable to compensate the aggrieved employee, in the event of an accident at work due to employer's fault.

### 10.2 Health and Safety Consultation

In undertakings with 50 or more employees, employees have the right to elect safety committees and/or representatives who are entitled to receive certain information and to be consulted.

In undertakings with 20 or more employees, employees have the right to elect representatives, for consultation on health and safety issues.

In undertakings with less than 20 employees, the employees are entitled to consult with each other and to elect their health and safety representative. The latter is elected for a two year-term.

## 11. Industrial Relations

### 11.1 Trade Unions

The 1975 Constitution guarantees trade union freedom. The constituent documents of a trade union must be signed by at least 20 people.

Labour Centres, which group together labour unions of a particular local district, supervise the enforcement of labour laws in that district and resolve organisational problems encountered by local unions. Federations represent industry on a sector by sector basis and sign collective agreements. Labour Centres and Federations are organised into national confederations. The most important confederation is the General Confederation of Greek Labour (GSEE). The GSEE negotiates the annual national collective wage agreement with the Federation of Greek Industries (SEB) which is the main employers' association.

### 11.2 Collective Agreements

The most representative trade union in a certain field/sector/profession/undertaking has the right to conclude collective agreements with the respective

employers' representatives. The law defines five categories of collective agreements: national collective agreements, sectorial agreements, national and local vocational agreements and special agreements. The first four are concluded by the appropriate trade unions and employers' associations and are applicable at different levels, while the latter is concluded by the employer and the employees represented by the Trade Union representing the employees of the employer and, in the absence of such representative union, by the Body/Union of employees established in accordance with the relevant legislation.

The General National Employment Agreement (GNEA), sets the minimum standards, as far as terms and conditions of employment are concerned, for all employees within the Greek territory. However, minimum standards regarding pay set by the GNEA apply only for the workforce of employers who belong to the contracting employer unions. Sectorial Collective Agreements are binding in respect of the employees of certain categories of company (companies operating in the same sector or companies established in a city, a specific region or the whole country).

Company Collective Agreements are binding in respect of the employees of a certain company.

National Vocational Collective Agreements are applicable in respect of employees who practice the same profession across the country.

Local Vocational Collective Agreements are applicable in respect of employees who practice the same profession in a specific region.

Collective agreements are binding on the parties which have concluded them. There are provisions of the law pursuant to which the Ministry of Labour can also decide to extend their application to all employees or employers in an industry

sector or a particular trade. The application of these provisions, however, has been suspended during the implementation of the Medium Term Fiscal Strategy. Collective agreements have precedence over private contracts, but may not contain provisions less favourable than those provided by law.

### 11.3 Trade Disputes

There is a right to strike under the Greek Constitution. In order to be lawful, industrial action must only be used as a means of protecting the interests of workers in relation to pay, insurance, union rights and working conditions. A decision to strike must be notified to the employer at least 24 hours before the strike by a recognised trade union, and an authorisation to strike must be provided by the relevant body within the union. If these rules are not observed, the strike is illegal and the employment contracts of the striking employees can be terminated.

In the event of disputes in relation to employment matters, including those relating to collective agreements, employers and trade unions can request the intervention of a "conciliator" from the Ministry of Labour or the Labour Office of the Prefecture. In the case of a collective dispute not being resolved through this Ministry official, parties can use the service of an official mediator who will hear the case and make the necessary inquiries. Having regard to the determination of the minimum basic salary and minimum daily wage, the parties can, by agreement, in specific circumstances submit the dispute to arbitration at any stage of the negotiations. Both mediators and arbitrators must be independent in the exercise of their duty; some of them are appointed by the "Organisation of Mediation and Arbitration" for a period of three years.

### 11.4 Information, Consultation and Participation

Undertakings with 20 or more employees are entitled to set up a works council in

cases where there is no trade union represented in the undertaking. Undertakings with 50 or more staff are entitled by law to set up a works council made up of employees only.

The law stipulates that the works council represents all the employees in an undertaking whether they are trade union members or not. However, the existence of a works council does not prejudice the role of trade unions, which have the right to press for better conditions than those agreed between the works council and the employer.

Works council members are elected for two-year terms and their number varies according to the size of the undertaking. The employer and the works council must meet in the first 10 days of every second month, or whenever one of the parties so requests. The works council is entitled to take decisions together with the employer on such matters as health and safety, annual leave, training, disciplinary procedures, and cultural and social activities at the work place. The employer is obliged to provide the works council with information on a wide range of issues.

Employee participation in the managerial decision-making process is currently being pioneered in both the private and public sectors.

## **12. Acquisitions and Mergers**

### **12.1 General**

Greek Presidential Degree (PD) 178/2002, implements the Acquired Rights Directive (Dir. 98/50/EC). There is a transfer of an undertaking for the purposes of the PD where there is a transfer of an economic entity which retains its identity, meaning an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary. A transfer of an undertaking leading to a change in the employing entity can occur in the case of

a business transfer, consolidation, buy-out or take-over.

### **12.2 Information and Consultation Requirements**

The PD requires the transferor and the transferee to provide information to the representatives of the employees in relation to the following issues:

- (a) the actual or proposed transfer date;
- (b) the reasons for the transfer;
- (c) the legal, financial and social consequences that the employees will suffer, due to the transfer;
- (d) the proposed measures for the employees (if any).

The PD also requires the transferor and the transferee to consult with the employees' representatives in the event they propose to change the employees' terms and conditions of employment.

The PD requires the transferor to communicate on the above issues with the employees' representatives before the business transfer takes place. However the transferee is only obliged to communicate the above information in a timely fashion and in any event before transferred employees' terms and conditions are affected by the transfer.

If measures are envisaged by transferor or transferee that will affect the status of the employees they must consult with the representatives of the employees in good time, in order to achieve an agreement, however agreement does not have to be reached. The results of the consultation are embodied in minutes.

The employee representatives will be the works council, or in the case of a workforce of less than 50, the tripartite committee provided for by the relevant regulations. In the absence of either of these the individual employees must be provided with the information outlined above.

### **12.3 Notification of Authorities**

There is no specific obligation on either transferee or transferor to notify the authorities of any business transfer.

### **12.4 Liabilities**

Failure to comply with the information and consultation obligation in respect of employee representatives or employees can give rise to a fine. This can be imposed on both transferor and transferee.

In addition, the Court can grant an injunction until the information/consultation obligations are complied with, suspending the transaction provisionally.

There are no ad hoc criminal sanctions for failing to comply with the information and consultation obligations.

## **13. Termination**

### **13.1 Individual Termination**

The right to work is protected under the Greek Constitution and any provision that limits that right is narrowly interpreted by the Courts. This is relevant, for instance, to fixed-term contracts which provide lower protection than contracts for an indefinite term. If an employer terminates a fixed-term contract prematurely, in the absence of a serious reason for termination, he or she is obliged to pay the employee's full salary until the agreed term of the contract has elapsed.

### **13.2 Notice**

The law provides different rules for terminating the contracts of blue-collar and white-collar employees. Dismissals of both types of employees with contracts for an indefinite term must be notified in writing and handed to the employee in person, whether the contract is terminated with or without notice.

Following recent legislative amendment, the minimum notice periods for white collar employees are:

Length of Service	Notice Period
1 to 2 years	1 month
2 to 5 years	2 months
5 to 10 years	3 months
10 years +	4 months

If an employer terminates a white employee without prior notice, it is obliged to pay the following severance pay.

Length	Severance Pay without prior notice
1 to 4 years	2 months salary
4 to 6 years	3 months salary
6 to 8 years	4 months salary
8 to 10 years	5 months salary
10 years	6 months salary
11 years	7 months salary
12 years	8 months salary
13 years	9 months salary
14 years	10 months salary
15 years	11 months salary
16 years	12 months salary

Salary is based on the regular earnings of the last month of employment increased by 1/6 (*pro rata* Christmas, Easter bonus and holiday allowance).

Pursuant to the recent changes, employees whose length of service exceeded 17 years on 12 November 2012 are entitled to an additional severance amount. This additional severance pay is calculated according to the number of years of service as at 12 November 2012 (see below) However, this amount will remain the same regardless of when the termination of contract takes place after 12 November 2012.

Termination with notice:

Length of service with the same employer on 12/11/2012	Additional severance pay without prior notice (salary is not calculated for the amount exceeding €2,000 euro)
17 years	+ 1/2 month salary
18 years	+ 1 months salary
19 years	+ 1 1/2 months salary
20 years	+ 2 months salary
21 years	+ 2 1/2 months salary
22 years	+ 3 months salary
23 years	+ 3 1/2 months salary
24 years	+ 4 months salary
25 years	+ 4 1/2 months salary
26 years	+ 5 months salary
27 years	+ 5 1/12 months salary
28 years	+ 6 months salary

Termination without notice:

Length of service with the same employer on 12/11/2012	Additional severance pay without prior notice (salary is not calculated for the amount exceeding €2,000)
17 years	+ 1 month salary
18 years	+ 2 months salary
19 years	+ 3 months salary
20 years	+ 4 months salary
21 years	+ 5 months salary
22 years	+ 6 months salary
23 years	+ 7 months salary
24 years	+ 8 months salary
25 years	+ 9 months salary
26 years	+ 10 months salary
27 years	+ 11 months salary
28 years	+ 12 months salary

For blue-collar workers, the situation is more straightforward. Whether adequate written notice is given or not, the blue-collar worker is always entitled to a severance payment as set out below:

Length of service	Severance pay
Less than two months	0
2 months to 1 year	5 days' wages
1 to 2 years	7 days' wages
2 to 5 years	15 days' wages
5 to 10 years	30 days' wages
10 to 15 years	60 days' wages
15 to 20 years	100 days' wages
20 to 25 years	120 days' wages
25 to 30 years	145 days' wages
30 years +	165 days' wages

In theory, an employee is obliged to give advance notice to the employer in the case of resignation. The notice period or payment in lieu to be given by white-collar employees is equal to one half of that imposed on employers in cases of dismissal with a maximum of three months. The notice period to be served by blue-collar workers is equal to the number of days for which they would have been compensated for had the employer terminated the contract. Payment in lieu of notice on the part of the employee amounts to half the wage that would have been paid during the notice period. In practice, this law is not usually enforced and the employee is allowed to leave freely without giving notice or paying in lieu.

**13.3 Reasons for Dismissals**

A dismissal may be challenged in Court because of a lack of legal grounds, discrimination or failure to observe the proper procedures (for example the non-payment of severance pay). If the dismissal is declared void, the Court may

also order the employer to compensate the employee for the entire period since the dismissal.

Provided the termination is notified in writing and subject to the principle of good faith, employers are, in general, not obliged to give the reasons for dismissal (a principle applying to employment agreements of indefinite term). The dismissal will be considered as "abusive" and, consequently, void if the employer has acted in bad faith or with malicious intent. Lawful reasons include those related to the employee himself (inability, inefficiency, breach of contract, lack of trust etc) or reasons related to the interests of the company (economic, financial or technical). In cases of dismissals on financial or technical grounds, Courts may examine whether the changes are needed in the real interests of the company or whether the employee could be kept on part-time or given alternative employment with the company.

Employers are also required to pay an indemnity:

- (a) to employees who voluntarily with the consent of the employer terminate their contracts after at least 15 years' service; or if they have reached the retirement age set by the relevant insurance fund or if no retirement age is set, the age of 65. The amount of compensation is equivalent to 50% of severance pay;
- (b) to white-collar employees who terminate the employment having satisfied the pre-requisites for receiving a complete pension;
- (c) to blue-collar employees who voluntarily terminate their contracts, having met the prerequisites for receiving a complete pension. The amount of compensation is equivalent to 50% of severance pay or 40% of severance pay for employees who are insured by an auxiliary pension scheme.

For the employees who leave employment or are dismissed, having satisfied the pre-requisites for receiving a full pension, the Ministry of Labour has clarified: For the calculation of the indemnity the salary of the last month of employment is taken into account and the length of service that is taken into account for the calculation of the indemnity is the service with the relevant employer on the 12 November 2012.

**13.4 Special Protection**

Several categories of employees are given special protection against dismissal. Trade union representatives, for instance, cannot be dismissed during their time in office and for a certain period afterwards, unless there are specific reasons which are not linked with their union duties. Pregnant women/women in lochia/breastfeeding, employees who serve their military service or those who have distinguished themselves in time of war, employees who are on leave, under age employees/workers and union members all enjoy various levels of protection against termination on the grounds of their status.

**13.5 Closures and Collective Dismissals**

In the event of the closure of a workplace, the employer must terminate the contracts lawfully and comply with the rules regarding the termination of employment.

Collective dismissals are defined by law as dismissals which affect more than a certain percentage of employees in any undertaking with more than 20 employees. Before dismissing, employers must inform employee representatives in writing of the intention to dismiss part of the workforce and consult with these representatives. Relevant information must be sent to various authorities, such as the Head of the Employment Office and the Head of the Prefecture or Minister of Labour and the Employment Office depending on the case. If no agreement is reached between the parties, the Head of the Prefecture or

the Minister of Labour can extend the consultation period for another 20 days or even refuse to approve the application to allow the proposed dismissals.

Recent legislation establishes a monthly dismissal limit, dismissals in excess of which give rise to a collective dismissal situation, as follows:

- (a) for businesses with 20 up to 150 employees, the limit is 6 dismissals per month; and
- (b) for businesses with more than 150 employees, the limit is 5% of the employed personnel and up to 30 dismissals per month.

## 14. Data Protection

### 14.1 Employment Records

Collection, storage, use and any kind of processing of personal data held by employers about their employees and workers (prospective, current and past) are regulated by Law No 2472/1997 as amended (the HDPa Law), which implements the EU Data Protection Directive 95/46/EC. Infringement of data protection law can lead to fines, administrative and penal, civil compensation claims from affected employees or regulatory action.

Collection and processing of employees' personal data is allowed exclusively for purposes directly related to the employment relationship and on condition that such acts are necessary for fulfilling the legal and contractual obligations of both parties.

Essentially employers, as data controllers, are under an obligation to ensure that they process personal data about their employees (whether held on manual or computer files) in accordance with specified principles including the following: a requirement to ensure that data is accurate, up to date, not excessive in relation to the purposes for which it is processed, not kept longer than is necessary and a requirement that it is

stored securely to avoid unlawful access, accidental destruction or damage to it.

Employers are generally advised to ensure they have some sort of document retention and security policy in place and to ensure that the personnel are aware of their data protection obligations and consents to their personal data processing.

### 14.2 Employee Access to data

Employees, as data subjects, have the following rights in relation to the processing of their personal data:

the right to be informed of the controller's identity, the purpose of the processing, the data recipients and of the employee's right to access.

The right to access, i.e. the right of the employee to know the exact content of his/her personal file and which of his/her personal data are subject to processing.

The right to object in case the processing is unlawful or contravenes the contractual agreement.

The right to seek provisional judicial protection in the case of an automated processing of his personal data with the purpose of evaluating his personality, his effectiveness at work and his general conduct.

### 14.3 Monitoring

The monitoring of an employee's e-mail, Internet and telephone or the installation of a CCTV system is regulated by 115/2001 Directive issued by the Hellenic Data Protection Authority (HDPa) under the framework of the HDPa Law 2472/1997. Monitoring is permissible provided that it is carried out in accordance with the principles and processing conditions provided by the HDPa Law (and where appropriate in accordance with any other applicable legislation). Any adverse impact of monitoring on employees must be justified by its benefit to the employer and/or others. Express employee consent

to monitoring is not usually required, however, employees should be notified that they are being monitored, the purpose of the monitoring and who has access to the monitored data, unless covert monitoring is justified. Where disciplinary action is a possible consequence of anything discovered, this too should be made clear to employees.

Whistleblowing schemes may be set up only when absolutely necessary for the purposes of a legitimate interest pursued by the employer. Such an interest must evidently prevail over the rights and interests of the person whom the data refer to. Whistleblowing schemes may only be established after the HDPa has been notified in writing. The scope of reporting permitted is limited to the fields of accounting, internal accounting controls, auditing matters, the fight against bribery, banking and financial crime. For the fair collecting of personal data, only identified reports must be communicated.

### 14.4 Transmission of Data to Third Parties

An employer who wishes to transfer employee data to third parties must do so in accordance with the principles and processing conditions provided by the HDPa Law. Where the third party is based outside the EEA it should be noted that the HDPa Law prohibits the transfer of data to a country outside the EEA unless that country ensures an adequate level of protection for personal data or one of a series of limited exceptions apply (Safe Harbor Certificate, EU Standard Contractual Clauses etc). In any event, the employee's express consent is required before his personal data is provided to third parties.

The transfer of personal data within the EU is permissible. In certain circumstances, personal data can be transferred to third countries (non EU-member states) upon the DPA's permission.

*Contributed by Bahas, Gramatidis & Partners*

# Hungary

## 1. Introduction

The basic rules of employment are regulated by Hungary's Labour Code (Act I of 2012 on the Labour Code, the "Labour Code") which came into force on 1 July 2012 and which replaces the former Labour Code in its entirety on 1 January 2013. The new Code represents a significant shift from the former regulation, which has been in place since 1992, and changes most aspects of employment relations. It gives greater contractual freedom with less regulation. The lawmakers' stated aim is to strengthen the employment market, make employment more flexible and incorporate the relevant EU *acquis* into the local legislation. Accordingly, the judicial practice is also expected to change.

The new Labour Code is applicable to all existing employment relationships and generally all agreements concluded under the previous Labour Code shall remain in force. The entry into force of the new Labour Code does not affect the validity of the provisions agreed under the previous Labour Code as long as the intention of the employer and the employee was not to stipulate the application of a particular provision of the previous Labour Code, but to generally apply the relevant provisions of the Labour Code as applicable from time to time, in which latter case the former regulations of the previous Labour Code and the references to its former provisions are automatically replaced by the provisions of the new Labour Code. If the parties' intention was to stipulate the application of a particular provision, it needs to be examined whether such provision is in compliance with the new Labour Code. Any provision of an employment contract or a collective agreement contrary to the mandatory provisions of the new Labour Code shall be invalid and shall terminate if not replaced by the parties with provisions consistent with the applicable provisions of the new Labour Code

In addition to the Labour Code, further laws and regulations may need to be taken into consideration when determining the legal provisions applicable to the particular employment relationship, such as the general provisions of the Hungarian Civil Code, provisions concerning work safety, supervisory proceedings of the labour authorities, act on temporary work agencies, act on pensions and social security contributions, etc.

The Labour Code implements the majority of EU employment law directives. Collective agreements and employment contracts may only regulate employee's rights and obligations which are not dealt with in the Labour Code or if they are more favourable to the employer. In certain cases, deviation from the general provisions of the Labour Code to the detriment of the employees may be agreed in collective agreements if such deviation is explicitly permissible in the Labour Code. In addition, employment contracts cannot cover rights and obligations dealt with in applicable collective agreements, except to the extent that they are more favourable to the employee.

Given the Hungarian labour courts' generally pro-employee approach, Hungarian employment law should be carefully complied with and if there is any doubt regarding the interpretation of employment law provisions, it should be assumed that the employee's interests will be respected by a court.

## 2. Categories of Employees

### 2.1 General

The Labour Code applies to all employees. However, Hungarian labour law categorises employees on the basis of their role within the employer's operations and distinguishes between "executive employees" and other "normal"/"average" employees. This

distinction is reflected in the regulation of employees' rights and obligations.

### 2.2 Directors

Executive employees are the employer's director and any other person under his direct supervision who are authorized – partly or entirely – to act as the director's deputy.

Employment contracts may also invoke the provisions on executive employees if the employee is in a position of considerable importance to the employer's operations, or has a position of trust, and his salary exceeds seven times the mandatory minimum wage.

Due to the specific nature of their role, executives are exempt from certain protective provisions of the Labour Code relating to working time or termination, for example, and have greater liability for damages caused in connection with their employment.

### 2.3 Other

Except as otherwise provided in the employment contract, employees are full-time. Part-time employees are entitled to the same protection as full-time employees. Any differences in treatment of part-time employees must be on justified grounds connected to the characteristics of part-time employment (e.g. *pro rata* salary).

## 3. Hiring

### 3.1 Recruitment

The employer's recruitment process is not regulated under Hungarian labour law. However, the activity of temporary work agencies and employment agencies is subject to additional requirements (e.g. registration and reporting obligations) set out in a separate government decree.

All persons entering into an employment relationship, as employees, must be at least 16 years of age, however: (i) a person of at least 15 years of age pursuing full-time studies may be

employed during the school vacation period, (ii) a person under 16 years of age may enter into an employment relationship with the prior consent of the guardian authority for the purposes of performance in certain artistic, sports, modelling or advertising activities permitted by law.

Persons of diminished capacity may enter into an employment relationship subject to the permission of their legal representatives (parent or a guardian).

Legally incompetent persons (e.g. owing to their mental state or unsound mind) may conclude employment relationships only for jobs which they are capable of performing on a stable and continuous basis in light of their medical condition. The employees' medical examination shall cover the employees' ability to handle all functions of the job.

In certain circumstances (e.g. in the case of decisions affecting a large number of employees including restructurings, new investments or collective dismissals) the employer must consult the representatives of the Works Council on major personnel planning.

Employers with 25 or more employees must pay a yearly "rehabilitation tax" unless at least 5% of their staff consists of disabled persons. In practice it means that the employer is to pay an amount of cc. €3,450 multiplied by a multiplier (the multiplier is the number of 5% of the employees less the number of the employed disabled employees).

### 3.2 Work Permits

The citizens of all EEA member states do not need to obtain a work permit for employment in Hungary. Non-EEA nationals and citizens must obtain a work permit prior to the commencement of employment in Hungary. An individual work permit, which must be applied for by the employer, may be granted for a maximum of two years and may be renewed.

EEA nationals may freely enter and stay in Hungary for a period not exceeding 90 days. If the term of their stay exceeds 90 days, they must obtain an EEA residence permit. An EEA residence permit is valid for a maximum of five years and is renewable. This general rule is applicable to the stay of non-EEA nationals but may vary depending on the citizenship.

## 4. Discrimination

Discrimination on the grounds of gender, race, colour, nationality, age, state of health and other characteristics not related and relevant to the position is prohibited. This principle is also applicable to the recruitment process.

In the event of a dispute on the grounds of discrimination, it is the employer who must prove that its conduct was not discriminatory.

## 5. Contracts of Employment

### 5.1 Freedom of Contract

Although employer and employee are free to agree on the terms of employment, the terms of the employment contract, if they are different from the rights and obligations provided for by employment law provisions, must be more favourable for the employee than the statutory minimum standards subject to certain exemptions applicable in the case of executive employees. Industry-wide collective agreements may also apply in certain sectors and collective agreements may apply to employers. The employment contract may only contain terms different from those set out in the collective agreement if they are more favourable for the employee. The provisions of collective agreements are not applicable to executive employees.

### 5.2 Form

In general terms, employment contracts must be in writing. However, oral employment contracts may be valid if the employee fails to challenge the validity of

the oral employment contract within 30 days of the start of employment.

In order to be valid an employment contract must at least contain details of the parties, the employee's position and the salary. The employer must, within 15 days of the conclusion of the employment contract, notify the employee in writing of certain essential conditions of his employment, however, non-fulfilment of this obligation does not render the employment contract invalid.

Fixed term contracts may be entered into for a maximum term of five years. This rule is also applicable to the aggregate of consecutive renewals. If a fixed-term employment contract is renewed or extended for reasons that are considered unjustified (i.e. not based on objective reasons independent of the work organization or it jeopardises the employee's legitimate interests) the contract is deemed to be a contract of indefinite duration. According to judicial practice, in such cases the contract may also be terminated and the employee is entitled to receive an absence fee for the duration of his notice period and severance pay is also payable.

### 5.3 Trial Periods

The probation period may not exceed three months starting from the first day of the employment. The employer and the employee are free to prolong the probation period in cases where it was originally shorter than three months, but the total term of the probation period cannot exceed three months.

During the probation period either of the parties may terminate the employment relationship with immediate effect without providing any reason.

### 5.4 Confidentiality and Non-Competition

Employees are subject to statutory non-competition provisions during the term of their employment. Executives must comply with strict non-competition requirements.

Non-compete agreements restricting competitive activities following the termination of employment must provide for a minimum level of compensation to be paid to the employee, not less than one third of the employee's previous remuneration. The compensation must reflect the nature and content of the specific prohibition. When determining the amount of such compensation, the employee's ability to find other employment elsewhere shall be taken into consideration. The period of restriction cannot exceed two years.

Employees have a general duty during their employment to refrain from any conduct that interferes with the employer's lawful economic interests. If expressly agreed between the parties, this obligation on the part of the employee may be maintained following the termination of employment in line with the rules on non-compete agreements. Employees are prohibited from disclosing business secrets both during employment and following termination. Disclosure of business secrets may, in certain circumstances, constitute a criminal offence.

The employees' behaviour in certain cases may be monitored by the employer even outside their working hours in accordance with their job or position in the employer's hierarchy as they are required to refrain from any conduct that directly and actually has the potential to damage the employer's reputation, lawful economic interest or the intended purpose of the employment relationship. However, the affected employees must be informed of such monitoring in writing in advance.

Under the new Labour Code the right of the employees to express their opinion may be restricted if it could lead to serious harm or damage to the employer's reputation or lawful economic and organizational interests.

### 5.5 Intellectual Property

The Intellectual Property Law distinguishes between service inventions

("szolgálati találmány") and employee's inventions ("alkalmazotti találmány") depending on whether or not the preparation of the work (invention) came within the scope of the employee's employment duties.

A service invention is made by a person who is employed for the express purpose of research and development in a specific field (e.g. research departments of companies, where the inventors are researchers employed to develop new solutions).

In the case of a service invention the employer is an "ex lege" successor in title to the inventor of the service invention. The inventor is entitled to remuneration by way of compensation (i.e. an inventor's fee).

An employee's invention is owned by the employee, but the employer has an ex lege non-exclusive licence. If the employee's invention is used by the employer, the employee is entitled to receive remuneration.

In both cases the employee has a duty to notify the employer of any such invention.

## 6. Pay and Benefits

### 6.1 Basic pay

Each year the Hungarian Government establishes the level of minimum pay. The monthly minimum wage in 2012 was HUF 93,000.00 (approx. €330). The so-called guaranteed wage minimum for 2012 was HUF 108,000.00 (approx. €385) established for employees who have at least secondary education or secondary professional education and perform work which requires at least secondary professional education.

Collective agreements may also establish a minimum pay rate for employees of certain categories.

Wages are paid either on a time or performance basis or a combination of the two. Time wages are paid on an

hourly (common among blue-collar workers) or monthly basis.

Wages in Hungary are not index linked. However, where employers come within the scope of a collective agreement, the wages are usually re-negotiated annually with the Trade Union.

### 6.2 Pensions

The provision of private pension plans is not mandatory. However, large employers often provide private pension arrangements as a benefit by contributing to a pension fund for the employee.

### 6.3 Incentive Schemes

Employee share schemes are not mandatory in Hungary. Large foreign parent companies of Hungarian employers often offer share schemes to the employees of Hungarian subsidiaries, but this form of benefit is not yet widespread in Hungary.

### 6.4 Fringe Benefits

Fringe benefits vary according to the size of the business and the influence of Trade Unions. These may include bonuses, company car, insurance, subsidised holidays and meals. These may be provided either unilaterally by the employer or on the basis of an employment contract or collective agreement. In the latter case the employer may not withdraw these benefits without the Trade Union's or employee's consent.

### 6.5 Deductions

Employers deduct the employee's income tax and social security contributions at source and account for it to the tax authorities.

## 7. Social Security

### 7.1 Coverage

The basic level of social security benefits covering old age, disability, industrial injury, sickness, death and unemployment, is provided by the state social security system.

## 7.2 Contributions

Social security contributions are paid by both the employer and the employee. An employee's social security contributions must be deducted at source by the employer from the employee's gross salary. Employer contributions are 24%, employee contributions are 17% of the gross salary.

## 8. Hours of Work

The statutory number of working hours per week is 40 hours. In general, daily working time is limited to eight hours. The employer and the employee may agree on 12 working hours per day in certain exceptional circumstances (extended daily working time). Hungarian labour law prohibits working on Sundays and public holidays except where the nature of work requires continuous operation (e.g. hotels, shopping malls, public utilities and other public services).

Working in excess of normal hours of work qualifies as overtime. Executives are not usually entitled to overtime pay.

Employees are entitled to wage supplements payable for working on Sundays or on public holidays or for shift work, etc. The employer and the employee in lieu of settling supplemental payments for overtime worked each month, may: (i) agree that the base wage includes the wage supplements or (ii) agree on a fix monthly average payment which includes the base wage and the wage supplements.

Specific rules apply where the employer makes use of specified shift patterns where work is defined in specific cycles instead of on a daily basis.

## 9. Holidays and Time Off

### 9.1 Holidays

There are 10 public holidays in Hungary. The number of statutory paid holidays depends on the employee's age and varies from a minimum of 20 days to

30 days. Collective agreements and employment contracts may provide for more paid holidays or extra holidays in certain circumstances (e.g. executives are often granted extra holidays).

### 9.2 Family Leave

Employees are entitled to extra holidays if they have children (two working days for one child; four working days for two children; seven working days for more than two children under 16 years). The extra holidays are increased for parents of children with disabilities by two working days per child.

Pregnant women are entitled to 24 weeks' maternity leave, which they may take, if possible, from four weeks before confinement. After the 24-week maternity leave, in certain circumstances either parent is entitled to additional leave of up to three years from the child's birth. During this leave no payments have to be made by the employer. Fathers are entitled to a five day paid holiday following the birth of their child or seven working days in the case of twins.

Pregnant women, mothers and single fathers have greater protection in terms of dismissal and performance management at work.

The employee who intends to return to work at the end or before the expiry of the maternity leave must notify the employer of such intention at least 30 days prior to the requested start date.

The maternity returner mother/single father is entitled to return to the same job or a similar job to that in which he/she was employed before he/she went on leave, on terms and conditions that are no less favourable than those that would have applied had she not been absent. He/she is also entitled to the benefit of any increases in salary made by the employer during the maternity leave. If the employer is unable to provide the returning employee with a position satisfying the

above requirements due to circumstances falling within the scope of the employer's operation, or if the employee refuses the offered job, the employer is entitled to terminate the employment.

### 9.3 Illness

Employees are entitled to 15 days' sick leave per year during which, broadly speaking, they are entitled to 70% of the absence fee to be paid by the employer. The amount of the absence fee is calculated on the basis of the employee's base salary and other performance-based wages and wage supplements paid for the last six months on average. In practice the absence fee is lower in value than the amount of the base salary.

Following the expiry of this 15 day sick leave period, the employee is entitled to sick pay for a maximum period of one year. The sick pay is provided by the state and is 60% of the base salary where the employee had at least two years' service and is 50% of base salary in the case of employees with shorter service. Two-thirds of this amount is paid by the social security system and one-third by the employer.

### 9.4 Other time off

Employees are exempt from work in certain circumstances e.g. during any mandatory medical examination; for donating blood - at least four hours; two working days upon the death of a relative; to attend court proceedings; due to personal or family reasons, etc. Exemption is granted by law for the duration of employee's studies in limited circumstances (e.g. only for finishing primary school studies). In general, agreement must be reached with the employer to undertake training or to attend seminars.

Employer and employee may agree in writing on a flexible working schedule where the employee is entitled to schedule a minimum of 50% of his working time.

## 10. Health and Safety

### 10.1 Accidents

Detailed regulations exist regarding safety measures at work. Non-compliance with these regulations triggers fines imposed by the labour authority.

The employer is fully liable for damages caused to an employee in connection with his employment, regardless of culpability. An employer is only relieved of liability if it is able to prove that the damage was caused (i) by an unavoidable event resulting from circumstances beyond the employer's field of operations and there had been no reasonable grounds for taking action to prevent or mitigate the damage; or (ii) solely by the unavoidable conduct of the injured employee. No liability arises in relation to damage attributable to the employee's negligence or in cases where the employee has failed to fulfil his obligation to mitigate the damage. The employee is required to prove that there is a causal link between the damage and his employment relationship. If the liability of the employer is proven, the employer is required to reimburse the employee for loss of income, material damage and justified expenses incurred in connection with the damage.

If the accident is attributable only to the employee then he/she is liable for the damage caused to the employer by any violation of employment-related obligations arising or as a consequence of the failure to act. The amount of compensation payable by the employee may not exceed four months' of the employee's absence fee. However, where the damage was caused wilfully or by gross negligence the employee is liable for the full extent of damages. The employer has to prove the liability of the employee, the occurrence and the amount of damage, as well as the causal connection.

If the accident is attributable to both the employer and the employee, the liability

and the financial consequences are apportioned according to their respective contribution.

### 10.2 Health and Safety Consultation

Trade Unions and Works Councils must be kept informed in relation to health and safety measures. Where the number of employees is at least 50, employees are entitled to elect Health and Safety Representatives. A Health and Safety Committee may be formed where there are three or more Health and Safety Representatives elected. These bodies have consultation rights and rights to information regarding health and safety measures.

## 11. Industrial Relations

### 11.1 Trade Unions

All associations under Hungarian law whose purpose is the representation of employees' interests in connection with their employment qualify as Trade Unions. If the Trade Union has members employed by the employer, Trade Union representatives are free to enter the employer's premises in order to perform their tasks relating to the employees' representation. Employees cannot be forced to join a Trade Union and discrimination against employees on the basis of their Trade Union membership is prohibited.

Trade Unions are entitled to conclude a collective agreement on behalf of employees if they are independent from the employer and sufficiently representative.

Trade Unions are entitled to request information on all matters affecting the employees' economic and social interests in connection with their employment and to express their opinion to the employer concerning its actions and decisions and/or initiate negotiations in connection with such actions/decisions.

### 11.2 Collective Agreements

Collective bargaining agreements may be concluded by Trade Union(s) on one side

and an employer or employers' association on the other. An employer may fall under the scope of no more than one collective bargaining agreement. If a Trade Union (that qualifies as an employees' representative) initiates negotiations with a view to concluding a collective bargaining agreement the other party (i.e. the employer) cannot refuse to negotiate. A collective bargaining agreement must be registered with the Ministry for National Economy. The parties are jointly obliged to notify the Ministry for National Economy of any amendments to and termination of the collective bargaining agreement.

Unless otherwise agreed between the parties, the notice period for terminating the collective bargaining agreement is three months. The parties are prohibited from exercising their right to termination during a six month period following the conclusion of the collective bargaining agreement.

The minister in charge of employment and labour may extend the scope of a collective bargaining agreement to the entire sector (or subsector), at the request of the parties provided they qualify as representatives of the sector (or subsector) in question. The opinion of the national employee and employer representative organizations affected by such a proposed extension must also be obtained before the extension is granted.

### 11.3 Trade Disputes

Employees and Trade Unions have the right to initiate strikes, provided that the strike has work-related objectives (other than the amendment of the Collective Agreement and matters falling within the court's competence) and that previous negotiation between the parties have failed. Works Councils do not have this right. Although striking employees are not entitled to remuneration during a strike, participation in a strike, provided that it is lawful, may not serve as a basis for discriminating against a striking employee.

Where an employer provides a fundamental public service e.g. public transportation, telecommunications, suppliers of electricity, water, gas and other energy, then a strike in such a workplace may be regarded as illegal if insufficient levels of service are maintained during the strike. What amounts to a sufficient level of service is either defined by law or must be agreed during the pre-strike negotiations.

#### 11.4 Information, Consultation and Participation

Employees and their representative bodies (such as Works Councils and Trade Unions), have the right to information, consultation and joint decision-making in relation to certain matters.

Where an employer has more than 200 employees, employees have the right to elect one third of the members of the employer's Supervisory Board in order to ensure employees' participation in supervising the employer's management.

Works Councils monitor compliance with the legal provisions relating to employment at the employer.

To the extent required to meet their responsibilities, Works Councils are entitled to request information and to initiate negotiations on relevant topics the employer cannot refuse such requests.

Where the number of employees exceeds 50 the election of a Works Council is compulsory but, unless the election is hindered by the employer, there are no legal consequences in the event that no Works Council is elected.

In general terms, the employer must request the Works Council's opinion on each matter affecting a significant number of employees (e.g. restructuring of the employer, introducing new technologies, investment programs) and the Works Council is entitled to receive information on all matters affecting the employees' economic and social interests connected

to their employment (e.g. in the case of changing wages and/or work conditions).

The Works Council's opinion does not bind the employer to any extent. However, employers must pass decisions jointly with the Works Council in matters relating to the utilisation of welfare funds listed in the collective bargaining agreement and of certain assets of a similar nature. Violation of these rights may result in the employer's action being ruled invalid by the Labour Authority and the imposition of fines of varying amounts.

## 12. Acquisitions and Mergers

### 12.1 General

The acquisition of a company through a share purchase in itself does not trigger any specific employment law obligations on the part of the employer, as the employing entity does not change as a result of the transaction.

Where an acquisition is in the form of a business sale (asset sale) various employment law obligations will be triggered. The transfer of an economic unit (i.e. an organised group of material and/or immaterial resources) or part of an economic unit, irrespective of the number of employees affected by the transfer, results in the automatic transfer of employment contracts related to the economic unit (or part of the economic unit) to the buyer proposing to operate the business.

The EU Acquired Rights Directive has been implemented in Hungary.

Transferred employees have no right to object to the transfer.

Termination of employment on the basis of the transfer of undertaking by the employer is invalid. However, the new employer (the transferee) can terminate employment on the grounds of re-structuring or staff rationalisation following the transfer.

In principle, unless the terms of the transferee's collective bargaining agreement are more favourable for the transferred employees, the transferee is bound by the collective bargaining agreement applicable to the previous employer (transferor) in respect of the employees affected by the transfer. This rule is applicable until the collective bargaining agreement is terminated by the transferor or the expiration of the collective bargaining agreement, or until another collective bargaining agreement is concluded between the relevant employees and the transferee. If none of these events occur the transferee must maintain the working conditions ensured by the collective bargaining agreement of the transferor for at least one year following the date of transfer.

### 12.2 Information and Consultation Requirements

In the case of a transfer of an undertaking the Works Council has no right to veto the transaction, however, the transferor shall inform the Works Council or in the absence of that the concerned employees directly in writing not later than 15 days prior to the date of the transfer of the (i) date or the proposed date; (ii) the reason; (iii) the legal, economic and social implications of the transfer; and (iv) any planned measures affecting the employees.

The transferee must inform the affected employees in writing within 15 days of the date of the transfer and the changes in certain working conditions and must also provide the employer's identification data.

The affected employees are entitled to terminate the employment relationship in cases where the transfer involves a substantial change in their working conditions and maintaining the employment relationship would result in an unreasonable disadvantage or would be impossible. The employees must exercise the right of termination within 30 days of the date of transfer.

### 12.3 Notification of authorities

There are no obligations to notify the authorities about the transfer of employment.

### 12.4 Liabilities

The transferor and the transferee are jointly and severally liable for liabilities incurred prior to legal succession if such claims of the employee are enforced within one year of the transfer.

In general terms, if the transferor and the transferee are not undertakings independent from each other, the transferor is liable, as surety, for the payments due to an employee if his employment relationship is terminated by ordinary notice in connection with the employer's operations or his fixed term employment is terminated by the employer.

If an employer fails to comply with its information and consultation obligations, Works Councils may apply to court for a declaration that the employer has breached its obligations. However, this does not affect the validity of the transfer agreement.

## 13. Termination

### 13.1 Individual Termination

An employer must comply with strict rules in relation to the termination of employment. Non-compliance with these rules may result in the invalidity of the notice of termination, re-instatement and compensation obligations. However, the rules on termination vary depending on whether the employment is for an indefinite duration, for a fixed term or whether the employment is still in the trial period phase. In every case, the termination notice must be in writing.

Employment may be terminated:

- (a) by mutual consent of the employee and the employer;
- (b) by notice;
- (c) by dismissal with immediate effect.

### 13.2 Notice

An employment relationship may be terminated by notice both by the employee and the employer. If the contract specifically so provides, the employment relationship cannot be terminated by notice for a period of up to one year following the date of commencement of the employment relationship.

In the case of indefinite employment relationships, employers are required to justify clearly and reasonably their termination notice, and are only entitled to exercise their termination right on the basis of reasons in connection with the behaviour or ability of the employee, or in connection with the employer's operation.

Fixed-term employment relationships may also be terminated by notice by the employer subject to the following limited circumstances: (i) in case of ongoing liquidation or bankruptcy proceedings, or (ii) for reasons related to the worker's ability, or (iii) when maintaining the employment relationship is no longer possible for the employer due to unavoidable external reasons.

Employees are not required to give reasons for terminating their indefinite employment relationship by notice, however they are required to give reasons for terminating their fixed-term employment relationship by a notice. In the latter case the reason for termination must be such that it would render continuation of the employment relationship impossible or would cause unreasonable inconvenience to the employee in light of his/her circumstances (e.g. changing the place of work).

The statutory minimum notice period is 30 days for both the employer and the employee. Depending on the length of service with the employer, the notice period in a termination notice of the employer can increase to 90 days. Employer and employee may agree on a longer notice period with the provision that the notice period cannot be longer

than six months. Statutory notice entitlements are not applicable to executive employees. Collective bargaining agreements often provide for longer notice periods.

The employer must exempt the employee from the duty to work for at least half the notice period and the employee is entitled to his salary while he performs work and his absence fee while he is exempt from work.

The amount of severance pay is 1-6 months absence fee depending on the length of the employment served.

### 13.3 Reasons for Dismissal

Both the employer and the employee are entitled to terminate the employment relationship with immediate effect in the event of any grave violation of any substantive obligations arising from the employment relationship or if, as a consequence of the other party's conduct, the employment relationship cannot be maintained. For instance, summary dismissal will be justified when the employment relationship is no longer sustainable and immediate action is required.

The right to dismiss summarily can be exercised within a 15 day period of initially becoming aware of the reasons for the dismissal, and at the latest within one year from the occurrence of the respective breach of the substantive obligation. In circumstances where the dismissal is as a consequence of a criminal offence, the termination without notice may be served up to the expiry of the limitation period for prosecuting the criminal offence.

The right of summary dismissal can also be exercised without giving reasons both by the employer or by the employee during the probation period and by the employer in the case of a fixed-term employment relationship. In the latter case the employee is entitled to an absence fee for 12 months, or if the

balance of the fixed period is shorter than one year, for the remaining time period.

#### 13.4 Special Protection

No notice of termination may be served in certain circumstances (*prohibition of dismissal*), for example the employer may not terminate the employment relationship by notice during pregnancy, maternity leave, unpaid leave of absence to care for a child, during any period of voluntary military service, and in the case of women receiving IVF treatment.

There are certain employees in relation to whom the dismissal the employer is required to comply with additional requirements, such as investigating whether there are any other position at the employer that could be filled by the affected employee before the termination notice can be lawfully served (*protection against dismissal*). Employees close to retirement age, mothers and single fathers with children under the age of three may be dismissed by notice only on specifically justified grounds. The employment of employees' close to reaching the age limit for old age pension may be terminated for reasons connected with the employer's operations, or in connection with the employee's ability, in the event that there are no vacant positions suitable for the affected employee in terms of his/her skills, education and/or experience, or if the employee refuses a position that is offered to him/her without good reason. Mothers or single fathers who are eligible for, but do not take, unpaid leave to care for a child up to the age of three can be dismissed if there are no vacant positions suitable for the affected employee in terms of their skills, education and/or experience or if the employee refuses a position offered to him/her without good reason, provided always that the general requirements in relation to dismissals are adhered to.

The Trade Union's consent must be obtained in order to dismiss any of their members and the Works Council's consent must be obtained in order to dismiss its chairman by notice.

Non-compliance with these rules renders the termination invalid.

#### 13.5 Closures and Collective Dismissals

The Labour Code defines collective dismissal by reference to the number of employees employed and the number of employees to be dismissed. In principle, the rules on collective dismissals apply if the employer has at least 20 employees and the redundancy affects at least 10% of the employees. When calculating the number of employees affected, it is not only dismissals by ordinary notice that must be taken into consideration, but also termination of fixed term employment relationships and terminations by mutual agreement.

Collective dismissal triggers a broad obligation on an employer to inform and consult with the representative of the Works Council, the local labour authority and the individual employees.

If there is a Works Council, due to the statutory consultation process prior to the implementation of the collective dismissal, the employer may make its decision on the collective bargaining agreement approximately four weeks after the initiation of the consultation process. The first termination notices may only be served approximately two months after the start of the consultation process.

If no Works Council operates at the employer, the employer is not required to consult with the employees directly and the length of a collective dismissal procedure can be significantly shortened. In any case the employer shall notify the employees of the intention of redundancy – at least 30 days prior to serving the termination notices on the employees. The notices can be delivered 30 days thereafter. The labour authority must be informed and updated during the course of the redundancy programme.

The Works Council or the employees are entitled to bring court proceedings in the

event the employer fails to fulfil any of its obligations in connection with the collective dismissal. Notices of terminations that do not comply with the proposed collective dismissal schedule or the agreement reached with the Works Council are invalid.

## 14. Data Protection

### 14.1 Employment Records

The collection, use and storage of employee data in Hungary is regulated by the Data Protection Act (DPA) and the Labour Code. The DPA is supported by the guidelines issued by the Hungarian National Authority for Data Protection and Freedom of Information (NADP). Although these guidelines are not legally binding regulations, the NADP has the right to request that the employer and other persons handling the employee's data comply with the data protection rules.

NADP is responsible for supervising and defending the right to the protection of personal data and to freedom of information in Hungary.

As a matter of practice suggested by the NADP, employers need to notify the NADP of their data controlling/processing activity if they handle data of employees in excess of the minimum data necessary to comply with their obligations under the employment contract (i.e. payment of wages/salaries), which is usually the case.

An employer may require data from the employee to the extent that this does not infringe his personal rights (e.g. privacy) and that the data provides the employer with substantial information concerning the employment relationship. In these cases the employee's implied consent (in practical terms by signing the employment contract) is sufficient. In accordance with the general rules of the DPA, the employee's express consent or a mandatory provision of law is necessary for the collection, use, storage and processing of personal data for purposes

other than the proper exercise of rights and obligations under the employment contract. Consent in writing must be obtained for certain sensitive data such as state of health, criminal records or Trade Union membership. Employers may be permitted to disclose facts, data and opinions concerning an employee to third persons only if the law permits such disclosure or the employee gave his or her consent.

Although there is no requirement to obtain an employee's consent to data handling in writing, since the burden of proof in data protection matters is generally on the employer, it is advisable to record the employee's consent.

Personal data may only be collected, used, stored and processed for a defined purpose and in order to exercise rights and perform obligations. Only personal data which is indispensable for the purpose of the data collection, use, storage and processing may be used, and only to the extent and for the period of time required for the accomplishment of such purpose.

Non-compliance with the data protection rules may result in a claim by the employee for damages and an obligation to delete the employee's data that has been collected, used, stored or processed unlawfully. In certain circumstances when data handling is contrary to the DPA, the NADP is entitled to (i) order the correction of false data; (ii) order the seizure, deletion or destruction of the unlawfully processed personal data; (iii) prohibit the unlawful management or processing of personal data; (iv) prohibit the transfer of personal data to any third country (i.e. country outside the EEA); (v) order the data controller to inform the person concerned if the data controller has refused previously to give the required information to such person; and (vi) impose fines of up to HUF 10 million (approx. €37,000). Data handling contrary to the DPA may also constitute a criminal offence.

Financial institutions, telecommunication service providers and public utilities must appoint an internal data protection "commissioner", who is responsible for compliance with the data protection rules, and establishing internal data protection rules within the organisation.

#### **14.2 Employee Access to Data**

Employees have the general right to receive information in advance on the collection, use, storage or processing of their data. They are also entitled to request the correction or, in certain circumstances, the deletion of their data.

#### **14.3 Monitoring**

Employers are allowed to monitor the behaviour of their employees only to the extent the monitoring relates to the employment relationship. The private life of the employees may not be violated.

The employer has the right to monitor the content of the hardware of the employee's computer if the computer is explicitly for work-related use. As far as emails are concerned, the employer must distinguish between email addresses for private purposes containing the employee's name and work-related email addresses not referring to the employee. Emails from email addresses accessible by the employee (and the system administrator) exclusively may only be monitored in compliance with the general rules of data protection.

The distinction between email addresses for work-related and private purposes applies to the use of the internet. If the employer explicitly limits internet use for purposes connected to the employee's work, it may monitor the use of internet provided that this was notified to the employees before the monitoring occurs.

The use of cameras for controlling employees' activities at work is subject to the employees' consent. The employer may use cameras in the absence of the employees' consent provided that the individual employees are not recognisable

in the picture transmitted by the cameras. In any event, employees must be notified of the existence of cameras and advised on whether the pictures are recorded or stored and for what purposes.

Further, according to the relevant laws, an electronic surveillance system may not be used in a place where surveillance is likely to violate human dignity, such as in dressing rooms, fitting rooms and toilets.

Monitoring private telephone usage, i.e. listing the numbers called by the employee, irrespective of the employee's consent, is usually contrary to the DPA as the telephone number of the other party to the telephone conversation qualifies as a personal data and it is impossible to obtain the other party's consent to list his/her telephone number.

#### **14.4 Transmission of Data to Third Parties**

Data transmission to third parties by the employer is subject to the general requirements on handling the employee's personal data.

For international data transfers the DPA requires either the explicit consent of the employee, or – in addition to the reliance on the legitimacy of data processing – adequate protection of personal data in the country outside the territory of EEA to which the data is transferred.

Notably, Binding Corporate Rules demonstrating that the organization has adopted EU data protection standards and that these are enforceable across the organization seated in different jurisdictions – and 'ad hoc' contractual clauses for international data transfers, are omitted from the list of recognized "adequacy" instruments under Hungarian Law. Under a mandatory legal act of the European Union the provisions of the DPA only permit the use of Model Clauses and reliance on third country adequacy decisions.

*Contributed by Lakatos, Köves és Társai*

# Ireland

This states the law in Ireland as at December 2012.

## 1. Introduction

Employment law in Ireland is governed by common law, statutory provisions and a range of fundamental rights enshrined in the Irish constitution. In addition, European Community Directives and Court of Justice of the European Union decisions apply to the employment relationship.

There are a number of separate systems of labour-related Tribunals: the Labour Court whose principal function is to provide conciliation facilities in connection with trade union disputes but also has jurisdiction under a number of statutory provisions; the Employment Appeals Tribunal appointed by the Minister for Jobs, Enterprise and Innovation, which hears grievances under specific legislation such as that relating to unfair dismissal, minimum notice, redundancy etc; the Rights Commissioner Service which may also hear claims of unfair dismissal, redundancy etc as well as having exclusive jurisdiction for claims under the European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003 and for claims of penalisation under the Safety, Health and Welfare at Work Act 2005; and the Equality Tribunal which deals with discrimination issues in employment.

There is currently a reform project underway to merge the above bodies and create a two-tier Workplace Relations structure to adjudicate claims.

In addition, employees have access directly to the Courts. The Courts have, in a series of employment-related cases, granted injunctions restraining purported termination of contracts of employment and also restraining internal disciplinary procedures on the basis that principles of constitutional and natural justice were not being observed. Such principles are further expanded by the European

Convention on Human Rights Act 2003. The Courts may also award damages for wrongful dismissal, a distinct remedy from unfair dismissal.

## 2. Categories of Employees

### 2.1 General

Irish employment law does not, in general, distinguish between different categories of employees within the private sector. Part-time employees are entitled to be treated no less favourably than full-time employees. Similarly, fixed-term employees are entitled to be treated no less favourably than permanent employees. The Protection of Employees (Temporary Agency Work) Act 2012 was enacted to give agency workers much the same rights and entitlements as permanent employees.

### 2.2 Directors

Directors may be officeholders and employees and, therefore, may have exactly the same entitlements as ordinary employees. Their rights and obligations as officeholders are governed by the provisions of the Companies Acts.

## 3. Hiring

### 3.1 Recruitment

The Employment Equality Acts 1998 to 2011 (the "Equality Acts") specifically prohibit discrimination in the areas of access to and conditions of employment, training, promotion and advertising. Employers are advised to review recruitment procedures, including advertising and interviewing techniques, to ensure that discrimination does not occur.

Employers are not required to use State unemployment offices and there are no recruitment quotas requiring employers to recruit from any particular groups. State employment offices and training centres are run by An Foras Aiseanna Saothair (FÁS). They provide formal sources of recruitment for manual or

semi-skilled workers. Private recruitment consultants are commonly used for more senior positions.

### 3.2 Work Permits

In general, an employment permit is required for non-EEA nationals (excepting nationals of Switzerland) who are working in Ireland. An employment permit is issued by the Minister for Jobs, Enterprise and Innovation following an application by the employing company, or the non-EEA national (excepting nationals of Switzerland) in prescribed circumstances. A non-EEA national (excepting nationals of Switzerland) may not make an application in respect of their employment in Ireland unless an offer of employment has been made in writing to them.

Work permits are available for occupations with an annual salary of €30,000 or more where green cards are not available and, in exceptional circumstances, for occupations with salaries below €30,000. Certain jobs are strictly ineligible for work permits, regardless of the salary paid.

Green cards are available for occupations with an annual salary of €60,000 or more and for certain occupations with an annual salary of between €30,000 and €59,999. Employment permits are initially granted for a two-year period.

An employer must demonstrate that they have taken all steps as were reasonably open to them to offer the employment in question to an EEA citizen or national of Switzerland and, in the case of a work permit, must advertise the role in a prescribed manner. In addition, the employer must prove that, at the time of the application, more than 50% of their employees were EEA citizens, or nationals of Switzerland. Refugees who come within the criteria laid down in the Refugee Act 1996 (as amended) are entitled to all employment rights available to Irish citizens.

Employers may also apply for intra-company transfers in certain circumstances.

## 4. Discrimination

The Equality Acts prohibit discrimination on nine grounds, namely gender, civil status, family status, sexual orientation, religious belief, age, disability, race and membership of the Traveller community. Discrimination on grounds of gender and marital status has been prohibited by statute since 1977 but the additional grounds were introduced more recently.

The principle of equal treatment of men and women requires that they receive equal pay for “like work” unless the difference in pay is based on grounds unrelated to the employees’ gender. The Equality Acts extend this principle to the nine discriminatory grounds so that different rates of pay for like work must be justified on grounds other than these grounds.

The Equality Acts also provide a remedy against acts of indirect discrimination which are those acts which place a particular category of employees (within the meaning of the nine grounds of discrimination) at a particular disadvantage by reference to a comparator and which cannot be objectively justified by the employer.

The Equality Acts outlaw sexual harassment in the workplace. It is defined as any form of unwanted verbal, non-verbal or physical conduct of a sexual nature carried out by fellow employees, customers or business contacts, being conduct which has the purpose or effect of violating a person’s dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment for the person. Unwanted conduct may consist of acts, requests, spoken words, gestures or the production, display or circulation of written words, pictures or other material.

The Equality Acts also outlaw non-sexual harassment in the workplace. It is defined as any form of unwanted conduct related to any of the discriminatory grounds carried out by fellow employees, customers or business contacts, being conduct which has the purpose or effect of violating a person’s dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment for the person. As with sexual harassment, unwanted conduct may consist of acts, requests, spoken words, gestures or the production, display or circulation of written words, pictures or other material.

Employers are liable for acts of sexual and non-sexual harassment by their employees unless they can establish that they took reasonable steps to ensure that harassment did not occur. Complaints concerning discrimination will be handled by the Director of the Equality Tribunal whose decisions may be appealed to the Labour Court. Complainants may also refer claims directly to the Circuit Court in certain circumstances.

## 5. Contracts of Employment

### 5.1 Freedom of Contract

In Ireland there is extensive freedom of contract between employer and employee, with statute intervening only in limited circumstances. However, employment legislation must be borne in mind. For example, although a contract of employment may allow an employer to terminate the contract on notice, the Unfair Dismissals Acts 1977 to 2007 (the “Unfair Dismissals Acts”) provide that dismissals are deemed unfair unless the employer can show otherwise.

### 5.2 Form

There is no requirement for a contract of employment to be in writing, although under the Terms of Employment (Information) Acts 1994 to 2012 (which implement Directive 91/533/EEC) employers are obliged to furnish

employees with a statement of the main terms and conditions of their employment within two months of commencement. The required information includes the place of work, the duration of any temporary or fixed-term contract, the rate or method of calculation of remuneration, the frequency of remuneration, any terms or conditions regarding hours of work including overtime, paid leave (other than sick leave), incapacity to work due to sickness or injury and paid sick leave. The statement should also specify the period of notice which the employee must give and is entitled to receive in order to terminate their employment.

Contracts may be for a fixed or indefinite term, or for a specific purpose, e.g. the completion of a project where it is not possible to predict the length of time required. Fixed-term or specified purpose contracts may be drafted to exclude an employee’s right to bring an unfair dismissal claim on the expiry of the fixed-term or on the completion of the specified purpose. For an exclusion to be valid, the contract should be in writing, signed by both parties, and should state that the Unfair Dismissals Acts shall not apply to a dismissal which is due only to the expiry of the fixed-term or the cessor of the specific purpose. Employers may not, however, use a series of fixed-term or specified purpose contracts to deprive employees of the protections available under the Unfair Dismissals Acts. Further limitations on the use of fixed-term contracts and further protections for fixed-term workers were introduced by the Protection of Employees (Fixed-Term) Work Act 2003 (which implements Directive 1999/70/EC).

### 5.3 Trial Periods

Probationary periods of up to 12 months from the commencement of the employment may be agreed between the parties, although in practice trial periods may be very much shorter. Although it is not a legal requirement that they are agreed in writing, in practice they are.

#### 5.4 Confidentiality and Non-Competition

All employees are under an implied duty not to enter into any business activities in competition with their employer, either during or outside working hours. In addition, restrictive covenants prohibiting employees from competing with the business of their employer after termination of their employment are included in the contracts of many senior employees. These will only be enforced by a Court where they are to protect the legitimate business interests of the employer and are limited in time and geographical area. A duty of confidentiality in relation to the employer's business applies during the employment relationship and after it has terminated.

#### 5.5 Intellectual Property

Contractual provisions concerning property rights in inventions made by employees are common, but in the absence of an express provision the Courts will usually decide that an invention made by an employee during the course of employment or where the employee was employed for the purpose of inventing, belongs to the employer.

### 6. Pay and Benefits

#### 6.1 Basic Pay

The National Minimum Wage Act 2000 introduced a statutory minimum wage, which is currently €8.65 per hour. Certain industries have established minimum pay levels (which may be higher than the National Minimum Wage) and employers in such industries must give details of the pay level to employees. An employer who pays less than the established minimum may be ordered to pay up to three years' arrears of wages due to the employee. An employee may sue his or her employer if that employer fails to pay his or her basic salary and, if the payment is governed by an Employment Regulation Order, the employer may be guilty of an offence under the Industrial Relations Acts 1946 to 2012.

Legally binding agreements relating to pay may be reached by one or more

trade unions and one or more employers through voluntary bodies known as Joint Industrial Councils ("JICs"). Such agreements apply to all individual employees covered by JICs regardless of whether or not those employees are union members.

There is no obligation on employers to index-link the salary they pay to employees. However, it is common practice for employers to link salary to inflation. National wage agreements based on a "partnership" approach between Government, unions, employers and other interested groups had been in place for many years in certain sectors, though the collapse of social partnership has seen these agreements fall away.

#### 6.2 Pensions

Private pension schemes are becoming more common with contributions made to an independent employer-sponsored fund by both employers and employees. However, these schemes tend to be defined contribution only with new defined benefit schemes being very rare. If an employer-sponsored pension scheme is approved under the Taxes Consolidation Act 1997, it may benefit from various tax concessions, subject to certain limits. Employers must offer access to at least a standard Personal Retirement Savings Account (PRSA) to "excluded employees" such as those whose employer does not operate an occupational pension scheme or where there is a waiting period of over six months or more to join the scheme.

#### 6.3 Incentive Schemes

In the last 10 years, the Irish Government has introduced tax legislation to encourage employees to participate in the ownership of their employer company. There are no tax incentives to

encourage employers to operate commission or bonus schemes.

#### 6.4 Fringe Benefits

In many employment contracts, fringe benefits include payment of the employee's contributions to a voluntary health insurance (operated by VHI or other health insurance providers) scheme for the employee and his or her dependants. For more senior positions the use of a car is frequently provided. Both the payment of health insurance premia and the provision of a company car are subject to income tax as a benefit in kind. (See also sickness benefits below).

#### 6.5 Deductions

Deductions must be made from all employee salaries and wages for income tax under the Pay As You Earn (PAYE) scheme, in respect of social insurance contributions and to cover certain amounts payable under Court Orders. Other deductions can only be made after obtaining the written consent of the employee.

### 7. Social Security

#### 7.1 Coverage

With very few exceptions, the Irish social security system covers all employees in the private sector who are over age 16 and who earn €38 or more per week (a worker who earns less than €38 per week is only covered for occupational injuries). The social security system provides for benefits to cover retirement, disability and survivors' pensions, sickness, maternity, industrial injury, unemployment, disability, social assistance and family allowances.

#### 7.2 Contributions

Contributions are generally made by both employers and employees, and are made as follows:

#### Employers' Pay Related Social Insurance

Salary less than €356 per week/€18,512 per annum	4.25%
Salary greater than €356.01 per week/€18,512 per annum	10.75%

Employees

The employees' contributions are made up of Pay Related Social Insurance ("PRSI") and a "Universal Social Charge" as follows:

- (a) PRSI 4% payable on salary (employees earning €352 or less per week are exempt from PRSI).
- (b) Universal Social Charge:

First €10,036	2%
€10,036.01 to €16,016	4%
Remainder	7%

Subject to certain conditions, there is an Employer's PRSI Exemption Scheme introduced for 2012 that exempts employers from the obligation of paying employers PRSI for 18 months when taking on certain additional full-time employees. To avail of the scheme, the additional full-time employees must have been employed during 2012.

## 8. Hours of Work

Under the Organisation of Working Time Act 1997 the maximum average working week is 48 hours. Hours may be averaged over a period of four, six or 12 months, depending on the circumstances. The Act also requires employers to provide rest breaks to employees. Employees have an entitlement to a 15 minute rest break where up to four and a half hours have been worked and 30 minutes where up to six hours have been worked. These breaks may be varied either by collective agreement (which must be approved by the Labour Court) between the employees' representatives and the employer or by Regulations made applicable to a particular sector. In such cases, compensatory rest must be provided.

Special provisions apply to night workers, i.e. those who work for at least three hours between midnight and 7am and at least half of whose annual working time is night work. Employers

must not permit night workers to work for more than an average of eight hours in any 24-hour period. The averaging period for night workers is two months (although longer periods are permitted in certain circumstances).

## 9. Holidays and Time Off

### 9.1 Holidays

There are nine public holidays, in respect of which employees are permitted at the option of the employer to (i) a paid day off on that day; (ii) a paid day off within a month of that day; (iii) an additional day of annual leave; or (iv) an additional day's pay. In addition, employees are entitled to a minimum of 20 days' holidays per year, although an employee must have worked for a particular employer for the full holiday year in question to be entitled to the full 20 days. Otherwise, holidays are granted on a *pro rata* basis.

### 9.2 Family Leave

The most important rights under the Maternity Protection Acts 1994 and 2004 are the right to return to work after maternity leave and the right to additional maternity leave. Female employees are entitled to attend ante-natal appointments during their working hours and to take maternity leave of up to 42 weeks, provided the employer is given at least four weeks' notice of the commencement of such leave. The maternity leave must include at least two weeks' absence before the date of the birth and at least four weeks after. The State provides a maternity allowance of 80% of the employee's gross earnings during the first 26 weeks of leave, subject to a maximum level determined from time to time by the Government. The employee is also entitled to take up to 16 weeks' additional maternity leave entirely at her own expense.

Female employees, and in certain limited circumstances male employees, are entitled to take up to 40 weeks of adoptive leave. Adoptive benefit is payable by the State for the first

24 weeks. An employee may take an additional 16 weeks of leave during which no benefit is payable.

The Parental Leave Acts 1998 and 2006 give parents of children the right to 14 weeks of unpaid leave in respect of each such child. The leave must be taken before the child is eight years old (subject to modifications in the case of an adopted or disabled child) and may be taken as a continuous period, in portions or by working reduced hours. While the leave is unpaid, it is reckonable for the purposes of employment rights. This is to be extended in 2013 to four months (at least one of which may not be transferred to the other parent).

Employees may in limited circumstances take up to 104 weeks of unpaid leave of absence to care for an incapacitated dependant.

### 9.3 Illness

In the absence of any express term in a contract of employment concerning a company sick pay scheme or any term implied as a result of custom and practice, an employee has no entitlement to receive money from the employer during any period of absence due to sickness or injury. Thus, during such periods of absence, the employee must rely wholly upon social welfare benefits.

Large undertakings usually provide for payment of full wages for a limited period of absence due to illness or injury, subject to a refund to employers in respect of the State benefits received.

## 10. Health and Safety

### 10.1 Accidents

All employers are required to take steps to ensure that their employees are working in as safe an environment as is reasonably practicable. That standard "so far as is reasonably practicable" is a high threshold pursuant to the Safety, Health & Welfare at Work Act 2005 (the "2005 Act"). Employees can bring civil claims

against their employers for any loss suffered as a result of accidents at work or industrial illnesses and also claim compensation from the State Occupational Injuries Benefit Scheme.

More recently, emphasis has been placed on protecting employees from incurring non-physical illness at work. Liability arising from stress-induced illness has been established in a number of cases and employers are expected to take appropriate steps to prevent any forms of harassment and bullying in the workplace or any other forms of practice which may give rise to injury and damage to an employee. There is no statutory obligation on employers to be insured against civil liability, although most large undertakings are covered by such insurance.

A criminal offence is committed where the duties imposed by the various sections of the 2005 Act are breached. Those offences can be divided into two separate sets, less serious offences for which the guilty person is liable on summary conviction to a fine not exceeding €3,000, and the more serious offences for which, on summary conviction, one can be liable to a fine not exceeding €3,000 and/or imprisonment for a term of up to six months. For the more serious offences, upon conviction on indictment a person can be liable to a fine of up to €3,000,000 and/or imprisonment for a term of up to two years. The “more serious offences” which attract the more severe penalty include such straightforward duties as providing information to employees regarding health and safety pursuant to Section 9 of the 2005 Act or providing instruction training and supervision to employees pursuant to Section 10 of the 2005 Act (i.e. it is not just contravention of the more obviously important duties which can attract the higher penalty).

Where an offence under health and safety legislation has been authorised or consented to by a manager, or a person who purports to act in such a capacity,

then that person, as well as the undertaking, shall be guilty of an offence and shall be liable to be prosecuted.

The Safety, Health and Welfare at Work (General Application) Regulations 2007 (the “Regulations”) came into force in November 2007. The Regulations complement the 2005 Act and include, in one text, most of the specific health and safety laws, which apply generally to all employment. The Regulations revoke a wide range of stand-alone health and safety legislation and present a vast array of health and safety provisions in one self contained and easily accessible text.

### 10.2 Health and Safety Consultation

An employer must provide information in relation to health and safety to employees and the Safety Representative (if any) in a form, manner and language that is understood by employees.

An employer must consult with employees, and take account of any representations made by the employees, for the purpose of giving effect to the employer’s statutory duties in respect of safety, health and welfare. As this is mandatory, some form of consultation mechanism must be provided (although safety committees are not mandatory). The Health and Safety Authority has issued guidelines on the effectiveness of consultation arrangements including advice on the selection of safety committees (where one is put in place).

The employees may, if they so wish, select a Safety Representative (or, by agreement with the employer, more than one) from “amongst their number”. The Safety Representative may consult with, and make representations to, the employer on safety, health and welfare matters relating to the employees in the place of work. The Safety Representative has a number of statutory rights and powers including:

- (a) the right to information from the employer in connection with the

safety, health and welfare of employees;

- (b) the right to make representations to the employer as to safety, health and welfare. The employer is required to consider these and, where necessary, act on them. The requirement to act on representations from the Safety Representative is more demanding than would apply to representations from other employees;
- (c) the power to carry out general inspections or investigate potential hazards on notice to the employer. The employer cannot unreasonably withhold permission for these;
- (d) the Safety Representative must be informed by the employer that a HSA Inspector has arrived at the place of work and also has a right to accompany the Inspector, unless the Inspector is investigating a specific incident. The Safety Representative may make oral or written representations to an Inspector and is also entitled to receive advice and information from an Inspector;
- (e) the Safety Representative is entitled to time off “as may be reasonable”, without loss of remuneration:
  - (i) to acquire knowledge to carry out his/her functions; and
  - (ii) to carry out his/her functions, e.g. conducting investigations and inspections;
- (f) the Safety Representative is to suffer no penalisation for being a safety representative; and
- (g) the right to investigate accidents and dangerous occurrences (provided that it will not interfere with the performance of another’s statutory obligation).

The Health and Safety Guidelines state that in most organisations a single Safety

Representative will be adequate to meet health and safety requirements but that, if an employer has different locations, a Safety Representative can be appointed at each place of work.

Every employer must have a Safety Statement in relation to every place of work. This is a statement based upon a risk assessment specifying how health and safety should be managed. An exemption exists for employers who have less than three employees if an approved code of practice exists, and in those situations compliance with that approved code of practice is sufficient.

Smoking is banned in enclosed workplaces by virtue of the Public Health (Tobacco) Act 2002 as amended (the "2002 Act"). Any employer who allows a contravention of the prohibitions or restrictions contained in the 2002 Act will be guilty of an offence unless they can show that they made all reasonable efforts to ensure compliance with the provisions of the 2002 Act.

## **11. Industrial Relations**

### **11.1 Trade Unions**

All Irish workers have a right to join together and form trade unions. However, only those trade unions with 1,000 or more members and on behalf of whom money has been deposited in Court are licensed to take part in collective bargaining. It is an offence for a union to enter into any sort of negotiations without such a licence, although groups of workers are legally entitled to negotiate with their own employer. There is no legal obligation on an employer to recognise a trade union, and the post-entry closed shop has been declared unconstitutional. The Labour Court has under the Industrial Relations (Amendment) Act 2001 (as amended) been given power to adjudicate in industrial disputes and in limited circumstances to issue binding determinations where the normal voluntary procedures have not resolved

the issue in dispute. Trade unions may be affiliated to the Irish Congress of Trade Unions ("ICTU").

The largest employers' association is the Irish Business and Employers' Confederation ("IBEC"), which acts as a central adviser to its members on matters concerned with employer/union relations. In general, IBEC will only take part in collective negotiations when requested to do so by one of its members.

For 22 years, the Government, employer associations, trade unions and other interested bodies entered into "social partnership agreements" with regard to issues such as wages, industrial relations and other reforms. However in 2009, social partnership effectively collapsed following the failure to agree on a new deal in light of the economic crisis.

### **11.2 Collective Agreements**

Collective agreements are generally not legally enforceable by the parties to them. However, the terms of such an agreement may become incorporated in a contract of employment or be registered with the Labour Court as a "Registered Employment Agreement" and hence, be enforceable by the employer against the employee or *vice versa*. Collective agreements in the more traditional industries tend to be negotiated on an industry-wide basis but more recently the trend with established industries is towards collective bargaining at plant level.

### **11.3 Trade Disputes**

Irish workers have no statutory right to strike or to take industrial action. However, the Supreme Court has held that there is an implied term to be read into every contract of employment to the effect that serving a strike notice not shorter than the contractual notice period and taking action pursuant to such a notice is not a breach of contract. Prior to the introduction of the Industrial Relations

Act 1990 there was some debate as to whether a right to strike should be included in it, but ultimately that Act preserved the position whereby striking employees are granted certain immunities from liability which they might otherwise incur for action in contemplation of or in furtherance of a trade dispute. However, no immunity is given to employees acting in defiance of a strike ballot or to an individual employee who has failed to follow the proper procedures. In a measure designed to improve industrial relations and to facilitate the resolution of disputes between unions and employers, a code of practice was introduced. This recognises that the primary responsibility for the resolution of disputes lies with the parties involved, and it lays down an appropriate dispute resolution procedure.

There are also certain limitations to the circumstances in which a Court will grant an injunction to an employer to prevent a strike.

### **11.4 Information, Consultation and Participation**

The Transnational Information and Consultation of Employees Act 1996 requires businesses with over 1,000 employees in the European Economic Area (which includes all EU states, together with Norway, Iceland and Liechtenstein) and at least 150 employees in each of two EEA states, to establish procedures to inform and consult employees in relation to transnational matters affecting the business at EEA level. Employers are required, either on their own initiative or at the request of at least 100 employees in at least two EEA states, to establish a Special Negotiating Body for the purposes of negotiating agreed information and consultation arrangements. Whilst the role of the "Works Council" is limited, it does involve a new consultative process with worker representation and is a new concept for employers in non-unionised workplaces.

EU Directive 2002/14/EC (the “Information and Consultation Directive”), which imposes further consultation obligations on businesses in Ireland with over 50 employees has been implemented in Irish law by the Employees (Provision of Information and Consultation) Act 2006.

Where collective redundancies are proposed, under the Protection of Employment Act 1977 (as amended) the employer is obliged to consult with the employee representatives and notify the Minister for Jobs, Enterprise and Innovation; failure to do so may result in the employer being fined after prosecution by the Minister. The employer must notify the Minister at least 30 days before the first dismissal takes place and must consult with the employee representatives at least 30 days before the first notice of dismissal is served. There is a maximum fine of €5,000 per offence on conviction for failure to provide information to and/or consult with the employee representatives and failure to notify the Minister. However, fines can be up to €250,000 for implementing the redundancies before notifying the Minister. Employees or their representatives may also refer the issue of non-consultation to a Rights Commissioner who may award up to four weeks’ remuneration as compensation.

Additional provisions apply in relation to “exceptional collective redundancies”. An exceptional collective redundancy is a dismissal which is collective and compulsory and where the dismissed employees are replaced by others who will perform essentially the same functions but on inferior terms and conditions of employment. Penalties can be up to five years’ salary and/or fines of up to €250,000.

Consultation obligations may also arise under existing collective agreements or the Transfer Regulations referred to in section 12 below.

## 12. Acquisitions and Mergers

### 12.1 General

The European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003 (the “Transfer Regulations”) implemented the 2001 EU Acquired Rights Directive (2001/23/EC).

Upon a transfer of a business or undertaking falling within the Transfer Regulations, all rights and obligations arising from contracts of employment as well as any rights under collective agreements are automatically transferred to the transferee. The dismissal of employees by reason of the transfer is prohibited unless this is done for “economic, technical or organisational reasons entailing changes in the workforce”. The status and functions of existing employee representatives are also preserved in certain circumstances.

### 12.2 Information and Consultation Requirements

The transferor and transferee must inform, and in certain circumstances consult with, the representatives of their employees that are affected by the transfer. They should be informed of when the transfer will take place, the reasons for the transfer, the implications the transfer will have for the workforce and of any ‘measures’ envisaged in relation to the employees. This information must be given to the employees or their representatives, where reasonably practicable, not later than 30 days before the transfer occurs and in any event in ‘good time’ before the transfer (which could be a period greater than 30 days).

Where there are no employee representatives the relevant employer(s) must put in place a procedure whereby representatives can be appointed. Time to appoint representatives needs to be factored into the timing of any transaction.

These information and consultation obligations apply to all transfers to which the Transfer Regulations apply regardless of the number of employees involved. Where the transferor or the transferee envisage any ‘measures’ in relation to the employees (e.g. a change to the employees’ work practices, work location redundancies) the employees’ representatives must be “consulted” with a view to reaching an agreement. Provided that there has been meaningful consultation there is no obligation to actually reach an agreement.

### 12.3 Notification of Authorities

There is no general obligation to notify the authorities about a transfer or its consequences, however certain regulated industries (e.g. financial services) may be required to notify the relevant regulatory authorities (i.e. the Financial Regulator) or indeed certain transactions may require approval by the Competition Authority.

### 12.4 Liabilities

A complaint of a contravention of the Transfer Regulations may be referred to a Rights Commissioner at first instance. If he upholds any complaint, the Rights Commissioner may require the employer to pay to each employee compensation not exceeding four weeks’ remuneration for a breach of the notification and consultation obligations and not exceeding two years’ remuneration for a breach of any other provisions of the Transfer Regulations.

A Rights Commissioner is also able to grant relief analogous to injunctive relief and in addition, it is possible to obtain an injunction from the courts, particularly in cases where time is of the essence (though such has been extremely rare in transfers under the Transfer Regulations). Any decision of a Rights Commissioner may be appealed to the Employment Appeals Tribunal and then to the Circuit Court. If the employer fails to carry out a decision, an application can be made to the Circuit Court to seek an order directing the employer to comply.

## 13. Termination

### 13.1 Individual Termination

Under the Unfair Dismissals Acts an employee who has worked for more than one year is entitled to rely on the legislation to challenge a dismissal as being unfair. Under the Unfair Dismissals Acts, a dismissal is deemed to be unfair and the onus is on the employer to establish otherwise.

It is also possible, although not concurrently with a claim under the Unfair Dismissals Acts, for an employee to challenge a dismissal which is discriminatory within the meaning of the Equality Acts.

### 13.2 Notice

In cases other than gross misconduct (when the employer is entitled to terminate without notice), an indefinite/permanent contract may be terminated by notice. However the Unfair Dismissals Acts must also be complied with. The following minimum statutory notice periods apply to all employees who have completed 13 weeks of continuous service with the employer:

Period of Employment	Notice
13 weeks – 2 years	1 week
2 years – 5 years	2 weeks
5 years – 10 years	4 weeks
10 years – 15 years	6 weeks
15 years or more	8 weeks

Individual contracts may provide for longer notice periods and often do so in the case of senior executives. Notice may be oral, although collective agreements may stipulate that it be in writing. Any dismissed employee is entitled to require the employer to supply a written statement of the reasons for dismissal within 14 days. After the initial 13 weeks of employment, an employee must give one week's notice of his or her intention to resign.

A former employee who has been dismissed without proper notice being given can claim salary (and loss of other benefits) in lieu of notice.

Claims of unfair dismissal are normally heard by the Employment Appeals Tribunal and must be made within six months of the date of dismissal; this deadline may be extended by the Tribunal to a maximum of 12 months in certain circumstances. If both parties agree, the claim can be heard more informally by a Rights Commissioner whose recommendation may be appealed to the Employment Appeals Tribunal.

The remedy which may be sought or awarded in the case of unfair dismissal is reinstatement, re-engagement or compensation of up to a maximum of two years' remuneration. Determinations of the Employment Appeals Tribunal are subject to appeal to the Circuit Court whose decision may be further appealed to the High Court; appeals in both Circuit and High Courts are by way of full re-hearings. Failure by the employer to implement a determination of the Employment Appeals Tribunal within six weeks may result in proceedings by the Minister for Jobs, Enterprise and Innovation in the Circuit Court to enforce the remedy awarded by the Court.

Employees may also apply to the Courts directly claiming wrongful termination of their contract of employment and apply to the Courts for injunctions restraining the purported termination.

### 13.3 Reasons for Dismissal

Dismissals may be justified on one of a number of grounds, including the employee's competence, capability, conduct or redundancy. In addition to demonstrating that there were substantial grounds justifying the dismissal, the employer must show that it acted reasonably in effecting the dismissal. Therefore, an employer considering dismissal for poor performance should apply fair procedures such as notifying

the employee of the dissatisfaction and affording an opportunity to improve before effecting the dismissal.

In a redundancy situation, the employer must show not only that a genuine redundancy situation existed, but also that the employee was fairly selected for redundancy. Employees must be informed about the disciplinary and dismissal procedures in force at their workplace and should be notified of any changes.

The employer must properly investigate any alleged breaches of working practices and may suspend an employee on full pay during such an investigation. The procedures followed by an employer are vitally important when deciding whether a particular dismissal was fair or not.

### 13.4 Special Protection

Dismissals which are connected with pregnancy, religion, politics, race, colour, sexual orientation, age, membership of the travelling community or trade union membership are automatically unfair. Selective dismissals of employees on strike are also unfair.

### 13.5 Closures and Collective Dismissals

As mentioned above, redundancy is a permissible reason for individual termination. However, it is frequently associated with plant closure and collective dismissals.

Where an employer closes a workplace or work of a particular kind is no longer needed, the affected employees who have worked for that employer for a minimum of two years are entitled to statutory redundancy payments calculated according to their age, length of service and rate of pay. Entitlement to such a payment may be lost if the employee refuses an offer of suitable alternative employment. The suitability or otherwise of such proposed alternative employment is considered by a subjective test, to be judged by the employee's personal circumstances.

There is no rebate available from the Irish Government for statutory redundancy payments where the date of dismissal due to redundancy is on or after 1 January 2013. Where the date of dismissal due to redundancy occurred in 2012, the employer will be entitled to receive a rebate of 15% of the statutory redundancy payment. Disputes arising as to entitlement to a redundancy payment are referred to the Employment Appeals Tribunal. An employee who is to be made redundant is entitled to reasonable paid time off during the last two weeks of the notice period in order to look for alternative work or attend training sessions.

Depending on the numbers of redundancies involved (in relation to the total workforce of the undertaking), employers may be under a duty to inform the Minister for Jobs, Enterprise and Innovation before making collective redundancies and to notify and consult any employee representatives. (See section 11.4 above).

As mentioned earlier, the Protection of Employment (Exceptional Collective Redundancies and Related Matters) Act 2007 (the “Exceptional Collective Redundancies Act”) prohibits collective redundancies in certain circumstances. The Exceptional Collective Redundancies Act provides that an “exceptional collective redundancy” is a dismissal which shall not be deemed a redundancy where, although the dismissals are collective and effected on a compulsory basis, the employees have been replaced by other employees to perform essentially the same functions as those previously dismissed on materially inferior terms and conditions of the employment.

The Exceptional Collective Redundancies Act establishes a Redundancy Panel whose purpose it is to determine whether what is proposed is in fact an exceptional collective redundancy. The Redundancy Panel may request the Minister, or the Minister may at his own behest in the

public interest, seek the opinion of the Labour Court as to whether the proposal is an exceptional collective redundancy. The timescale for a referral to the Labour Court is the 30 day consultation period under the Protection of Employment Acts 1977 to 2007 (which may be extended by seven days if there has been a referral to the Redundancy Panel).

The first dismissal of an employee under a proposal for collective redundancy shall not take effect while the process of referral pursuant to the Exceptional Collective Redundancies Act is continuing. If an employer acts in breach of this he may be guilty of an offence and liable to a fine up to €250,000.

The Labour Court must make a decision within 16 days of the referral of the proposal to it. Where the Labour Court decides that the redundancies are of an exceptional nature and the employer dismisses the employees as per the proposal, the Minister shall take into account the Labour Court’s opinion when considering the employer’s application for a rebate. Notably, should the Minister refuse/reduce the rebate to the employer on the basis of the Labour Court’s opinion, the exemption from income tax for statutory redundancy payments does not apply to the payment.

The Exceptional Collective Redundancies Act modifies the compensation payable under the Unfair Dismissals Acts if the exceptional collective redundancies are held to be unfair dismissals. An employee who has less than 20 years’ continuous service may be compensated with up to 208 weeks’ remuneration. For employees who have more than 20 years’ continuous service, compensation may be up to 260 weeks’ remuneration.

## 14. Data Protection

### 14.1 Employment Records

Employers’ data protection obligations are set out in the Data Protection Acts 1988 and 2003 (the “Data Protection Acts”). The

Data Protection (Amendment) Act 2003 implements the European Data Protection Directive 95/46/EC. The Data Protection Acts regulate how employers collect, store and use personal data held by them about their employees (past, prospective and current). More onerous obligations are imposed in respect of sensitive personal data. Infringement of the Data Protection Acts can lead to investigation by the Data Protection Commissioner, fines of up to €100,000 or compensation claims from affected employees.

Employers, as data controllers, must ensure that personal data about their employees is collected and processed fairly, is kept accurate and up-to-date and is not kept for longer than necessary. Appropriate security measures must be taken by employers against unauthorised access to, or alteration, disclosure or destruction of, personal data.

Employers should have a data protection policy in place including a data protection notice, a defined policy on retention periods for all items of personal data and provide appropriate staff training in data protection.

### 14.2 Employee Access to Data

Employees, as data subjects, have the right to make a subject access request. This entitles them, subject to certain limited exceptions, to be informed what personal data is held about them and to whom it is disclosed, to obtain a copy of their personal data and have personal data amended or deleted where it is incorrect. Employers should respond to subject access requests as soon as possible or within 40 days from receipt of the written request. Subject access requests cover personal data held in electronic form and in manual form (provided it is held in a “relevant filing system” as defined by the Data Protection Acts). Employers may charge up to €6.35 for supplying employees with a copy of their personal data.

### 14.3 Monitoring

As a result of the electronic workplace, organisations commonly have a general communications policy which in certain instances confers a right on the employer to monitor employee communications. Such policies apply to all employees including those who travel on business with PCs, laptops and e-workers who work from home.

All monitoring of employee email, internet and telephone use and close circuit TV monitoring is subject to compliance with the Data Protection Acts. Certain types of monitoring may also be caught by the Postal and Telecommunications Services Act 1983 (as amended by the Interception of Postal Packets and Telecommunications Messages (Regulation) Act 1993) (the "1983 Act") and the EC (Electronic Communications networks and Services) (Data Protection and Privacy) Regulations 2003 (the "Data Protection Regulations"). Section 98 of the 1983 Act makes it an offence to intercept (i.e. listen to or record) any telecoms message in the course of transmission unless either the sender or

recipient has consented to such listening or recording.

On the other hand, if an employer wishes to monitor stored information such as voicemails and emails, the Data Protection Acts and the Data Protection Regulations will apply. Express employee consent is not required provided the employee is notified that this form of monitoring may be carried out as well as the purpose for which it may be carried out and the parties to whom the stored information may be disclosed. The Data Protection Commissioner has issued guidelines in relation to employee monitoring, the guiding principle being that any limitation of the employee's right to privacy should be proportionate to the likely damage to the employer's legitimate interests.

### 14.4 Transmission of Data to Third Parties

Employers should not provide employee data to third parties otherwise than in accordance with the principles and processing conditions set out in the Data Protection Acts.

It may be necessary to obtain express consent from the employee to such disclosure in the absence of a legitimate business purpose for the disclosure and depending on the nature of the information and the location of the third party. Where the data is being transferred to a third party within the EEA a written contract should be entered into whereby the recipient agrees to process the data in accordance with the instructions of the transferor and comply with the security obligations set out in the Data Protection Acts. Where the third party is based outside the EEA, the Data Protection Acts prohibit the transfer of data unless that country ensures an adequate level of protection for personal data or one of a series of limited exceptions apply. Where employee data is requested in the context of a commercial transaction, anonymised data should be provided.

*Contributed by McCann FitzGerald*

# Italy

## 1. Introduction

Employment relationships are regulated by the Constitution, the Civil Code, the Workers' Bill of Rights (Law No. 300/1970, namely *Statuto dei Lavoratori*) and other Acts of Parliament and Decrees. The Constitution provides for the general rights of employees whereas the Civil Code and other laws set out a detailed body of rules governing employment relationships.

In addition to statutory provisions, terms and conditions of employment are set out by the national collective labour agreements (*contratti collettivi nazionali di lavoro*) applicable to employees in particular industries. In principle, such agreements are private contracts and, as such, bind only employers that are members of employers' associations and employees who are union members. In practice, however, case law indicates they will apply to almost all employers and employees (whether union members or not), since Italian Courts have in several instances ruled that such agreements provide a minimum level of wages and other benefits. However, in recent years some unions have refused to sign some collective agreements, therefore the application to employees who are members of non-signatory unions has become controversial. Some collective labour agreements have in the past been codified into legislation and therefore made applicable to all employees concerned.

*Contratti integrativi aziendali* are agreements which supplement at company level national collective labour agreements and which are concluded between employer and employee representatives. Local agreements may apply in addition, or as an alternative, in certain territorial areas.

Individual labour disputes are heard at first instance by the local *Tribunale* (and the trial is before a one-man labour Court). Hearings are usually held shortly

after the filing of the claim. Compliance with an order of the *Tribunale* cannot be delayed by the employer lodging an appeal. Appeals are brought to the *Corte d'Appello* and, in the last instance, to the Supreme Court (*Corte di Cassazione*) which rules on points of law only. A preliminary fast-track procedure applies in respect of certain dismissal claims (see below; Reasons for Dismissal) and is carried out prior to the steps above.

Alternatively, disputes can be brought before Arbitration Tribunals as provided in the national collective labour agreements. In principle, it is permissible to apply for a conciliation procedure with the competent authorities/unions conciliation committees before issuing labour Court proceedings however it is not compulsory to do so. However, in the case of individual dismissal for economic or other objective reasons in large undertakings (i.e. employers with more than 15 employees in the same production unit/municipality or with more than 60 employees overall), the employer is obliged to attempt conciliation prior to giving the worker notice of dismissal, by sending a notice to the Territorial Employment Office (see below; Reasons for Dismissal).

Italian Labour law has been extensively reformed by Law No. 92/2012. The most significant amendments relate to individual dismissals (with the intention of achieving "greater flexibility in relation to dismissals") and changes to rules governing some categories of contracts (with the intention of curbing improper use of these contracts, while encouraging apprenticeships as a preferred route for access to the labour market). The reforms changed some of the categories of employment relationships e.g. contracts for project work (i.e. contracts on a self-employed basis for special projects), contracts for the professional services of holders of VAT registration numbers, job-on-call, casual labour, and apprenticeship. Having regard to contracts for project work, the only

permissible object of the collaboration contract is now the realization of a specific project aimed at fulfilling a specific result; the specific result must be separate and distinct from the business purpose of the employer and it cannot consist of merely executive or repetitive tasks; the project has to be precisely specified in the contract, otherwise the relationship is considered to be an employment contract of indefinite duration. The new legislation also introduced circumstances in which an employment contract is presumed to exist. The reforms also introduced a new protection regime for those professionals who work as VAT registration number holders, by providing that in some circumstances there will be a presumption that they are engaged on a contract for project work, such that a "project" is required (and in the event that no project can be identified the contract will be deemed an employment contract of indefinite duration).

Job-on-call is a work contract, which allows an employer to have a worker available for non-continuous or intermittent work, within certain limits and terms; under the new legislative regime competent authorities must be notified under simplified procedures when the worker is called to work; job-on-call is now permissible for workers aged under 25 or over 55. Casual labour is defined as purely occasional work where the aggregate remuneration from all the "employers" does not exceed €5,000 per year, and from any employer who is a commercial businessman or professional, does not exceed €2,000 per year; the remuneration is paid with vouchers, that also include social security and insurance contributions.

Under the reforms, the apprenticeship contract has become the principal gateway to the world of employment. The training that an apprenticeship is intended to provide is achieved by a number of devices, including the following: providing that the minimum duration of an

apprenticeship is six months (save for certain exceptions); increasing the ratio between apprentices and qualified workers from 1:1 to 3:2 (excluding employers who employ less than 10 employees, for whom the ratio cannot exceed 100%). An employer who does not have any qualified or specialised employees or who has less than three such employees, may hire no more than three apprentices. For those who employ more than 10 employees, the ability to hire a new apprentice is conditional upon the percentage of apprentices whose employment relationship has been continued at the end of the apprenticeship period, within the previous three years (30% for the 36 months following the effective date of the reform; 50% subsequently).

## 2. Categories of Employees

### 2.1 General

Both Italian law and collective agreements classify employees into various categories. The three basic categories are:

- (a) blue collar employees (*operai*);
- (b) white collar employees (two grades: *impiegati* and *quadri*); and
- (c) executive employees (*dirigenti*).

The categorisations are important not only as legal concepts but in a practical sense too; promotion from one category to another is seen as a major event in an employee's career.

### 2.2 Directors

Directors of companies with delegated powers are traditionally considered self-employed. However, there is a social security contribution charge on directors' fees, expressed as a percentage of income, and the fiscal treatment of directors' fees is subject to the same tax regime applicable to employees' salaries.

### 2.3 Other

Part-time employees have full employment protection, priority application for full-time posts and collective bargaining rights over hours of work. Other specific provisions apply to seasonal employees in certain industries and in relation to fixed-term contracts. Legislation aims to encourage part-time working and to this end a degree of flexibility in part-time working hours and overtime is allowed. Part-time work, Law No. 92/2012 permits collective bargaining to cover not only the introduction of flexibility clauses in individual contracts but also conditions and procedures whereby the worker may request a change to, or the elimination of, these clauses. Student workers or cancer patients will in any event be entitled to revoke consent to these clauses.

## 3. Hiring

### 3.1 Recruitment

Recruitment through authorised private companies is allowed for all types of employees. The recruitment system has been reformed in 2003 by giving private bodies a more extended role and by providing for an IT database, which will be continuously updated with data on the supply and demand of manpower. Companies are allowed to engage employees provided by another entity (an authorised private agency) for fixed or indefinite periods. However, undertakings with more than 15 employees are required to recruit fixed quotas of their labour force from special lists of "protected categories" like refugees and disabled persons and, in some cases, widows and orphans.

Some social security contribution advantages (including lower rates of social security contributions) are available to employers that hire workers from special lists of unemployed people (such as people who have been dismissed following collective dismissal procedures).

Employers are prohibited from investigating or asking any questions about an applicant's political beliefs or labour union membership or activities or other matters not necessary to assess job skills. These rules are in addition to those relating to discrimination (see further below).

Companies are permitted to take on temporary employees through authorised private agencies. National collective labour agreements impose limits on what proportion of the firm's workforce may be temporary. The Ministry of Employment authorises the agencies, which must also be registered. Companies that apply for authorisation will be examined under several criteria: they must, for example, have a minimum paid-up capital and hold adequate deposits with a credit institution. The employment relationship is with the authorised private agency which pays the employee's salary and social security contributions and retains disciplinary power. The company using the agency employee remains nonetheless liable for any unpaid salary and social security contributions and for workplace safety and health.

### 3.2 Work Permits

Work permits are required for non-EEA nationals and must be obtained before the employee enters Italy by applying to the appropriate Provincial Labour Office. Work permits are issued subject to a numerical cap established each year by Government Decree. All foreign nationals must obtain a residence permit from the police authorities within eight days of arrival.

Employers are liable if they employ workers who have not complied with residence permit regulations.

## 4. Discrimination

Direct and indirect discrimination on the grounds of gender, race, disability, age, language, religious belief, political or trade union affiliation or activity, strike

participation, sexual orientation and personal beliefs is prohibited. A discriminatory dismissal is void and the employee is entitled to reinstatement plus damages irrespective of the size of the undertaking and of the employee's category (see Reasons for Dismissals).

There is a right to freely express any opinion in the workplace.

The Italian legislative definitions of direct and indirect discrimination correspond with those set out in Directives No. 2000/43/EC and 2000/78/EC, as follows:

- (a) "direct discrimination" shall be taken to occur when one person is treated less favourably than another or has been or would be treated in a comparable situation on the grounds of his/her religion, belief, disability, age, sexual orientation, race or ethnic origin;
- (b) "indirect discrimination" shall be taken to occur when an apparently neutral provision, criterion or practice would put persons having a particular religion, belief, disability, age, sexual orientation, race or ethnic origin at a disadvantage.

The discrimination laws are, in principle, monitored and enforced by the National Commission for Equal Treatment and Equal Opportunities. Regional Equality Counsellors may bring discrimination cases against employers.

Law No. 120/2011 introduced "gender quota" requirements for corporate boards of listed companies and of non-listed publicly controlled companies: these undertakings have to reserve at least 1/3 of their corporate board seats in order to ensure gender equality and promote the participation of the underrepresented sex. Only a one fifth quota is required for the first renewal of the boards after 12 August 2012 for listed companies (and after a later date, not yet fixed, for non-listed publicly controlled companies).

## 5. Contracts of Employment

### 5.1 Freedom of Contract

Individual contracts of employment (*contratti individuali*) cannot derogate from the provisions of the law and national collective agreements (*contratti collettivi nazionali di lavoro*) and supplemental agreements at company level (*contratti integrativi aziendali*) to the detriment of the employee. Because of detailed labour laws and collective agreements, often very little is left for individual contracts to cover other than improvements in basic economic terms.

The employer is also required to maintain a "unified employment record" (*Libro Unico del Lavoro*), recording its hiring and payroll records.

### 5.2 Form

There is no general requirement that a contract of employment be in writing to be valid. However, most collective agreements require the contracts of employment to which they apply to be in writing. However, part-time, fixed-term contracts and probationary period covenants (including job description) must all be in writing.

All employers must display a copy of the disciplinary rules and sanctions applying to all employees at the workplace.

Legislation requires the employer to give notice of any new employment relationship to the competent authority, by transmitting on-line the required information no later than the day before the employment relationship commences. This information must include: the personal details of the employee, the type of contract, the starting date and the duration of the contract, the date of termination (if any), the employee's grade, the applicable terms and conditions (e.g. salary, working hours, duties, tasks, etc). If employers fail to comply with this provision, administrative fines from €100 up to €500 may be imposed.

In addition the employer has a duty to provide new employees before they start work with a copy of the information notice sent to the competent authority, or with a copy of the individual employment contract, which has to include information on the appointment, the place of work, the start date, the duration of the contract and any trial period, the employee's grade, the salary, holiday entitlement, hours of work, and notice periods. If an employer fails to comply with this provision, administrative fines from €250 up to €1,500 may be imposed.

Subsequent changes must be notified to the employee within a month of their becoming applicable to the employee, unless they arise out of legislation or changes to the applicable collective agreement. Otherwise, the employee may submit an application to the local labour office requesting that the employer provide details of the changes within fifteen days; if the employer fails to do so, it may be fined up to €1,290. In most cases if the employer has failed to comply with the above notification provisions the competent authority will issue the employer with a notice to perform and if the employer complies a reduced fine only will be imposed.

Fixed-term contracts can only be concluded if there is an objective reason for doing so derived from technical, productive or organisational reasons justifying the fixed-term, which must be specifically set out in writing in the employment contract. Law No. 92/2012 introduced an exception to this requirement; such justifications are not needed for either (i) the first fixed-term employment contract or fixed-term private agency supply of work contract with a duration of up to 12 months (non-extendable) or; (ii) where provided for by collective agreement subject to an overall limit of 6% of workers employed in the production unit, in circumstances where the fixed term contract recruitment is linked to an organisational process resulting from specific scenarios identified in the

legislation (for example, product launches or launch of an innovative service).

Fixed-term contracts are prohibited in some cases (e.g. to substitute workers on strike). In some circumstances, the contract may be renewed once, or new fixed-term contracts may be entered into with the same employee, for a maximum cumulative term (including the original term) not in excess of three years (the cumulative term also takes into account any period worked under a fixed-term authorised agency supply of work contract).

### 5.3 Trial Periods

Any agreement for a probationary period must be in writing and specify the job description. During this period, either party may terminate the agreement without giving notice (on the basis that the trial was not satisfactory); a termination payment (TFR) and other minor indemnities will, however, still be due. Collective agreements lay down maximum probationary periods, in principle up to six months.

### 5.4 Confidentiality and Non-Competition

An employee may not carry on business in competition with his or her employer or work for a competitor, divulge confidential or secret information concerning the company or the production methods of the employer, or utilise such information so as to cause prejudice to the employer.

The non-competition obligation is limited to the carrying out of activities in the same field of business in which the employer operates. It applies only during the employment contract and does not survive thereafter unless a specific non-competition agreement is entered into between the parties. A non-competition agreement is only enforceable if:

- (a) it is agreed in writing;
- (b) compensation for the employee is provided for; and

- (c) the limitation on the former employee's activities is reasonable as to activity, duration (in any case, the duration cannot be more than five years for *dirigenti* and three years for all other employees) and geographical limit.

### 5.5 Intellectual Property

Inventions made by an employee in the course of employment belong to the employer where their creation is anticipated by the employment contract and special provision has been made. If not, and the invention is made while performing the contract, the employee is entitled to a bonus in proportion to the importance of the invention. In the event that the invention is made outside the scope of the employment and relates to the activities of the employer, the employer has a preferential right over the invention. In all cases the employee retains a moral right to be regarded as the inventor.

## 6. Pay and Benefits

### 6.1 Basic Pay

There is no minimum wage as such, but the Italian Constitution guarantees the right to fair pay. Collective agreements provide minimum levels of wages and benefits. A Court can order an increase where pay is insufficient and generally the standard reference is the national collective labour agreement.

Wages are normally paid in 12 monthly instalments with a 13<sup>th</sup> instalment paid in December. Some collective agreements provide for a 14<sup>th</sup> instalment at other times, usually to coincide with summer holidays.

The multi-industry agreement of 2009 provides that the parties shall negotiate salary increases every three years, taking the rate of inflation into account.

### 6.2 Pensions

Because of extensive and compulsory state benefits, private pensions have

been rare. They are sometimes provided by the financial services sector and Italian subsidiaries of international companies (usually only for executives).

With effect from 1 January 2007, employees have been able to choose to contribute their accruing "TFR" termination indemnity (namely "trattamento di fine rapporto") in a supplementary pension fund. The TFR is a deferred compensation which an employee is entitled to receive upon termination of employment, whether in the case of resignation or dismissal, and regardless of the reasons (see further below).

In companies with more than 50 employees, employees must decide within six months of starting work whether to transfer future TFR accruals into a private pension fund or an individual pension plan. Alternatively, they may choose to transfer the TFR to a specific TFR fund (*Fondo Tesoreria*) managed by the National Social Security Institute (*Istituto Nazionale di Previdenza Sociale – INPS*). If they make no election within the six-month period, future TFR accruals will be transferred to a pension fund selected by the employers and unions (or, if one is not available, to the *INPS* fund).

Different rules apply for companies with fewer than 50 employees. The main difference is that, if employees choose to leave their TFR with the employer, the TFR can continue to be an accounting accrual within the company (i.e. it does not have to be transferred to the *INPS* fund). The purpose of this is to help smaller companies with cash flow issues.

### 6.3 Incentive Schemes

No official measures have been taken to encourage share participation apart from tax and social security relief in relation to certain grants of shares and social security relief for share options. The specific tax relief that was applicable in relation to share options was abolished by Law Decree No.

112/2008 (as converted into law), in relation to the exercise of any options (that is, the granting of the shares) on or after 25 June 2008. Any capital gains made in relation to such options is included as employment income, and taxed as such, in accordance with the usual tax bands (however, in certain circumstances, a 10% tax supplement will apply to managers and directors of banking and financial sectors). Social security contributions relief has been maintained.

#### 6.4 Fringe Benefits

Italian managers enjoy relatively high remuneration as well as, in certain cases, fringe benefits such as company cars, low interest loans, mobile telephones, etc.

Other employees enjoy fringe benefits such as cafeteria or restaurant tickets, private supplementary insurance, etc.

#### 6.5 Deductions

The employer is required to withhold income tax on behalf of the employee and to pay such tax to the authorities on a monthly basis.

### 7. Social Security

#### 7.1 Coverage

The Italian social security system is compulsory and provides a comprehensive set of benefits for all employees. The general programmes are administered by the National Social Security Institute, *INPS*, as set out in the relevant collective agreements.

#### 7.2 Contributions

The system is financed by employee and employer contributions which vary according to the category of employee and are calculated on gross earnings. Employee contributions are deducted from earnings at source by the employer, who then passes them to the relevant authorities. The amount of the contributions vary but are around 9% for employees and from 30% to 36% for employers, to be calculated on the overall salary, in most cases.

### 8. Hours of Work

Normal working hours are generally 40 per week. Collective labour agreements may establish a shorter working week. There is no maximum limit on daily working hours, however, average working hours cannot exceed 48 hours, including overtime, in any seven-day period, and daily rest must be, in most cases, at least 11 hours in any 24-hour period. The average working time must be calculated using a maximum reference period of four months (NCLAs may increase the reference period to six or 12 months where there are objective, technical or organisational reasons for doing so).

In the absence of overtime limits being established by collective labour agreements, it is necessary for individual agreement between the employer and each employee. In any event overtime cannot exceed 250 hours per year.

The rate of pay for overtime, night work, holiday work and work undertaken during the weekly rest break must be - in principle - higher than for work during normal hours. Overtime rates range in principle from an additional 15-50% for night work to an additional 30-70% for work performed on a public holiday. The rates are set by collective agreement. Managerial employees are not entitled to extra pay for overtime.

### 9. Holidays and Time Off

#### 9.1 Holidays

Each town has a holiday on the day of its patron Saint and, in addition, there are ten religious and national holidays.

The Constitution establishes a right to one day of rest a week (usually taken on Sunday) and a right to annual holiday.

The law provides for a minimum annual holiday entitlement of four weeks with full pay. Having regard to this four week entitlement the employer may not make payments in lieu of accrued but untaken

holidays, except on termination of the employment relationship.

More generous arrangements can be agreed by collective labour agreements; in such cases it is possible to agree that the employer may make payments in lieu of accrued but untaken holiday.

#### 9.2 Family Leave

An employee is entitled to 15 days' leave at normal pay on marriage as well as occasional days off for family responsibilities (such as the death of a relative or child's sickness).

Legislation provides that a woman must go on maternity leave two months before childbirth and three months thereafter (or, if she prefers and her health situation is good, one month before childbirth and four months thereafter). During this period she is entitled to maternity pay equal to 80% of normal pay which is paid by the social security system. In some exceptional circumstances, the father is entitled to take up to three months' leave from the child's date of birth, in place of the mother. Collective agreements may provide for additional pay by the employer, up to 100% of normal pay.

A woman or her husband may elect to take a further 10 (or 11 in specific circumstances) months' leave, partly paid. During the parental leave period, the rate of pay is 30% of normal pay for a period of six months in aggregate up to the child's third birthday. Thereafter, until the child's eighth birthday, pay during parental leave is 30% of normal pay if the individual's revenue is below a specific threshold. Exercising this leave entitlement does not affect the worker's right to resume her/his employment. In the first year following the birth of the child, the mother (or, in some cases, the father) is entitled to break from work for two hours each day in order to nurse the child (if more than one child was born, four hours' break may be taken).

As an experimental measure in order to sustain parental relationships and to promote the sharing of duties towards children, Law No. 92/2012 provides that in 2013-2015:

The father is obliged to take one day off within five months of the child's birth. Within the same period, the father may replace the mother for a maximum of two days during the mandatory period of maternity leave. During this leave he is entitled to a daily indemnity - paid by *INPS* - equal to 100% of the salary.

It is anticipated that the mother will be entitled to receive - within 11 months of the end of the maternity leave and as an alternative to the parental leave - vouchers for the purchase of baby-sitting services, when implementing legislation is passed. Originally the date of implementation was summer 2012, the new date for implementation is unknown and is subject to budget availability.

### 9.3 Illness

An employee who is sick has a right to retain his or her position, seniority and, generally, regular pay for a period up to six months or more, depending on the provisions of the applicable collective agreement. The social security system covers part of the salary.

If employers require employees to undergo medical examinations to test their aptitude for the job or their fitness following sickness or accident, such medical check-ups must be carried out by the national health service.

### 9.4 Other time off

An employee is entitled to paid or unpaid leave in several circumstances prescribed by law or by the applicable collective agreement. For example, paid leave is granted for trade union activity, for assisting disabled relatives, for blood donations, or to undertake study in order to complete compulsory education. The right to unpaid leave may be granted in a

number of cases, which can vary depending on the applicable collective agreement (it may be granted for example in the event of sickness of the employee's children, to perform public offices, for volunteering activity, and so on).

## 10. Health and Safety

### 10.1 Accidents

Employers have a duty to ensure safety at work, and may incur penal sanctions in the event of negligence. Insurance against accidents at work is compulsory and is managed by a state agency. Strict regulations about health and safety also apply to supply or service contracts, and the principal is jointly liable with the contractor and any subcontractors for accidents sustained at work by their employees performing the supply or service contract (as well as for insurance contributions, social security contributions, salary allowances, tax deductions and VAT).

### 10.2 Health and Safety Consultation

The law gives employees and their representatives the right to control the implementation of health and safety standards. In practice, this often means that union organisations at company level (*RSUs* – see below) will exercise their right to consultation on the promotion of health and safety at work. Formal inspection rights are only granted to the National Health Service and to the other competent public authorities.

## 11. Industrial Relations

### 11.1 Trade Unions

Employees have the right to join and be active in trade unions. Around 30-50% of the Italian workforce is unionised. The general right to associate is contained in the Constitution with legislation giving specific rights, such as paid and unpaid time off work for officials to carry out union duties. Union officials have the right to post notices, collect funds and, in large undertakings, to use the undertaking's premises for union

activities. There are strict regulations preventing employers from dismissing or transferring union officials. Employers cannot, financially or otherwise, support any trade union.

Employers not complying with an order to cease anti-union activity may be liable to penal sanction.

Unions are often organised on political lines but form alliances for the purpose of collective bargaining at various levels. The national confederations reflect political orientation as well. The largest organisations are:

- (a) CGIL (Confederazione Generale Italiana Lavoratori);
- (b) CISL (Confederazione Italiana Sindacati Lavoratori);
- (c) UIL (Unione Italiana del Lavoro);
- (d) Dirigenti are represented by *FederManager* in the industrial sector and by *ManagerItalia* in the commercial sector.

The main industrial employer's confederation is *Confindustria*. The commercial equivalent is *Confcommercio*.

### 11.2 Collective Agreements

The most important level of collective bargaining is that which sets national industry-wide agreements. Such agreements are negotiated by the trade unions representing the employees concerned on one side, and the association of the employers in the particular industry on the other.

### 11.3 Trade Disputes

The right to strike is enshrined in the Constitution, although restricted in some public services and essential supply industries. Industrial action short of a strike is prohibited. There is no law which governs the right to strike in general, with the exception of a statute regulating strikes in public and other "essential" services.

#### 11.4 Information, Consultation and Participation

Italian unions generally believe in collective bargaining as the preferred method for regulating industrial relations and, for that reason, tend to disapprove of other methods for consultation and participation. Employees are also represented by committees organised at company level. The most important form of employee representation is the *rappresentanze sindacali unitarie (RSU)*. The number of works council members will depend on the number of employees at the establishment. Where they exist, they have the power to conclude collective labour agreements at company level as well as having various information and consultation rights. Members of such committees have the right to time off for the performance of their duties. There are also procedures for creating joint committees where the employer operates from more than one establishment. Employees are entitled to consult the representatives of recognised unions whenever they disagree with their employer's decisions.

## 12. Acquisitions and Mergers

### 12.1 General

In the event of a transfer of an undertaking, or of a part of an undertaking, the employment contracts are automatically transferred to the transferee and the employees maintain their respective seniority and the position that they have acquired during their employment with the transferor.

Employees whose employment conditions undergo significant changes during the three month period following a transfer of an undertaking may resign and claim notice compensation. Under the terms of their national collective agreement *Dirigenti* in various commercial sectors have the right to resign within 180 days of a change in ownership and to claim an indemnity. The level of indemnity is set out in the relevant

national collective agreement and will typically amount to a sum equal to part or all of their notice entitlement.

Following the transfer, the transferee must continue to observe the terms and conditions under any collective agreement applied by the transferor at the date of the transfer and on the same terms, until the date of expiry of such collective agreement or the entry into force or application of another collective agreement of the same level.

### 12.2 Information and Consultation Requirements

If the transferor employs, in total (i.e. irrespective of the number of employees who are actually transferred) more than 15 employees, both the transferor and transferee of the undertaking must carry out an information procedure at a local level prior to the execution of any binding agreement. This must take place at least 25 days before the deed effecting the transfer is executed or, if earlier, before a binding agreement between the parties is reached. Both the transferor and the transferee must inform the representatives of workers in the undertaking, and the relevant trade unions of (i) the reasons for the transfer; (ii) the legal, economic and social implications of the transfer as they affect the employees; (iii) the measures envisaged in relation to the employees (if redundancies are contemplated, this information must be disclosed, and a collective dismissal procedure could be required); and (iv) the date of the envisaged transfer.

If there is a European Works Council, information must be provided in accordance with established procedures.

Within seven days of receiving the information outlined above, the workers' representatives and trade unions are entitled to request a consultation meeting. Consultation must commence within seven days of receipt of such a request. The procedure is deemed

complete 10 days after the commencement of the consultations, regardless of whether the parties reached agreement on the transfer.

### 12.3 Notification of Authorities

There is no obligation to supply information and/or consult or negotiate with any public authorities in relation to the transfer of an undertaking.

### 12.4 Liabilities

Failure by the transferor and the transferee to comply with the information and consultation obligations constitutes an unfair union practice, in breach of the Workers' Bill of Rights. In the case of such a breach the trade union can seek a court injunction ordering the employer to cease such breaches.

An employer that fails to comply with an injunction (or subsequent appeal decision) will be liable to criminal sanctions (i.e. imprisonment for up to three months or a fine of up to €206). It is generally very rare for imprisonment to arise.

Relatively recent case law indicates that the validity of a transfer agreement will not be affected by a failure to comply with information and consultation obligations. This contrasts with earlier court decisions to the effect that a failure to inform and consult renders a transfer agreement either null and void or without legal effect in relation to the employees until the information/consultation procedure is completed. There is no obligation to obtain consent to a transfer from trade unions and/or workers' representatives, and they have no right of veto.

The seller and the buyer are jointly liable for all the employees' rights at the date of the transfer. The Italian Civil Code states that if a transfer of an undertaking is followed by a supply contract between the seller (as principal) and the buyer (as contractor) to be performed using the undertakings (or part of an undertaking) transferred, the ordinary regime of joint liability in supply or service contract

applies. It provides that, for a period of two years following the supply or service contract, a claim may be brought against the principal as well as the contractor and any subcontractor, by the employees of the contractor or any subcontractor for payment of salary allowances and insurance and social security contributions and tax withholdings and VAT.

Law No. 92/2012 has introduced some changes in relation to the regime of joint liability for salary allowances, insurance and social security contributions and tax deductions, provided that joint liability can be disapplied as a result of collective bargaining. In addition, it provides that the principal may be sued for payment together with the contractor and any other subcontractors. If, however, there has been prior enforcement against the contractor and any subcontractors, the enforcement action can only be brought against the principal if that enforcement action failed. In such circumstances, the principal may have a right of recovery against those parties.

In addition to the minimum legal obligations set out above, more favourable provisions may be contained in any applicable collective agreement.

## 13. Termination

### 13.1 Individual Termination

Termination by the employer is generally possible only if it is for just cause or justified reasons (see below).

### 13.2 Notice

Both parties can terminate a contract (other than a fixed-term contract) by giving due notice. Notice periods are regulated by collective agreements (and to a lesser extent by individual contracts) by reference to service and grade. They tend to range from approximately two weeks for blue-collar workers to three months for senior managers or up to 12 months for executives.

Failure of either employer or employee to give proper notice will make the defaulting party liable to pay compensation to the other party of a sum equal to the pay due to the employee for the notice period.

### 13.3 Reasons for Dismissal

Dismissal by the employer generally has to be for just cause (*giusta causa*), or there must be justified reasons (*giustificato motivo*).

In the case of justified reasons (whether objective ones relating to the undertaking or subjective ones relating to the employee), full notice and a termination payment must be given.

For there to be just cause, there must be grave misconduct, so that the employment relationship is deemed to be unable to continue, even provisionally. In this case, no notice needs to be given, although the employee is still entitled to the termination payment.

Disciplinary sanctions against an employee are regulated by statute, collective agreements and disciplinary codes laid down by the employer. Failure by the employer to post a copy of the disciplinary procedures in each production unit renders the disciplinary sanction void. An employee may challenge any disciplinary procedure in Court or by requesting that an independent conciliation and arbitration board investigate the matter. If disciplinary procedures are not complied with, the employer's failure to comply can be challenged in Court as well.

Dismissal must be promptly notified to the employee in writing. The notice must state in detail the reasons for the dismissal (just cause or justified reason).

A termination payment (TFR) is defined by law as a deferred compensation which an employee is entitled to receive upon termination of employment, whether in the case of resignation or dismissal, and

regardless of the reasons. (See also Section 5.2 above).

TFR is calculated according to a complex formula, which approximately represents the annual salary (including payments in kind) paid each year divided by 13.5. Employers set aside such termination payments annually as reserves in the balance sheet for any part not contributed to supplementary pension funds (see section 5.2 above) throughout the employment. The law provides that employees with at least eight years' service are entitled to ask the employer for an advance payment equal to 70% of the accrued termination payment depending on the specific circumstances; requests must be satisfied annually in respect of up to 10% of the employees entitled to such advance payments or, in any case, in respect of up to 4% of the total number of employees.

Other minor indemnities due in all cases of termination of employment are: accrued but untaken holidays and time-off, and portions of the accrued 13<sup>th</sup> month salary instalments (and 14<sup>th</sup> month, if any).

Law No. 92/2012 introduced significant amendments to article 18 of the Workers' Bill of Rights in relation to the consequences of unlawful dismissal in certain scenarios, with the intention of retaining the right to reinstatement only in the most insidious cases and providing for compensation alone in all other cases. This has resulted in the following regimes:

- (a) "full reinstatement": in the case of verbal dismissals or null and void dismissals, irrespective of the size of the undertaking and in the case of executive dismissals, the Court will order the employer to reinstate the worker and to pay damages incurred as a result of the dismissal pending reinstatement (with a minimum of 5 months' pay, subject to the deduction of earnings received from another employer

(*aliunde pereptum*)) and social security and welfare contributions. The employee has the right to choose an indemnity in lieu of reinstatement, equal to 15 months' pay. Note the following dismissals will be null and void:

- (i) dismissal of a woman within one year of marriage because of the marriage;
  - (ii) dismissal of a woman during her pregnancy and up to one year after the birth, or of the father if he takes leave in her place; dismissal because of a request to take parental leave/leave for a child's sickness.
- (b) "reduced reinstatement": in certain serious cases (i.e. (i) unlawfulness of dismissal due to objective reasons consisting of the physical or mental unsuitability of the worker or notification in violation of regulations governing the protected sick leave entitlement; (ii) where the Court finds that there is manifestly no objective, justified reason for dismissal and decides to apply the regime applicable to serious cases; (iii) where the underlying facts being used as justification for the disciplinary dismissal complaint do not exist or represent conduct punishable with a lesser sanction according to applicable collective agreements or disciplinary codes), reinstatement is provided, however compensation is capped at 12 months' pay (and it is permissible to deduct both the *aliunde pereptum* and the *aliunde percipiendum*, i.e. earnings that the employee would have received if he/she had diligently looked for another job or actual earnings secured from a job). The employer will also be ordered to pay welfare and social security contributions, minus any amounts covered by other employment contributions made in the interim. The worker is

entitled to choose indemnity in lieu of reinstatement, equal to 15 months' pay;

- (c) "full compensation": in other cases where there are insufficient grounds for dismissal, the employee will be awarded an indemnity ranging from 12 to 24 months' pay;
- (d) "reduced compensation": in cases where the dismissal is declared ineffective due to procedural breaches only (e.g. violation of the required written specification of reasons of termination, or of prior procedural requirements, i.e. disciplinary procedure or conciliation procedure, depending on the reason for termination, the worker will be awarded an indemnity ranging between six and 12 months' pay).

It should be noted that the pre-existing regime of unlawful dismissal for small companies has not changed (i.e. re-hiring or, at the employer's election, compensation from two and half to six months' pay, extended to 14 months in specific cases).

Law No. 92/2012 introduced the following changes with effect from 18 July 2012:

- (a) it imposes an obligation to attempt conciliation prior to giving the worker notice of dismissal in cases of dismissal for an objective economic reason by large undertakings. The dismissal must be preceded by a notice to the Territorial Employment Office with a copy to the worker. The notice to the Territorial Employment Office will call the parties to a meeting that will start a conciliation procedure which should, in principle, conclude within 20 days of the notice convening the meeting. In the case of a legitimate and documented impediment preventing the worker from attending the meeting, the procedure may only be suspended for a maximum of 15 days;

- (b) it provides that notice of dismissal given after the conciliation or the disciplinary procedure (i.e. for just cause or subjective justified reason) (as appropriate) will take effect from the date on which the procedure was commenced (save for certain exceptions which do not however include illness, in order to curb possible delaying tactics);
- (c) it provides that in the case of retraction of the dismissal, provided that this occurs within 15 days of the date of receipt of the employee's challenge, the employment relationship is regarded as restored without interruption and the worker will only be entitled to pay accrued in the period prior to the retraction;
- (d) for judicial disputes concerning dismissals and events governed by article 18 of the Workers' Bill of Rights a dedicated fast-track procedure has been implemented. The writ of summons can only concern claims relating to dismissals governed by article 18 of the Workers' Bill of Rights, additional claims may not be made under this procedure unless they are grounded on identical facts. The defendant can file its defence up to five days prior to the hearing (fixed by way of an order no later than 40 days after the claim is filed); upon termination of the hearing the court will either accept or dismiss the action by way of an immediately enforceable ruling; the enforceable nature of the ruling cannot be suspended or withdrawn pending a decision in any appeal proceedings, which must be brought within 30 days of notification of the ruling; the appeal proceedings are ordinary labour proceedings, following which a decision is issued, which may be appealed within reduced terms (30 days). It is possible to petition the Supreme Court against the appeal decision.

### 13.4 Special Protection

Certain employees, such as pregnant women, recently married women, employee's representatives, and disabled employees enjoy special protection against dismissal.

In addition, a resignation or mutual consent termination during pregnancy or the period up to the child's third birthday requires validation with the *Servizio Ispettivo* Servizio Ispettivo del Ministero del Lavoro (Employment Ministry Inspectorate), at the Territorial Employment Office.

For other employees, Law No. 92/2012 has established a resignation/mutual consent termination procedure to prevent pre-arranged termination practices (i.e. where the worker is required to sign an undated termination letter when hired). The effectiveness of resignations or mutual consent termination of the employment relationship will be suspended pending the completion of certain procedures, including: validation with the Territorial Employment Office or *Centro per l'Impiego* (Job Centre) or other bodies identified in collective agreements; or the worker signing a declaration at the foot of the transmission receipt of the communication of the termination of the relationship to the competent offices; additional procedures may be established by way of ministerial decree. In this respect, employers must follow a specific invitation procedure within 30 days of the date of resignation/consensual termination and workers are entitled to withdraw their resignation or consent to termination within seven days of the date of receipt of the employer's invitation.

### 13.5 Closures and Collective Dismissals

The law regulates collective dismissals and provides that employers in undertakings with more than 15 employees who intend to dismiss more than five employees (within a period of 120 days) in the same province for the

same purpose of restructuring operations, are required to carry out a complex consultation and negotiation procedure with trade unions, which may have a duration of 75 days. The consequences described above for unlawful dismissal apply depending on the nature of breach. Scenarios can be summarised as follows: (i) full reinstatement in the case of dismissal notified in the absence of a written communication; (ii) reduced reinstatement in the case of violation of selection criteria; (iii) full compensation in the case of violation of the collective dismissal procedure.

## 14. Data Protection

### 14.1 Employment Records

Legislative Decree No. 196/2003 regulates the processing of personal data, including the collection, storage and use of information regarding employees (the "Consolidated Act"). The Consolidated Act sets out very precise requirements to be followed for the lawful processing of personal data. The Workers' Bill of Rights also regulates the processing of data.

As a general rule, employers, as do all other data controllers, have to comply with the specific principles of the Consolidated Act when processing sensitive personal data, i.e. any data which identifies the employee's religious, sexual, or political orientation, or membership of or affiliation to any other group or union. An employee's prior written consent and authorisation from the Italian data protection authority are generally necessary to process sensitive data, subject to a limited number of exceptions. The Italian data protection authority grants an authorisation to employers to process sensitive data for employment purposes annually. This authorisation describes the permitted purposes of the processing, the data subjects covered, the processing arrangements, data categories and the methods for data maintenance, communication and dissemination.

An employee's prior consent is required for the processing of personal data. Such consent is valid only if freely given, documented in writing, and the employee has been informed of the following:

- (a) the purposes and methods of the processing of the data being requested;
- (b) whether compliance with the request for the data is mandatory or voluntary;
- (c) the consequences of a refusal or failure to reply;
- (d) the categories of person to whom the data may be communicated and the geographic area within which the data may be disseminated;
- (e) the right to access his/her personal data, and the right to have his/her personal data updated, erased, blocked or rendered anonymous if it is incorrect or has been obtained unlawfully. For these purposes, personal data which is not necessary for the purposes for which it was collected or processed is considered unlawfully obtained and may not be retained;
- (f) who the person responsible for the processing will be.

In principle, consent is not required if the processing of personal data meets at least one of a series of justifying conditions, specified in the Consolidated Act. Consent is not necessary if: (i) the processing is necessary for compliance with a legal obligation; (ii) the processing is necessary for the performance of a contract to which the data subject is a party; (iii) the processing concerns data taken from public registers, lists, documents or records that are publicly available; (iv) the processing concerns data relating to economic activities that are processed in compliance with the legislation in force as applying to business and industrial secrecy; (v) the processing is necessary to protect life or

bodily integrity of a person; (vi) the processing is necessary for carrying out investigations or to defend a legal claim; (vii) the processing is necessary for the purposes of legitimate interests of either the data controller or a third party recipient in the cases specified by the Italian data protection authority, in circumstances where those interests are not overridden by the interests or fundamental rights and freedoms of the data subjects; (viii) the processing is carried out by no-profit associations; and (ix) the processing is necessary exclusively for scientific or statistical purposes. The condition relating to the performance of a contract to which the data subject is a party has a relatively broad application. This condition may be applicable in the context of an employment relationship to the extent that the processing of the employees' personal data is necessary for the employer in order to perform its obligations in the relationship.

Employers are prohibited from investigating and collecting data regarding religious and political opinions, including opinions relating to trade unions. Any act or decision taken by an employer on the basis of the political opinion, ethnic origin, language or gender of any employee may also be discriminatory and therefore void, and the presence of such data on a personnel file could be used in court as evidence of discrimination.

As a general rule, the employer cannot control, for instance, the contents of its employees' email, unless a series of conditions are met. Any breach by the employer of the relevant data protection rules can lead to an administrative fine ranging from €3,000 to €90,000. Moreover, an additional administrative sanction in the form of an injunctive order may also be applied. Finally, if the employer causes damage to his employees as a consequence of the processing of their personal data it may be liable to pay civil damages pursuant to Article 2050 of the Italian Civil Code.

Criminal sanctions only apply if: (i) personal data are unlawfully processed with a view to making a profit or to causing harm to another; (ii) the relevant minimum security measures required by the law are not adopted; or (iii) the provisions issued by the Italian data protection authority are not complied with.

#### 14.2 Employee Access to Data

Employees are entitled to obtain, upon simple oral request, confirmation that personal data about their job exists, even if the data is not yet recorded, and to be clearly informed about the nature of the data, the origin of their personal data, the aim and terms of the data processing, the identity of the person responsible for the data processing and the people to whom the data can be disclosed. The processing of employees' data by means of automated calling systems, email, fax, MMS or SMS or other electronic communications means for advertising purposes is only permitted with prior employee consent (on an "opt-in" basis). In any event, direct marketing must not disguise the identity of the data controller and must provide a means by which the employee can exercise his right to object without being penalised as a consequence of doing so.

#### 14.3 Monitoring

The Consolidated Act does not contain specific provisions governing the monitoring of employee communications, whether email, Internet use, telephone, fax or voicemail, therefore this activity must be considered subject to the general principles and conditions governing the processing of personal data. The Consolidated Act does, however, prohibit any kind of remote audio-visual systems such as CCTV in the work place aimed at monitoring the activity of workers, unless the requirements of the Workers' Bill of Rights are met (i.e. previous agreement has been secured from the unions or prior authorisation obtained from the Labour Office to set up the audio-visual system, and the use of that system for

objective reasons such as the protection of business property, rather than remotely controlling the employees' working activity). There is a risk that monitoring emails sent or stored by employees, internet access or telephone calls during working hours could be classified as an indirect means of remotely controlling employees' working activities. An employer may set up audio-visual systems or similar systems monitoring the activities of employees, if:

- (a) they are necessary because of specific and defined organisational and technical needs (e.g. in order to ensure safety in the work place or due to the particular business carried out by the employer); and
- (b) the works council has given its prior consent. In the absence of a works council or in the event that an agreement with the works council cannot be reached, the employer is entitled to file a request with the Labour Office in order to obtain the relevant authorisation from the Labour Authority. In the absence of such agreement or authorisation, the audio visual system or similar technical device should not be set up and the employees' awareness of the introduction of remote control devices into the workplace or the individual employee's acceptance is not deemed valid consent for this purpose.

#### 14.4 Transmission of Data to Third Parties

Employers may transfer personal and sensitive data to third parties provided that: (i) employees have been previously informed of the entities to which their data may be transferred and have consented to the transfer; and (ii) the transfer is for a legitimate purpose.

The Consolidated Act generally prohibits the transfer of personal data outside the European Union if the laws of the destination countries do not guarantee a

level of protection equal to the protection offered by Italian and European law. Non-EU transfers will nevertheless be permitted if the employee consents to the transfer in writing, or for example if the

transfer is necessary (i) to perform obligations arising from a contract to which the employee is a party; (ii) to gather information at the employee's request prior to the conclusion of a

contract; or (iii) for the conclusion or performance of a contract in the interests of the employee.

*Contributed by Clifford Chance, Milan*

# Latvia

## 1. Introduction

The basic legislative act that regulates employment relationships in Latvia is the Labour Law, Darba likums (LL), which came into force on 1 June 2002. It regulates the major aspects of employment ranging from job advertisements to claims against unjustified dismissals. The LL establishes a minimum benchmark for employment rights and obligations and, accordingly, any provisions in employment contracts, collective agreements, work procedure regulations etc which reduce these minimum employment rights are void.

## 2. Categories of Employees

### 2.1 General

Any person who performs work under an employment contract is deemed to be an employee (*darbinieks*) and the other party to an employment contract is always the employer (*darba devjs*). The LL applies to the legal relations between any employee and his or her employer. Issues related to the remuneration of employees working for state or municipal institutions are regulated by the Law On Remuneration of Officials and Employees of State and Local Government Authorities.

The law specifically provides that part-time employees and employees with a fixed-term contract are entitled to the same conditions as full-time and indefinite term employees. Moreover, the law provides that employment contracts must generally be for an indefinite duration, and only in certain specified cases is a fixed-term contract justified.

### 2.2 Directors

Under the provisions of the LL members of the management boards (*valdes locekļis*) and supervisory boards (*padomes locekļis*) of companies should normally be employed under employment contracts, unless they are employed on the basis of contracts other than employment contracts, for example

where the director is engaged under a service provider contract. In cases where the board members are employed under employment contracts the mandatory provisions of the LL to some extent (e.g., with respect to termination of the employment) do not apply giving a company greater flexibility.

## 3. Hiring

### 3.1 Recruitment

The State Employment Agency, *Nodarbinātības Valsts aģentūra* (SEA) offers personnel services to employers, which can be useful, in particular for finding lower level employees. Private recruitment agencies must have a licence from the SEA. Internet-based placement firms are also popular among persons looking for work.

The LL regulates several other issues in relation to the recruitment of employees, including the right of the employer to request that a candidate undergo a medical examination prior to recruitment. There are also restrictions on what may be included in a job advertisement and on the type of questions that may be asked during a job interview, e.g. regarding a candidate's marital status, pregnancy, religious beliefs, national or ethnic origin.

### 3.2 Work Permits

A non-EEA national will, in most cases, have to obtain a work permit from the Office of Citizenship and Migration Affairs, *Pilsonības un migrācijas lietu pārvalde* (OCMA). First, the employer must notify the State Employment Agency, *Nodarbinātības valsts aģentūra* (SEA) of the vacancy. After the vacant job has been registered at the SEA and has remained vacant for at least one month, the resident employer in Latvia has to ask the OCMA, to affirm the work summons.

After the work summons is approved, the employee must submit it, together with other required documents, to an embassy or other representative office of

Latvia abroad in order to obtain a residence permit from the OCMA.

## 4. Discrimination

All employees have a right to equal work, just remuneration and just, safe and non-hazardous working conditions. Direct or indirect discrimination at any stage of employment (including recruitment) on the grounds of a person's race, colour, gender, age, disability, religious, political or other conviction, national or social origin, wealth, family status, sexual orientation or other circumstances is unlawful.

It is unlawful to discriminate against an employee on the grounds of his/her membership of an organisation for the protection of employees' social, economic and professional interests (mainly trade unions). In addition, it is unlawful to subject an employee to detrimental treatment because he or she has exercised his employment rights legitimately and, in the event of a dispute, the employer bears the burden of proving that the detrimental treatment did not result from the employee's exercise of his or her rights.

The LL also imposes a general obligation on employers to take reasonably adequate measures in order to adapt the working environment for disabled persons to facilitate their recruitment, promotion and training.

## 5. Contracts of Employment

### 5.1 Freedom of Contract

The LL provides that those provisions of employment contracts, collective agreements, work procedure regulations and the employer's instructions, which fall below the mandatory minimum rights and obligations stipulated by the LL, are void and are unenforceable against an employee.

### 5.2 Form

Employment contracts have to be concluded prior to commencement of

work in writing in duplicate; one copy must be given to the employee and there is a certain level of information which is required by the LL to be set out in the contract. If an employment contract is not set out in writing, an employee can request that the employment contract is concluded in writing. In the meantime, an oral employment contract has the same consequences as a written one if at least one party has begun to perform it. In circumstances where there is no written employment contract and neither the employer nor the employee can prove the duration of the employment relations, working hours and remuneration, it is assumed that the employee has already been employed for three months and that normal working hours and the minimum monthly salary have been provided for.

Employment contracts have to be concluded for an indefinite period of time. Fixed-term employment contract can be concluded only in a limited number of cases (e.g., for performance of seasonal work, providing cover for an employee temporarily absent, incidental work not characteristic to the undertaking, etc). The maximum aggregate term for a single fixed-term employment contract or consecutive fixed-term contracts between the same parties is three years. However, although a seasonal work contract cannot exceed 10 months, an employment contract with an employee who is providing cover for a temporarily absent employee can exceed three years. If, upon the expiry of the fixed term, neither party requests the termination of employment and it continues de facto, the employment contract is deemed to be for an indefinite term.

### 5.3 Trial Periods

It is common for employers to require a trial period and this must be expressly agreed in the employment contract. The maximum probation term is three months, excluding temporary employee incapacity and other justified absence. During this term, either party may give the other party three days' prior

notice of termination without having to state the reason for termination. If an employee considers that he or she has been dismissed during a probationary period in breach of the principle of equal treatment, that employee may bring a claim before the court within one month of receiving the termination notice.

### 5.4 Confidentiality and Non-Competition

An employee has a statutory obligation not to disclose information that is regarded to be the employer's commercial secret and to take care so that commercial secrets do not become directly or indirectly available to a third party. The employer must therefore indicate to the employee in writing which information qualifies as a commercial secret. The Commercial Law (Komerclikums) sets out additional conditions, which must be fulfilled before an employer can classify information as a commercial secret, e.g. the information must not be generally available to third parties and the employer must have taken reasonable measures for the preservation of the confidentiality of the information. It is advisable for employers to prescribe, in detail, in the employment contract or the internal working procedure rules the categories of information regarded as commercial secrets and to specify that the confidentiality clause will continue to apply following the termination of employment.

During the employment relationship, the employer may restrict the employee's right to take up work with other employers (by-work), insofar as the restriction is justified to protect legitimate interests of the employer, in particular if the by-work may adversely affect the employee's performance of his/her obligations.

The employee and the employer may also conclude post-termination restrictive covenants in relation to the employee's professional activity. The maximum term of a non-compete provision is two years, and an adequate monthly compensation must be paid to the employee for the duration of the restriction.

### 5.5 Intellectual Property

Generally, if an employee creates work that is the subject of copyright, the economic rights to the work can be transferred to the employer only if the employment contract or other agreement provides so. In relation to software created under the employer's instructions, the law presumes that all economic rights belong to the employer, unless the contract provides otherwise. An employer is entitled to an employee's invention, if it is produced while performing work under an employment contract that involves inventive activity or as a result of carrying out duties at the employer's request that involve research, construction, or specific projects, etc. However, in practice, it is advisable that the rights and obligations of the employer and the employee are defined in greater detail in the employment contract.

## 6. Pay and Benefits

### 6.1 Basic Pay

With effect from 1 January 2013 the statutory minimum wage equals LVL 200 (approx. €285) per month or LVL 1.203 (approx. €1.72) per hour (this is slightly higher for some categories of employee, whose weekly working time is 35 hours instead of 40, and minors).

The employer is obliged to ensure equal pay for equal work or work of equivalent value to employees without discrimination. If the amount of remuneration that an employee receives is contrary to the principle of equal treatment, the employee may, within a certain term, bring a claim before the court for adequate remuneration.

Subject to the minimum wage, there are no other statutory conditions regulating the amount of remuneration in private sector, and employment contracts do not generally provide for a regular increase of salary.

### 6.2 Pensions

Pension funds have now existed in Latvia for more than 10 years. Closed pension

funds are those established by employers, and only employers may be shareholders of closed funds; these funds are only open to the employees of the founders and shareholders of the respective fund. Open pension funds are, by contrast, those whose founders and shareholders are banks with a license to accept deposits from natural persons in Latvia or Latvian-registered life assurance companies. The latter are gradually becoming popular. Participation is purely voluntary and can occur either via individual or collective participation. In the latter case, an employer must conclude a collective participation agreement. There are strict legal requirements as to the content of participation agreements for the protection of the interests of the participants.

### 6.3 Incentive Schemes

There is no statutory obligation to introduce such schemes, although they are quite common in contracts with senior management of companies; these can include annual bonuses and share options in the company.

### 6.4 Fringe Benefits

It is common for employers in both the public and private sector to procure medical insurance for their staff. Other common fringe benefits include reimbursement of mobile phone expenses and the provision of company cars for senior employees.

### 6.5 Deductions

An employer is obliged to withhold the employee's obligatory social insurance payments and income tax before paying the salary to the employee. Additional deductions from the employee's net salary deriving from the employer's claims (e.g. for damage to or loss of the employer's property) against the employee can be made within the limits prescribed by the law (generally up to 20%). If the deductions are intended to cover damages caused by the employee to the employer, the employee's written consent must first be obtained.

## 7. Social Security

### 7.1 Coverage

The state social security system covers state pensions (old age, disability, survivor's pension), allowances and benefits (maternity, paternity, sickness, unemployment, temporary disability, death grant, parents' benefit, child adoption, family benefit, etc). Since the reform of the state pension scheme, a part of the social insurance payments for employees who were below the age of 30 on 1 July 2001 are included in the funded pension scheme, which is executed by the licensed investment management companies. Older employees can join the funded pension scheme voluntarily.

### 7.2 Contributions

The total amount of contribution equals 35.09% of the taxable base (broadly speaking, all income gained in employment), and the employer covers a 24.09% share of it whereas the employee pays a 11% share.

## 8. Hours of Work

The LL includes detailed regulations on working and rest time and sets the normal working time at 40 hours per week and eight hours per day. A normal five-day working week can be changed to six days of work every week, if necessitated by the nature of the work and employees' representatives have been consulted. Overtime is allowed only if the employer and the employee have agreed it in writing and may not exceed 144 hours in four months. Aggregated work can be provided, if normal working time is impossible to maintain, and may not exceed 56 hours per week. Shift work can be introduced if it is necessary to ensure continuous work at an undertaking.

The LL sets the normal daily rest time at a minimum of 12 hours and the minimum weekly rest amounts to a period of 42 hours without interruption, except in the event of aggregated work. Sunday is

a general holiday, however, working is permitted on that day if continuous work must be ensured and a different rest day is granted.

## 9. Holidays and Time Off

### 9.1 Holidays

There are 15 statutory holidays in Latvia (some of them on Sundays, e.g. Easter Sunday). Employees are entitled to a minimum of four weeks of annual paid leave. It is allocated on a *pro rata* basis depending on the time the employee has spent working and can be claimed after the employee has worked at least six months for the employer. Annual paid leave may, in exceptional circumstances, be postponed to the following year, but may not be compensated by money, except on termination of employment.

### 9.2 Family Leave

Pregnancy leave and birth leave are calculated together and amount to 112 days, which are granted as a single leave period. In some cases, additional pregnancy leave will be granted. Pay during this leave is provided by the state social security system at a rate of 80% of the average monthly salary calculated according to a set formula. Where the calculated amount of paid leave exceeds 23.02 LVL a day, then 50% of the amount in excess of 23.02 LVL per day is paid. Paid paternity leave and leave for one of the adoptive parents of a child of no more than three years of age is ten days. Any employee has the right to paid childcare leave in relation to the birth or adoption of a child until the child is one and a half years old. Until a child reaches the age of one, one of its parents is entitled to a 'parent benefit' which is paid from the social security system. Upon returning from any of these periods of leave, the employee is entitled to return to the same position, or, if that is not possible, to a similar or equivalent position with equally beneficial conditions of employment.

### 9.3 Illness

If an employee is temporarily incapacitated due to illness and obtains a physician's note (*darba nespējas lapa*) certifying that he or she is unable to work, the employer will have to pay an illness allowance to the employee (at least 75% of the average remuneration for the second and third day of illness and at least 80% with effect from the fourth day) up to the 10th day of illness. From the 11th day of illness, the allowance is paid by the State Social Insurance Agency (*Valsts sociālās apdrošināšanas aģentūra*) from the social insurance budget.

### 9.4 Other time off

Regular study leave can be prescribed in the employment contract or collective agreements, however, an employee can claim 20 business days leave per year in order to sit state exams or to write a diploma thesis at the end of his studies. The employer may decide on his own discretion whether to grant paid or un-paid leave in this case.

## 10. Health and Safety

### 10.1 Accidents

The Labour Safety Law (*Darba aizsardzības likums*) sets out an employer's general obligations in this area e.g. an obligation to assess labour safety risk factors in the undertaking of mandatory health inspections for certain categories of employees, etc. In addition, numerous governmental regulations set out detailed labour safety requirements for particular kinds of work. Compliance with all these requirements is supervised by the State Labour Inspection (*Valsts darba inspekcija*). There is no particular obligation for an employer to provide health insurance for employees, since social assistance in the event of an accident at work is provided under the compulsory social security (social insurance) system.

### 10.2 Health and Safety Consultation

An employer is required to consult employees or labour safety

representatives, who can be elected by employees if the undertaking or unit thereof has five or more employees. In addition, the employer must appoint one or several labour safety experts in the undertaking depending on the number of employees. Alternatively, the employer can conclude an agreement with a licensed firm providing labour safety services.

## 11. Industrial Relations

### 11.1 Trade Unions

The right to unite in trade unions is a fundamental right of employees and is protected under the Constitution (*Satversme*). According to the Employers' Confederation of Latvia survey: "Conditions and Risks of Employment in Latvia 2009- 2010" in January 2011, around 5.8% of the national workforce had union membership in 2010. Unions are usually related to a particular sector of the industry and most of them are united under one federation (*Latvijas Brīvo arodbiedrību savienība*).

Trade unions are one kind of employees' representatives and therefore have the basic rights attached to representation, including access to the undertaking and the right to hold meetings there. Trade unions have a priority right to conclude collective agreements and their consent must be obtained in almost all cases before a trade union member employee can be dismissed.

### 11.2 Collective Agreements

Collective agreements (*darba koplīgums*) must be in writing and are usually concluded at the undertaking level, i.e. between a particular employer and a trade union; general agreements at industry level (*enerģivienošans*) are less common. Trade unions have priority over authorised employees' representatives (elected individuals from amongst the employees) in concluding a collective agreement. A collective agreement will cover all the employees in an undertaking unless the collective agreement itself provides otherwise.

The LL establishes a basic procedure for the conclusion of a collective agreement and the employer (or association of employers) cannot refuse to negotiate. A collective agreement must be for a particular assignment or for a fixed term. However, after the term has expired, the provisions of the collective agreement remain applicable until the conclusion of a new one.

### 11.3 Trade Disputes

Strikes are permitted in the case of collective disputes of interests, although the preliminary procedure for the resolution of such disputes established by the Labour Dispute Law (*Darba strīdu likums*) has to be observed. The decision to strike must be taken by a trade union at a general meeting attended by more than 50% of the members (or their representatives). The decision to strike must be taken by employees at a general meeting attended by at least 50% of the employees of the undertaking. A strike must be notified to the employer at least seven days in advance. Employees taking part in the strike may not be dismissed and are entitled to return to their previous position afterwards.

The right to strike is restricted in a number of cases, including the prohibition to strike in support of political demands or during the term of a concluded collective agreement with the aim of amending it. Solidarity strikes are uncommon and are only permitted in connection with the failure to conclude or observe a general agreement (on tariffs or social/labour guarantees at industry level). Employers are entitled to lockouts in the event of a strike, although the number of employees subject to a lockout may not exceed the number of employees on strike.

### 11.4 Information, Consultation and Participation

Employers are obligated to provide information to employees' representatives and to consult them before taking decisions that may affect the interests of the employees. Consulting is defined as a

dialogue and exchange of opinions with a view to achieving a consensus. Employees' representatives are entitled to require information on the social and economic status of the undertaking and information necessary for the conclusion of a collective agreement.

Employees' representatives are entitled to be consulted prior to decisions being taken in relation to the following issues: determination of work norms, internal work regulations, the establishment of a six-day working week, shift work, aggregated work, breaks and vacation schedule. There are also more detailed consultation obligations in relation to collective redundancies and transfers of undertakings.

The European Works Councils' Directive has been transposed into national law.

## 12. Acquisitions and Mergers

### 12.1 General

The Acquired Rights Directive has been implemented in Latvia. The transfer of an undertaking or an independent part of it, as well as mergers and acquisitions of companies, is subject to the regulation in the LL relating to the transfer of an undertaking. In general, the obligations arising from the employment relationships existing at the time of the transfer will pass from the transferor employer to the transferee employer; this also includes any collective agreement in force at the time of the transfer, the provisions of which cannot be amended to the detriment of the employees for a one-year period following the transfer. An exception to this rule is the transfer of an undertaking within the context of bankruptcy proceedings. The transfer itself is not a valid reason for termination; it is, however, possible to terminate for general reasons, e.g. dismissals justified by the implementation of economic, organisational, technological measures or measures of a similar nature in the undertaking.

### 12.2 Information and Consultation Requirements

The transferor and transferee must inform the representatives of their employees or, if such representatives are not elected, the employees about: (i) the date or proposed date of the transfer; (ii) the reasons for the transfer; (iii) the legal, social and economic implications of the transfer of employees; and (iv) any measures or activities envisaged in relation to the employees.

The transferor must provide this information to his employees not later than one month before the transfer. The transferee must provide this information to the employees not later than one month before the transfer starts directly affecting the working conditions and employment terms of its employees.

Where the transferor or transferee has planned to take certain organisational, technological or social measures in relation to his employees in connection with the envisaged transfer, it is under an obligation to start consultation with the representatives of the employees not later than three weeks before the transfer with an aim to reaching an agreement on such measures and their implementation. The obligation to start consultation, however, does not create any obligation on the employer to actually reach agreement.

There are no thresholds in terms of number of employees triggering the information obligation. The obligation of information and consultation must be performed before the transfer. In principle, the documentation giving effect to the transaction (e.g. sale and purchase agreement) can be signed before the information and consultation takes place, provided the transfer takes place after the information and consultation is performed as described above.

The LL does not prescribe any time frame as to the length of the information and consultation process. The information process in practice should not be a time

consuming process as it merely involves the provision of information. The consultation might take more time. However, given the fact that the consultation does not create any obligation on the employer with regard to the outcome, the employer may be in a position to control the time frame.

### 12.3 Notification of Authorities

From the employment law perspective there is no obligation to supply information to or consult with state or regulatory bodies in relation to the transfer of an undertaking.

### 12.4 Liabilities

Failure to comply with information and consultation obligations in relation to the transfer of undertakings may give rise to an administrative fine of up to LVL 750 (approx. €1,071). The fine would be imposed on the transferor or transferee respectively. In addition, the employee(s) adversely affected by the transfer could claim appropriate compensation. For example, if an employee is unjustifiably dismissed as a result of the transfer of undertaking, the employee could claim the annulment of the dismissal and payment of average earnings for the whole duration of the dismissal. However, the possibility that a violation of the procedural requirements associated with the transfer of an undertaking could lead to the annulment of the actual transfer is highly unlikely.

## 13. Termination

### 13.1 Individual Termination

An employer wishing to bring an employment contract to an end must be careful to ensure that the provisions of the LL in relation to the reasons for and procedure leading to dismissal are satisfied.

Exceptionally, the employer may apply to the court for permission to dismiss an employee when he has a relevant reason, but none of the explicit clauses of the LL are applicable to the particular circumstances.

### 13.2 Notice

Dismissal during a probationary period requires a three-day notice period. In other cases, the minimum notice period established by the LL is either none, 10 days or one month, depending on the particular clause of the LL that is used as grounds for the dismissal. The employment contract or collective agreement may provide for longer periods of notice.

The employer must give the dismissal notice in writing. In the event of dismissal due to the employee's behaviour, he must first require the employee's written explanation and when deciding whether to dismiss or not, the gravity of the breach, the employee's previous work, etc. must be considered. The dismissal may only take place within one month of the discovery of the violation and, in any event, no later than 12 months after the violation was committed.

### 13.3 Reasons for Dismissal

During the probationary period, an employee may be dismissed without the need to give reasons. Aside from that, the LL sets out an exhaustive list of grounds on which an employee may be dismissed. These must be related either to: the employee's behaviour (e.g. appearing intoxicated at work, grave violation of the employment contract; breach of work safety rules leading to endangerment of the safety and health of other persons); his capabilities (the employee lacks professional skills for performing the work, the employee is medically certified as incapable of performing the work due to his health status; he or she is ill for a long period of time); economic, organisational, technological measures or measures of a similar nature in the undertaking (liquidation of the employer, reinstatement of the previous employee to the same work or reduction in the number of employees). In any event, the employer must notify the employee in writing of the reasons underlying the dismissal (this can be included in the dismissal notice). The

employee is entitled to full pay during the notice period.

A dismissal on grounds related to the employee's capabilities or economic, organisational, technological measures or measures of a similar nature in the undertaking (except the liquidation of the employer) can only be implemented if it is impossible to transfer the employee to another position in the undertaking, where the employee can work, with the employee's consent.

The employer and the employees' representatives can agree on the establishment of a labour dispute commission (*darba str du komisija*) in the undertaking. However, these institutions are not common in private sector undertakings.

Once the employer gives notice to the employee, the latter can challenge it by filing a claim in court within one month (unless a labour dispute commission procedure is applicable). Generally, if the court finds the dismissal unjustified, the employee will be reinstated (unless he or she requests otherwise) and his average remuneration for the period of forced absence from work (i.e. period of unjustified dismissal) will have to be paid.

It is the employer's obligation to prove that the dismissal occurred in accordance with the law and was justified.

### 13.4 Special Protection

An employer may not give notice of dismissal to an employee during absence due to sickness (except in case of a long term sickness) or other justified reasons. In addition, the law restricts the right to dismiss a pregnant employee or for one year following childbirth (or throughout the breastfeeding period) or a disabled employee (although dismissal on the basis of the employee's behaviour is still allowed).

A member of a trade union can, in most cases, only be dismissed with the consent of the trade union; therefore,

before giving notice of dismissal, the employer must find out whether the employee belongs to a union.

### 13.5 Closures and Collective Dismissals

If the number of employees dismissed from an undertaking due to a "reduction in the number of employees" (*darbinieku skaita samazin šana*) within 30 days exceeds a certain threshold (from 5 to 30 employees, depending on the total number of employees in the undertaking) the dismissals are classified as a collective dismissal. This imposes an obligation on the employer to carry out a collective dismissal, to provide employees' representatives with detailed information on the dismissal and commence consultations with them in good time in order to agree on the number of employees subject to dismissal and their social guarantees (i.e. dismissal benefits and pensions schemes, in addition to the State Social insurance schemes and other issues arising from the collective agreement or employment contract), as well as the dismissal procedure itself. In addition, the employer must notify the State Employment Agency (*Nodarbin t bas valsts a ent ra*) and the local municipality of the undertaking at least 45 days in advance.

## 14. Data Protection

### 14.1 Employment Records

Under the LL, an employer may transfer the information acquired from and the documents submitted by a job applicant in applying for work only to the persons who take the decision about the recruitment of that applicant. The information and documents may be disclosed to third parties only with the consent of the job applicant. Moreover, information about the employee's health status and professional qualifications, which the employer has obtained upon the employee's application for work, may be used by the employer only in order to carry out organisational, technical or social measures in the undertaking and the employer is liable to ensure that such

information is only available to persons who use them for carrying out the respective measures.

The Natural Persons' Data Protection Law (Fizisko personu datu aizsardzības likums; hereinafter - NPDPL), which implements the EU Data Protection Directive, is applicable to employers as data controllers. There is no requirement to register data processing with the Data State Inspection (Datu valsts inspekcija), which is only undertaken for normal HR and accounting purposes.

#### **14.2 Employee Access to Data**

Under the NPDPL, an employee has the rights of any personal data subject, namely to obtain all information about himself that is held in a personal data filing system as well as to receive other information regarding the processing of his or her personal data.

#### **14.3 Monitoring**

Although the fundamental right to privacy is constitutionally recognised, most of the legislation in force deals with the rights and obligations of the state in this context (e.g. the right of investigatory authorities to monitor telephone communications) and, at present, there is little regulation that applies to other private individuals. Therefore it is recommended that, at the very least, the employer should inform the employees in writing about any form of surveillance or monitoring that the employer carries out and include a reference to that in the employment contracts and internal work regulations. Of course, as any form of employee surveillance will be regarded as personal data processing under the NPDPL, the employer must have the appropriate legal grounds for processing the employees' data, i.e. consent of the employee.

#### **14.4 Transmission of Data to Third Parties**

As indicated earlier, the employer may only transfer information acquired from the documents submitted by a job applicant in applying for work to the persons who make the decision about the hiring of that applicant and that information may not be disclosed to third parties without the consent of the data subject (i.e. job applicant or current employee) or on some other legal basis.

*Contributed by Sorainen Law Offices*

# Lithuania

## 1. Introduction

Employment relations in Lithuania are generally controlled by the Labour Code (2002). This regulates the formation, amendments to and termination of employment contracts, salaries, vacations, liabilities, dispute settlements etc. In practice, it applies to almost all employment relations.

Employment relations with civil servants, persons working in certain services such as the police, the prosecutor's office and certain other employees are regulated by the Law on Public Service as well as specific legislation and government resolutions. Relations with trade unions are regulated by the Law on Trade Unions and the Labour Code.

Employment contracts must be drawn up in accordance with legislative requirements and it is unlawful to seek to contract out of the minimum employment rights established by legislation. In certain cases, however, collective agreements may establish conditions deviating from the legislative provisions provided it is expressly sanctioned by the relevant legislation.

Trade unions and work councils can be established in enterprises, although collective representation of employees is not very well developed. As a result, the influence of collective agreements on employment relations is generally not significant. Labour disputes are usually handled by the courts.

## 2. Categories of Employees

### 2.1 General

Pursuant to Lithuanian law, a company has two managing bodies: the general manager (one natural person) and the management board (the latter is optional and consists of a minimum of three natural persons). The general manager performs day-to-day activities of the company and the management board decides on more important issues related

to the company. The management board also appoints/dismisses the general manager. An employment contract has to be concluded with the general manager (in order to provide him with social security benefits); however, employment contracts may not be concluded with the members of the management board.

Lithuanian legislation does not distinguish between blue-collar and white-collar employees. There are no specific regulations in relation to the employment of directors, other than in relation to working time and termination.

### 2.2 Directors

The Labour Code provides that the work of the administrative (management) officials of a company, which exceeds the contractual working time, is not deemed to be overtime. In addition, general managers of companies are not, as a matter of law, entitled to notice of termination, except where the employment contract so provides and their entitlement to severance pay does not depend on their length of service. Employment contracts are not concluded with the members of the management board.

### 2.3 Other

Part-time work is permissible by mutual agreement. The part-time contract must be granted at the request of the employee due to his/her medically certified state of health, at the request of a pregnant woman, a woman who has recently given birth or who is breastfeeding, an employee raising a child under three years of age, an employee who is a single parent of a child under 14 or a disabled child under 18 years of age, an employee under 18 years of age, an employee medically certified as disabled or employees nursing a sick family member. The employment contract must expressly address the part-time working conditions and, if a full-time contract is varied, it must be amended to reflect the new part-time arrangements.

The salary for part-time employees must be proportionally equivalent to the salary paid to equivalent full-time employees.

Fixed-term employment contracts may not exceed five years. Under the provisions of the Labour Code, employment contracts are normally of an indefinite duration; fixed-term employment contracts are generally not allowed for the permanent positions and can be concluded only on the basis of a temporary need. There are a few exceptions to this rule. Fixed-term employment contracts are allowed for permanent positions if expressly permitted by law or collective bargaining agreement. Moreover, fixed-term employment contracts are allowed for permanent positions, if the employee is recruited to a newly established position/vacancy (there should be no more than 50% of such positions in the company), and the fixed-term contract does not extend beyond 31 July 2015.

If another fixed-term employment contract for the same role is concluded with the same employee within one month upon the expiry of a previous fixed term contract, such a contract can be classified as a contract of indefinite duration at the request of the employee.

Employees working under a fixed-term contract are subject to the same social guarantees as employees working under an employment contract of an indefinite duration.

Short-term employment contracts are concluded, where necessary, for urgent or short-term work or to provide cover for temporarily absent employees (due to illness, vacation etc.). Short-term contracts can be concluded for a maximum period of two months. Short-term contracts may also be concluded with students during their school vacation.

Employees working under short-term employment contracts are subject to the same rules in relation to working time;

they are not subject to a trial period or granted annual leave (they are, however, entitled to compensation in lieu of annual leave). They do receive severance pay if terminated prior to the expiry of its term, one month's average salary or the balance of the unexpired term if the contract is terminated with less than a month to run. If the fixed term of a short-term employment contract has expired but the employment relationship actually continues and neither party has served notice of termination prior to the expiration of the term, the contract will be deemed extended for an indefinite term.

In certain circumstances, an employee has the option of agreeing to perform additional work (not specified in the contract) at the same workplace or to undertake secondary duties. An employee wishing to undertake secondary duties must, prior to the conclusion of an employment contract, provide the employer proposing to hire him for the performance of the secondary duties with a certificate from the principal employer specifying the time when the daily work starts and ends in the principal working place. The secondary employer must ensure that the regulations on maximum work time are not breached.

'Remote' workers perform their work at a location other than the employer's workplace by agreement with the employer. The working time of a 'remote' worker may not exceed 40 hours per week. A 'remote' worker is not subject to the internal rules of the employer and manages his working time at his discretion.

### 3. Hiring

#### 3.1 Recruitment

Employers are free to select personnel as they wish, subject to compliance with the rules that outlaw discrimination.

#### 3.2 Work Permits

The Law on Legal Status of Foreigners provides that non-EEA nationals must obtain a temporary residence permit to

stay in Lithuania for more than three months per six-month period or if he or she plans to work or to be engaged in any other legal activities in Lithuania.

Work permits are required for the employment of non-EEA nationals in Lithuania (there are certain exemptions, e.g. government workers, diplomats, etc). The work permit is issued by the Labour Exchange under the Ministry of Social Security and Labour, which, by doing so, takes into consideration internal labour market demand. It should be noted that general managers of enterprises are not always required to obtain a work permit.

The Law on Legal Status of Foreigners stipulates that nationals of European Union member states who are employed or self-employed in Lithuania and who intend to stay in Lithuania for more than three months in any six-month period, have to declare their place of residence according to the procedures established by the Law on Declaration of Place of Residence. They do not need to obtain any residence or work permits.

### 4. Discrimination

Discrimination on the grounds of gender, sexual orientation, social status, race, colour, national or social origins, personal status, age, disability, private life, religious activities and union activities is prohibited by the Law on Equal Opportunities (2003). The scope of the law is broad and it is applied to all aspects of the employment relationship, including recruitment, remuneration, promotion and dismissal. The equal opportunities controller investigates complaints of discrimination and can adopt a binding decision (e.g. transfer the investigation to the prosecutor in the event a crime may have been committed, warn the employer, etc). A victim of discrimination has a right to claim damages under the rules of civil liability. There are no limits on the level of damages that can be awarded. In addition, the Labour Code includes similar discrimination prohibition

provisions and in addition prohibits discrimination on the grounds of family, marital status and intention to have children, religious or political views or other circumstances not related to the employee's work.

### 5. Contracts of Employment

#### 5.1 Freedom of Contract

Although an employer and an employee are, in principle, free to settle the terms of their relationship, this freedom is, in practice, limited. The contractual terms of the employment agreement may not be less favourable to the employee than mandatory provisions of laws. In certain cases, conditions that are more beneficial for the employer may be established by collective agreements provided it is expressly permitted as a matter of law.

#### 5.2 Form

Any employment contract must be concluded in writing and in accordance with the sample form approved by the Government. The employment contract has to be concluded in at least two originals: one for the employee, the other for the employer. On the day of conclusion of an employment contract it should be registered with the Registration Journal of Employment Contracts (i.e. the formal register maintained by the employer). Such registration is not mandatory where an employer is a natural person employing three or fewer employees. An employee may commence his/her work only after having received from the employer an identification card, one original of the employment contract and after being familiarised with the working conditions, collective agreement (if any), internal work regulations and other regulations applicable to the work place. The employer must also notify the State Social Insurance Fund Board about the new employee at least one business day before the start of work.

The following terms must be specified in the employment contract:

- (a) the place of work;
- (b) the employee's duties; and
- (c) the terms applicable to remuneration.

The parties may also agree on other terms and conditions of employment, such as a probation period, unlimited liability of the employee to the employer for damage caused to the employer's property or business, work regime, fringe benefits, etc.

### 5.3 Trial Periods

An employment contract may include a trial period. As a general rule, the trial period may not exceed three months. A trial period may be established to assess whether:

- (a) the employee is suitable for the work for which he/she is employed; or
- (b) the work is suitable for the employee.

If an employment contract incorporates a trial period for the purpose of testing whether the employee is suitable for the work, the employer may terminate the employment contract before the end of the trial period on three business days' written notice without paying the employee any severance payment. If the trial period is established for the purpose of assessing whether the work is suitable for the employee, the employee may terminate the contract during the trial period on three business days' written notice. If an employee continues working after the expiry of the trial period, the employment contract may only be terminated in accordance with the general rules on termination (see section 13 below).

### 5.4 Confidentiality and Non-Competition

The parties to an employment contract can agree on terms and conditions that are not directly prohibited by relevant legislation;

however, the employment contract must comply with the general principles of justice, reasonableness and fairness.

When recruiting an employee, a company may include non-compete provisions in the employment contract or conclude a separate non-compete agreement prohibiting the employee from competing with the former employer after termination of employment. The non-compete prohibition must be reasonable, limited in term (usually, up to two years) and remunerative. However, in practice, enforcement of such non-compete clauses may be complicated.

Employees must keep the business secrets of the employer. If an employee violates this obligation, the employer is entitled to compensation for any loss incurred. The Competition Law provides that an individual may use commercial secrets learned as a result of employment or other contractual relations with an enterprise no earlier than one year after the date of the termination of the employment or other contractual relations, subject to any provisions to the contrary in the relevant contract. In practice, it is recommended that employers incorporate this statutory provision into the employment contract and the internal rules of the company. In addition, it is advisable to require employees to sign a document setting out the categories of information classified as commercial secrets by the management body of the employer and give a written undertaking not to disclose such information, failing which the employee will be liable for damages.

### 5.5 Intellectual Property

Employee inventions are defined and regulated by the Law on Patents. If something is deemed to be an invention, the employee is obliged to inform his employer promptly in writing to that effect. Until a patent application is prepared, both the employer and the employee must keep the details of the invention secret. An employee will not be

entitled to royalties for his inventions if his contract of employment explicitly specifies that his duties involve creating inventions and the level of remuneration takes this into account.

Similar to those of patent invention are the rights to design, which can also be registered in order to entitle the designer to royalties. The design rights of designs created by an employee during his employment and in accordance with his employment contract will be owned by the employer, unless the employment contract specifies otherwise.

The Law on Copyright and Related Rights provides that the property rights to copyrighted material created by an employee during his employment and in accordance with his employment contract will be owned by the employer for a period of five years, unless the employment contract specifies otherwise. One exception exists in relation to the title to software, which will be owned by the employer indefinitely, unless the contract stipulates otherwise.

## 6. Pay and Benefits

### 6.1 Basic Pay

The minimum pay tariffs (hourly and monthly) to be paid to each employee are established by the Government. The hourly minimum pay is currently LTL 5.15 (€1.49). The monthly minimum pay is currently LTL 850 (€246.17). Discussions are currently underway in relation to proposed increases to minimum pay. One of the current proposals is that the minimum monthly wage could be increased to LTL 1000 (€290) with the hourly wage increasing accordingly.

Minimum pay rates are revised from time to time; however, there are no fixed dates for the minimum pay rates to be increased. Employees must be paid at least twice per month. At the written request of the employee, pay may be paid monthly only. Parties have to agree on the dates when the salary is paid. The

Labour Code obliges the employer to present each employee with payroll details setting out the net and gross salary, details of deductions made and actual overtime worked.

Indexation is left to be negotiated by the contracting parties or by the relevant collective agreement.

If an employee's salary equals the minimum monthly salary, it has to be increased in line with any increase to the minimum monthly salary. In addition, if the salary of an employee is tied to the minimum monthly salary (e.g. the employment contract stipulates that the salary payable amounts to three times the minimum monthly salary) then such salary must also increase in line with any changes to the minimum monthly salary.

## 6.2 Pensions

Social guarantees are ensured by the state social security system. There is no obligation on employers generally to provide private pension arrangements. Private schemes are either insured with pension insurers or through a pension fund enterprise.

## 6.3 Incentive Schemes

Profit-related pay may be paid to some managerial staff. There are no legal or fiscal measures encouraging employee share participation.

## 6.4 Fringe Benefits

Fringe benefits vary according to the internal policy rules and may include bonuses, company cars (for more senior or frequently travelling employees), mobile phone, etc. If the fringe benefits are provided for personal use as well, they may be subject to taxation.

## 6.5 Deductions

Employee's income tax is deducted by the employer at source and then accounted for to the tax authorities. Employee's income tax consists of income tax and separate health insurance tax. The income tax rate is

15% and the health insurance tax rate is 6%.

The tax exempt minimum salary varies and is dictated by an employee's salary.

## 7. Social Security

### 7.1 Coverage

The state social security system provides benefits in the case of old age, disability, death, sickness, maternity and industrial injury.

### 7.2 Contributions

The social security system is financed by employee and employer contributions, which are based on the employee's salary. A 3% social insurance payment is withheld from the income of the employee and is deducted from the gross salary of the employee; a 31% social insurance payment is paid by the employer on top of the gross pay to the employee.

Currently, there are no upper limits for taxation or social insurance payments and the fixed tax rate is applied.

## 8. Hours of Work

Ordinary weekly working time may not exceed 40 hours per week and eight hours per day. Exceptions may be established by legislation, governmental resolutions and collective agreements. The maximum length of a workday or shift, including overtime, as well as the work under two or more employment contracts may not exceed 12 hours per day and the working week cannot exceed 48 hours.

The working hours of the employees of certain categories prescribed by government, such as medical personnel, child carers, children education institutions, energy sector, special communication agencies, etc, as well as security services watchmen may not exceed 24 hours per shift. However, the average weekly working time (in any seven-day period) of such employees

may not exceed 48 hours, and the rest time in between the working days must not be less than 24 hours.

## 9. Holidays and Time Off

### 9.1 Holidays

There are 15 public holidays per year. The basic right is to four weeks' (28 calendar days') paid annual leave each year that may be granted for the first time after six months of continuous employment. This is increased to five weeks (35 calendar days) for minors under 18, disabled employees, single parents who are raising a child under 14 years or disabled child under 18 years and other employees specified by law. Specific groups of employees (e.g. employees of the teaching, medical, aviation, or maritime professions or those working in hazardous conditions) have an extended annual leave entitlement. The total annual leave entitlement conferred by law may never exceed 58 calendar days. Public holidays falling within a period of leave do not count as part of the annual leave, nor does a period of sickness.

### 9.2 Family Leave

Women are granted pregnancy and childbirth leave for the period of 70 calendar days before childbirth and 56 calendar days after it (in the event of a complicated childbirth or the birth of two or more children – 70 calendar days' maternity leave is granted after the birth). The leave is paid provided she was covered by social sickness and maternity insurance for at least 12 months during the preceding 24 months. Pregnancy and childbirth leave is granted to the woman as a single period (126 days in total); however, its duration may depend on the precise circumstances.

A man is granted one month's paternity leave from the child's birth until the child is one month old. The leave is paid provided he was covered by the social sickness and maternity insurance for at least twelve months during the preceding 24 months. Paternity leave is

paid by the social insurance authority and paternity pay is equal to the average salary of the employee.

On request, a mother (or adoptive mother) or a father (or adoptive father) or a grandmother or a grandfather or other relatives who are bringing up the child may be granted child care leave until the child reaches three years of age. Alternatively, the family may decide to share the leave between the father, grandmother, grandfather or relatives of the child who are actually bringing up the child. Leave may be taken either in full or in part and persons entitled to this leave may alternate turns. A maternity (paternity) allowance is granted to one of the parents, adoptive parents or foster parents until a child is two years old and is paid by the social insurance authority. If the maternity (paternity) leave does not last beyond the child's first birthday, the allowance may amount to 100% of the insured income (subject to statutory thresholds). If the maternity (paternity) leave continues up to the child's second birthday the allowance is 70% of the insured income during the first year and 40% of the insured income during the second year (subject to statutory thresholds). The length of child care leave (including the type of compensation) depends on the choice of parents. At the request of a parent bringing up children less than 14 years of age, unpaid leave of up to 14 calendar days per year must be granted. Parents bringing up disabled children less than 18 years of age are entitled to annual unpaid leave for up to 30 calendar days.

### **9.3 Illness**

An employee is entitled to sickness benefit if sickness occurs during the term of employment, including any probation period, provided he was covered by the social sickness or maternity insurance for at least three months during the last 12 months or six months during the last 24 months before the sickness.

Employees must obtain an authorised medical certificate of incapacity to work in

order to receive this benefit. Sickness benefit is paid from the third day of incapacity until a person is able to work or sickness is replaced by disability. The sickness benefit during the first two days of employee's incapacity is paid by the employer.

### **9.4 Other Time Off**

Employees who are studying, taking entrance examinations to colleges and higher educational institutions under study contracts with their employer are entitled to paid educational leave, with the pay at the rate of at least the average salary. If an employee is taking examinations or is studying on his own initiative, then his rate of pay (if any) for any study leave will be determined in any applicable collective bargaining agreements or by express agreement with the employer.

Employees who study in educational institutions are granted study leave to prepare and take regular examinations - three days for each examination; to prepare and take tests (two days for each test); to perform laboratory work and consultations (as many days as stipulated in educational projects and schedules); to finish and defend graduation theses (30 calendar days) and to prepare and take state examinations, including the examination for general education secondary school leaving certificates (six days for each examination).

## **10. Health and Safety**

### **10.1 Accidents**

Employers are liable for their employees' work-related accidents, including those occurring on the way to or from work or during and as a result of the employment. The employers must have appropriate insurance.

### **10.2 Health and Safety Consultation**

The employer has a general duty to ensure that employees are provided with a safe system of work and a safe working environment. This duty is subject to

control by the State Labour Inspectorate. Labour inspectors have the right to enter an enterprise at any time of the day to inspect whether the regulations are observed and, amongst other things, to demand that the employer stops the works in case the working environment becomes hazardous to the health or life of the employees.

When starting a new business, the premises in general, as well as the particular work places, need to be certified as safe and compliant with applicable hygiene and safe work environment standards.

A health and safety committee must be set up in any business, which employs more than 50 people. Where there are 50 or fewer employees, such a committee may also be set up by agreement. The committee consists of equal numbers of employer representatives and the trade union or other employees' representatives. The employer cannot terminate the employment of a member of a labour safety committee without consent from the trade union or the employees.

## **11. Industrial Relations**

### **11.1 Trade Unions**

A trade union may be established when it has no less than 20 founders or when the founders would account for no less than one tenth of all employees in an enterprise, an institution or an organisation.

A trade union is considered to be a legal entity when it has the requisite number of founders, the statutes of the trade union are approved in general meeting, the managing body is elected and the general meeting passes a resolution regarding the legal address of the trade union. A trade union must lodge documents, testifying its compliance with the above requirements, with the Register of Legal Entities.

### 11.2 Collective Agreements

Collective agreements are not common in private enterprises and in those businesses established after market liberalisation there are few collective agreements. Although legislation promotes the conclusion of collective agreements, the number of collective agreements has not increased.

Agreements are legally binding on the parties. The employer has a duty to inform new employees of the contents of relevant collective agreements.

A collective agreement can include the terms of payment for work, salary rates, benefits and compensatory allowances, conditions of employment, management, labour protection, organisation of work, safety in the workplace, work and rest time and other social and economic factors or guarantees that are not regulated by legislation.

The collective agreement comes into force upon signing unless the agreement provides otherwise and remains valid until the deadline set in the agreement or until the signing of a new collective agreement. If a fixed-term collective bargaining agreement has been concluded, the parties should begin negotiations for its renewal two months before the expiry date.

### 11.3 Trade Disputes

A strike is permitted by law in the event of a collective dispute not being settled or a decision adopted by the Reconciliation Commission, Labour Arbitration or Third Party Court that is acceptable to the employees not being executed. The right to adopt the decision to announce the strike is vested in the trade union. Sectorial strikes have been permitted since 22 June 2010.

During a strike, labour contracts of those employees taking part in the strike are suspended. They maintain continuity of employment, length of service, their entitlement to the state social insurance

and the assurance of safety at work. Employees taking part in strikes do not receive pay and are exempt from obligations to carry out their work functions.

Lithuanian law bans lockouts. The employer is forbidden to hire new employees to replace those on strike.

### 11.4 Information, Consultation and Participation

Representatives of the employees have the right to receive information from the employer and they have a right to be consulted. The information about current and future activities of the company (structural unit), its economic situation and status of employment relations should be provided to the representatives of the employees regularly and, in any event, not less than once per year.

Before adopting any decisions on collective redundancy or reorganisation or other decisions that may have a material effect on the organisation of work within the company or the legal status of the employees of the company, the employer has to inform and consult with the representatives of the employees. In the event that there are no employee representatives in a company, the employer has to inform the employees directly or in a general meeting of the employees.

Employees are not entitled to have representatives in the management or supervisory bodies of the employer.

If there is no trade union in an enterprise and the employees' meeting has not transferred the function of employee representation to the trade union of the appropriate sector of economic activity, the employees may be represented by the Labour Council. The Labour Council has the same competence as the trade unions, except in relation to those powers exclusively conferred upon trade unions by law.

## 12. Acquisitions and Mergers

### 12.1 General

The requirements of Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfer of undertaking, businesses or parts of undertakings or businesses are implemented in the Labour Code. In the event of a business transfer, the employment relations continue with the new employer under the same conditions. It is prohibited to change the employment conditions or terminate employment on the grounds of business transfer.

### 12.2 Information and Consultation requirements

There is no statutory timeframe for the information and consultation of employees other than that this should take place with employee representatives (or in the absence of such representatives – informing the employees directly) prior to taking a decision on the reorganisation of the company and other decisions that are likely to have substantial effects on the organisation of work in the company and the legal status of the employees. The information and consultation should be about the reasons for such a decision, the legal, economic and social implications for the employees, as well as about any measures envisaged with a view to avoiding or mitigating the expected consequences.

In order to transfer the employees, each employee must be individually informed about the business transfer 10 business days in advance. Furthermore, each individual employee has to consent to the transfer.

### 12.3 Notification of authorities

In the event of a transfer of business by means of company reorganisation there is a general requirement to notify the Register of Legal Entities about the transfer of the business, but there is no

specific notification obligation in relation to the transfer of employees. The new employer has to notify the Social Insurance institution on the change of the employer.

### 12.4 Liabilities

The employer is under an obligation to inform and consult with the employee representatives or directly inform the employees (as set out above). In the event of a failure to fulfil this obligation a fine ranging from LTL 500 to LTL 5,000 (from €145 to €1,550) may be imposed by the State Labour Inspection on the employer.

## 13. Termination

### 13.1 Individual Termination

An employer wishing to terminate must ensure he has a valid reason for dismissal and complies with the relevant notice requirements.

### 13.2 Notice

As a rule, the employer is required to provide the employee with written notice of dismissal two months prior to the dismissal, except in the following cases when notice of four months should be given to:

- (a) a person who is within five years of being entitled to a full retirement pension;
- (b) a person under 18 years of age;
- (c) a disabled person;
- (d) an employee bringing up children under the age of 14 years.

The Labour Code prescribes certain cases when an employment contract must be terminated immediately:

- (a) when a court judgement sentencing the employee to a criminal penalty, as a result of which he cannot continue working, becomes effective;
- (b) when the employee is deprived of a special right to carry out certain types of work;

- (c) at the request of a state body or official authorised by law;
- (d) when a medical or Disability and Working Capacity Defining Office concludes that the employee is not allowed to perform his employment functions or work;
- (e) at the request of one of the parents, a statutory representative, doctor, or school to terminate an employment contract of a minor aged between 14 and 16 years; or
- (f) upon liquidation of the employer if its employment obligations are not transferred to another entity.

The employer also has a right to terminate an employment contract without notice if:

- (a) the employee carries out work duties carelessly or has otherwise violated work discipline or if he has had a disciplinary sanction imposed at least once within the previous 12 months; or
- (b) the employee has committed one major violation of work discipline.

Notice of termination has to be given in written form to be effective. The Labour Code provides that, after serving notice of termination, the employer must provide the employee with time off work during the notice period, the duration of which should be at least 10% of the employee's working time to look for a new job. During this time off, the employee is entitled to his or her average monthly salary.

During the entire notice period the employer has to offer the employee any available positions.

### 13.3 Reasons for Dismissal

The main grounds for terminating an employment contract are:

- (a) agreement between the parties;
- (b) expiry of a fixed-term employment contract;

- (c) request by the employee;
- (d) reasons outside the employee's control e.g. the employee may give notice if the employee is not provided with any work during his contractual working hours for over 30 successive days or over 60 days in aggregate in the last twelve months, as well as if the employee is not paid his full work pay (monthly wage) for over two successive months through no fault on the part of the employee;
- (e) at the initiative of the employer (in the absence of employee fault), if there are serious grounds for terminating the contract, provided the employee receives a termination notice within the established terms (two or four months' notice). According to the Labour Code, serious grounds may be related to the qualification of the employee, his professional capabilities, his conduct at work, economical or technological reasons or structural changes in the work place, etc.;
- (f) at the initiative of the employer when the employee is at fault, e.g. theft from the employer or material breach of work regulations such as misbehaviour with the customers etc.

### 13.4 Special Protection

The Labour Code limits an employer's right to terminate the employment contracts of pregnant women and employees bringing up children. An employee may not be dismissed from the date of submitting to the employer a medical certificate of pregnancy, up to the month after the end of the pregnancy and childbirth leave (subject to certain exceptions). The employer may not terminate an employment contract of an employee who is bringing up a child of up to three years old, if there is no fault on the part of the employee.

In the case of an employee to be dismissed who is a member of an elective

body of the trade union or the Labour Council, the employer has to obtain the permission of the trade union or the labour council to dismiss the employee.

Employees are entitled to suspend their employment contracts (for no longer than three months) in case the employer does not fulfil its obligations. If the employee suspended the employment contract on legitimate grounds, the employer is obliged to pay the monthly compensation for the employee under suspension in the amount of one minimum monthly wage.

### 13.5 Closures and Collective Dismissals

In the event of dismissal of employees on economic or technological grounds or due to the restructuring of the workplace, the employer must, prior to giving notice of termination, consult with employee representatives with a view to avoiding or mitigating the negative effects of the proposed restructuring.

When an employer proposes to make redundant within 30 calendar days:

- (a) 10 or more employees where an enterprise employs from 20 to 99 employees;
- (b) over 10% of employees where an enterprise employs from 100 to 299 employees; or
- (c) 30 or more employees where an enterprise employs 300 and more employees;

the Territorial Labour Exchange must be notified about a collective redundancy

exercise upon completion of the consultation procedure and before termination notices are issued to the employees.

## 14. Data Protection

### 14.1 Employment Records

The principal piece of legislation regulating data protection issues in Lithuania is the Law on Legal Protection of Personal Data ("LLPPD"). The LLPPD regulates the collection, storage and use of personal data and allows private persons to process and use personal data when this is permitted or required by statute or when the affected person consents. The LLPPD permits the recording, processing and use of personal data within a contractual relationship if this is covered by the legitimate purpose of the contract. There is no specific legislation governing data protection in the employment context.

The employer, as the data controller, is allowed to process the collected data for specified and legitimate purposes in a way compatible with those purposes. When processing personal data, the employer should ensure that data is processed accurately, fairly and lawfully, is accurate, and, where necessary for the processing of personal data, kept up to date, consistent, adequate and not excessive in relation to the purposes for which they are collected and processed and kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected and processed.

### 14.2 Employee Access to Data

The employee as data subject is entitled to obtain information on the source and type of his personal data that has been collected, the purposes of processing and the recipient to whom the data have been disclosed. Upon receiving an enquiry, the employer, as the data controller, must provide the employee with the requested data. On request, such information must be provided in writing.

### 14.3 Monitoring

The Law on Electronic Communications (2004) prohibits the disclosure of the content of information transmitted over electronic communications networks and/or related traffic data without the consent of the users of the electronic communications services. The legislation does not explicitly establish to what extent, and in which cases, the communications of the employees may be monitored by the employer.

### 14.4 Transmission of Data to Third Parties

Transfer of employee data to third parties is generally prohibited, unless the affected person consents. An employer who wishes to provide personal data to third parties must follow mandatory provisions concerning data processing. Transmission within the EU is allowed. The transfer of data to a third party based in a country outside the EU is permissible only if the country ensures an adequate level of data protection.

*Contributed by Sorainen Law Offices*

# Luxembourg

## 1. Introduction

Under Luxembourg law, employment relationships must be evidenced in writing.

Freedom of contract is limited by various mandatory legal provisions and particularly by the provisions of the Labour Code (Code du Travail) (the “LC”). The LC is the most important source of employment law in Luxembourg. Agreements concluded between social partners on specific subjects such as telework and moral harassment as well as collective bargaining agreements are another important source of law.

Disputes are usually resolved in Labour Courts (Tribunaux du Travail) from which appeals lie to the Court of Appeal (Cour d’Appel). A special Court deals with issues relating to social security.

Employment contracts are usually written in French, German or English. There is no legal requirement in connection with the language to be used, as long as the employee can understand the content of the employment contract. In certain circumstances, in order to admit employment contracts in evidence before a Luxembourg Court or public authority, a complete or partial translation into French or German may be required.

## 2. Categories of Employees

### 2.1 General

The Luxembourg labour market is characterized by a significant number of commuters and expatriates (many of them being employed in the banking/financial sector).

The provisions of the LC apply to all employees (see however, section 5.3 below), however its provisions in relation to working time (e.g. overtime) are not applicable to senior executives (“cadres supérieurs”).

Senior executives are defined by the LC as employees who have the authority to take a decision, who have significant autonomy in relation to the organisation of their work and working hours and who are granted an adequate remuneration (meaning a higher remuneration than an ordinary employee).

### 2.2 Directors

Under Luxembourg law, members of the board of directors are not considered to be employees as directorship is considered to be a corporate mandate function.

However, it is possible to hold a directorship at the same time as having an employment relationship with the same company if the director, in addition to his legally defined director’s mandate, holds a specific and technical function which is distinct from the office of director and if for the purposes of carrying out the employment function the individual is in a subordinate relationship (lien de subordination) with the company.

### 2.3 Other

Part-time employees and employees employed under fixed-term contracts (in the latter case except if otherwise provided by law) enjoy the same legal protection as full-time employees.

## 3. Hiring

### 3.1 Recruitment

The Constitution guarantees the right to work and the freedom of all citizens to exercise that right. Employers must report any job vacancy to the National Labour Office (Agence pour le développement de l’emploi) and must not recruit on a discriminatory basis. Reference to the sex of potential employees in job advertisements is forbidden.

The employment of disabled people is compulsory both in the public and the private sectors. In the private sector, undertakings with at least 25 employees must employ at least one disabled employee. Undertakings with at least

50 employees must employ at least 2% of the workforce from those people registered as disabled. For undertakings with at least 300 employees, the percentage rises to 4%. In any case, this requirement is subject to the National Labour Office being presented with a job demand from a disabled person. If the undertaking fails to employ the required number of disabled employees, a special compensation tax of an amount equal to half the minimum monthly wage is payable in respect of each disabled employee who has not been employed in breach of these minimum requirements.

The law forbids the employment of people under 15 years of age but exceptions to this rule exist in the area of public entertainment. Young people between 15 and 18 years cannot be employed to do certain types of work, for example, assembly line work and piecework.

### 3.2 Work Permits

Work and residence authorisations are governed, in Luxembourg, by the law dated 29 August 2008 on the free movement of European Union citizens and on immigration policies (the “Immigration Law”).

As a general rule, any “third-country national”, i.e. any foreigner who is not: (i) a citizen of an EU Member State, of one of the member states of the Agreement on the European Economic Area (“EEA”) or of Switzerland; or (ii) a family member of such citizens (regardless of his/her nationality), has to apply for and to obtain a prior authorisation from the Luxembourg minister of foreign affairs and immigration, to be employed in the Grand-Duchy of Luxembourg.

The third-country national must apply for the residence authorisation prior to entering Luxembourg.

The Immigration Law distinguishes between third-country nationals’ stays for up to three months and third-nationals’ stays for more than three months. Subject

to certain conditions, third-country nationals have the right to enter and reside in Luxembourg for up to three months, within a period of six months, without being required to apply for a residence authorisation unless they intend to work as employees or to commence self-employment activities. However, they do not need an authorisation if they come to Luxembourg for less than three months within one calendar year, for business trip purposes or to perform services within the same group of companies (excluding any subcontracting work), or as an artist, sportsman, lecturer, etc.

Third-country nationals who intend to enter and reside in Luxembourg for more than three months have to get a residence authorisation prior to their entry. There are a number of different categories of residence authorisations for third-country nationals working as employees, i.e.:

- (a) Residence authorisation for salaried workers (“wage-earners”) (travailleurs salariés): this residence authorisation is subject to several conditions and requires amongst other things, the conclusion of an employment contract between the third-country worker and the Luxembourg employer. It is valid for a period of one year, in respect of one profession and one business activity but for any employer. This residence authorisation for salaried workers may be renewed. The first renewal is valid for a period of two years. The subsequent renewals are each valid for a period of three years in any profession and business activity.
- (b) Residence authorisation for highly qualified workers (travailleurs hautement qualifiés) (EU Blue Card): this residence authorisation, which also requires the conclusion of an employment contract with the Luxembourg employer, is delivered to third-country nationals who have a higher education

qualification (or at least five years of professional experience) and who will earn remuneration equivalent to at least one and a half times the Luxembourg average gross annual salary. This amount is determined by a Ministerial decree. For the year 2012, the minimum gross annual salary that needed to be earned by a foreign worker who wanted an EU blue card was €66,564. It is valid for a period of two years (or for the duration of the employment contract plus three months) and is renewable upon request.

- (c) Residence authorisation for salaried workers temporarily seconded to the grand-Duchy of Luxembourg (travailleurs salariés détachés) (this residence authorisation is delivered to third-country nationals temporarily assigned to Luxembourg by companies established outside EU Member States, EEA States or Switzerland for the provision of cross-border services (prestations de services transnationales). It is valid for the duration of the contemplated cross-border services and may be renewed in exceptional circumstances if the provision of the cross-border services has not been completed.
- (d) Residence authorisation for transferred salaried workers (travailleurs salariés transférés). An authorisation of stay can be issued, at the request of the host company (i.e. the Luxembourg entity within which the third country national will work during his stay in Luxembourg), to the salaried worker of a third country temporarily “transferred” (transféré) to the Grand Duchy of Luxembourg, as part of a transfer (transfert) between companies belonging to the same economic and social entity, as defined by the LC.

## 4. Discrimination

All direct or indirect discrimination based on religion or belief, disability, age, sexual orientation, race or ethnicity is prohibited. This prohibition applies, among other things, to access to employment, promotion, professional orientation and training, work conditions, including conditions of remuneration and termination, affiliation to a workers’ organisation, social security entitlements, social benefits, etc.

Luxembourg law also specifically forbids all forms of sexual discrimination, whether direct or indirect and affirms the principle of equal treatment for men and women as regards access to employment including promotion, access to an independent occupation or profession, professional guidance, vocational training, advanced training and retraining, terms and conditions of employment including remuneration, and affiliation to a workers’ or employers’ organisation.

All collective bargaining agreements must provide for the application of this principle of equal treatment.

Employers are required to take preventive measures against sexual harassment at the work place.

An agreement in relation to harassment and violence at work has also been concluded between the OGBL and LCGB trade unions on the one hand and the Union of Luxembourg undertakings on the other (the “Agreement”). The Agreement has been declared as generally applicable (d’obligation générale) by a Grand-Ducal regulation. It has however to be noted that the Agreement is only applicable to some sectors (such as the banking and the insurance sectors).

## 5. Contracts of Employment

### 5.1 Freedom of Contract

As a general rule under Luxembourg law,

employment contracts are concluded for an indefinite duration.

Fixed-term employment contracts are permitted in certain circumstances only. They may only be entered into for the performance of a specific and temporary task such as, for instance, the replacement of a sick employee, for seasonal jobs, for specific tasks which do not form part of the normal activities of the undertaking or when there is a temporary increase in activity in the undertaking. Fixed-term contracts can also be concluded in a sector of the economy where it is customary to conclude contracts of a limited duration (e.g. actors, sports coaches). Fixed-term employment contracts can be renewed twice (if the option of renewal is provided for in the contract or in a subsequent document), but the duration of the contract, including any renewals, cannot exceed 24 months in aggregate. Fixed-term contracts must specify a termination date and, if this is not possible (for example, in the case of replacement of an absent employee due to illness), they must be concluded for a minimal duration (indicated in the contract). Fixed-term contracts that violate these rules are deemed to be contracts for an indefinite duration.

Freedom of contract is limited by legislation. The terms of the employment contract cannot be less favourable to the employee than the provisions of the LC or the provisions of the collective bargaining agreement.

The modification of an essential clause to the disadvantage of the employee requires the employee's express consent or has to be notified in accordance with the notice and other obligations that would apply to the employer in the event of the termination of the employment contract by the employer. Luxembourg law does not define "essential clause" and this is a matter to be determined by the courts, on a case-by-case basis.

After having been notified of the proposed modification of a fundamental clause of the existing employment contract, the employee is entitled to request the reasons for the proposed changes. The employer will then have to communicate these reasons.

In the event the employee does not accept the changes, he will have to resign and his resignation will be treated as a termination by the employer of the employment contract. In the event that the court considers that the amendment was not justified, the employee will be entitled to damages.

It is also possible to notify the employee of an amendment to the existing employment conditions with immediate effect (i.e. without notice period), but only if serious reasons exist.

Mandatory provisions of Luxembourg labour law (such as working time, holidays, weekly rest period) must be applied to all employees performing their employment duties in Luxembourg. It has however to be noted that the provisions of the LC concerning part-time work and fixed-time work, as well as the provisions of the LC concerning the requirement of a written contract and the provisions concerning collective labour agreements are not applicable to seconded employees.

The automatic indexation of remuneration, which is also a rule of public order in Luxembourg is only applicable to seconded employees in relation to the minimum wage or in relation to the minimum salary applicable in a specific sector as defined by a collective bargaining agreement that has been declared of general application.

## 5.2 Form

A contract of employment must be in writing and signed in two originals, one of which is given to the employee at the latest at the time he or she starts working.

The contract must, as a minimum, state the identity of the parties, the commencement date, the place of work, the nature of the employment, the normal daily or weekly working schedule, the normal working hours, the basic salary and benefits, the length of paid holiday, the length of the notice period to be observed by the employer and the employee in case of termination of the agreement, the length of the trial period if any, a reference to any applicable collective bargaining agreement, any derogation from the law (where permitted), the existence and nature of a complementary pension scheme, if applicable, as well as any additional terms upon which the parties have agreed.

## 5.3 Trial Periods

Trial periods function as a mechanism for both parties to terminate the contract on short notice and without providing a reason. Trial periods must be provided for in writing in the employment contract. As a general rule, a trial period cannot exceed a period of six months. The LC however provides for exceptions to this general rule. Indeed, for an employee who has not obtained the so-called "certificat d'aptitude technique et professionnel de l'enseignement technique", the maximum legal duration of the trial period is three months. In addition, the employer is entitled to provide for a trial period of a maximum duration of 12 months for employees earning, from the commencement of the employment a gross monthly salary of at least €536, Index 100 of the mobile salary scale (a government published index, which determines the index applicable to salaries - see further paragraph 6.1 below) (i.e. with effect from 1 October 2012 a 12 month trial period is only permissible in relation to employees earning at least €4,053.60 a month).

## 5.4 Confidentiality and Non-Competition

Employees have a general duty of confidentiality with regard to the business of the employer. In the banking sector

this duty is more specific. In addition to criminal penalties applicable to employees in breach of rules on banking secrecy, most employment contracts in the banking sector provide that any breach of the confidentiality obligation is a ground for immediate dismissal without notice. However, Luxembourg Courts still retain the power to determine whether the breach was sufficient to justify an immediate dismissal.

Restrictive covenants are regulated by the LC. A non-compete clause may only prohibit a former employee from undertaking a competitive activity as an independent worker within the Grand-Duchy of Luxembourg in the same industrial sector in which the individual had been previously employed and for a maximum period of 12 months only. A non-compete clause may not prohibit the employee from taking up new employment. In addition, a non-compete clause will only be valid if on the day the employee leaves the company the employee's annual gross salary is equal to or exceeds €6,817, index 100 (i.e. €51,554.92 as of 1 October 2012, the index standing at 756.27).

## 5.5 Intellectual Property

Intellectual Property is comprised of several aspects, such as design patterns, copyrights, patents, trademarks and industrial property.

The applicable legislation mainly consists of:

- (a) the law of 16 May 2006 implementing the Benelux Convention relating to intellectual property (trademarks, design patterns and models), signed in the Hague on 25 February 2005, as amended;
- (b) the law of 20 July 1992 modifying the rules on patent rights, (the "Law of 1992"), as amended;
- (c) the law of 18 April 2001 on copyrights, ancillary rights and data bases as amended.

If a design pattern has been created by an employee in the discharge of his duties relating to the employment contract, the employer is considered as its creator, unless otherwise agreed.

If a computer programme is created by an employee in the discharge of his duties or under the instructions of his employer, the employer is authorised to exercise property rights exclusively relating to the programme, unless contractually agreed otherwise.

The property rights of databases belong to the "producer". The producer is legally considered to be the physical person or legal entity, which takes the initiative and principally takes the risk to undertake the necessary investments for the creation of a database. Thus, in practice the employer will nearly always be considered the producer of a database and will be entitled to the property in it.

Generally speaking inventions made by a person bound by an employment contract will belong to the employer if the invention is made:

- (a) during the performance of a contract of employment which encompasses a requirement to make inventions;
- (b) during a period of study or research with which the employee is explicitly entrusted;
- (c) during the performance of his or her duties;
- (d) in the undertaking's field of activities, or
- (e) as a consequence of the knowledge or use of techniques or means specific to the undertaking or as a result of data provided by the undertaking.

The employer and employee have to disclose to each other any useful information relating to the invention and have to abstain from making any

disclosures that could compromise the exercise of the rights granted by the law.

Any agreement between the employer and the employee relating to an invention of the employee must be in writing, failing which it may be deemed null and void.

Pursuant to article 13 of the Law of 1992, if an employer realises "notable profits" as a consequence of an employee's invention he has to grant the employee a reasonable portion of the profits. Failure to do so will allow the employee to bring an action against the employer for a share of the profits.

## 6. Pay and Benefits

### 6.1 Basic Pay

Wages and salaries are determined by the individual employment contract. They are subject to a minimum salary (salaire social minimum). The minimum depends on the age and qualifications of the employee. With effect from 1 October 2012, the statutory minimum wage payable to non-qualified employees over 18 years old age is €1,846.51 per month. The statutory minimum wage for qualified employees as at 1 October 2012 is €2,215.81 per month.

The minimum wage is regularly adjusted by the Government to take account of economic developments and the cost of living. Also, all salaries have to be automatically increased by the employer in line with any rise in the mobile salary scale index (often referred to as the "price index", or simply, "the index") where this index increases by more than 2.5%. Given the economic circumstances, the indexation has been limited by law until 2014 to a maximum of one indexation per year.

Employees are normally paid monthly.

In some sectors, collective bargaining agreements provide for remuneration scales, and/or require employers to pay an additional bonus equivalent to between half a month and two month's salary on top of the monthly basic salary.

Employers may also provide for a performance bonus, which is normally linked to the business results.

## 6.2 Pensions

The state social security system is generally considered to be adequate. Nevertheless, it is becoming increasingly common to have occupational pension schemes in place.

If a complementary pension scheme is provided, generally by multinational or large local undertakings, it is usually financed through book reserves, pension funds or group insurance. Complementary pension schemes are governed in Luxembourg by a law dated 8 June 1999 on complementary pension schemes.

## 6.3 Incentive Schemes

The promotion of employee share participation has never been encouraged through legal or fiscal measures. However, resident companies have sought to encourage employee involvement, primarily through annual bonuses related to profits and by offering shares to employees at preferential prices.

Credit institution and investment firms are legally required, as part of their governance arrangements, to have remuneration policies and practices in place that are consistent with and promote sound and effective risk management.

The Luxembourg Supervisory authority of the financial sector (CSSF) has the legal power to require a credit institution and investment firms, to limit the variable remuneration as a percentage of the total net revenues where such a remuneration is not compatible with a sound financial basis.

## 6.4 Fringe Benefits

Fringe benefits vary according to the sector concerned and the function of the employee.

## 6.5 Deductions

Employers are required to withhold income tax and social security charges at source from the salary of the employee.

# 7. Social Security

## 7.1 Coverage

The social security system provides a high level of benefits, most of which are automatically linked to the price index. Some of the benefits are earnings-related. The following benefits are provided: retirement pensions, survivors' benefits, medical care, sickness, disability, unemployment and maternity benefits, industrial injuries and occupational disease insurance and family allowances.

Luxembourg's state pension scheme will be reformed in 2013 (in particular by extending the period over which employees must contribute). It currently provides generous pensions (in 2012 the state pension, after a full career, varied between 50% and 92% of final earnings with a rate of around 75% for final earnings equivalent to the contribution ceiling defined as five times the minimum wage (i.e. €9,232 as at 1 October 2012)).

The LC sets out rules governing the payment of unemployment benefits. Workers domiciled in Luxembourg, who have been employed for at least 26 weeks over the last 12 months are entitled, if certain other conditions are met, to receive unemployment benefits of roughly 80% of their former gross salary (with an initial cap at two and a half times the minimum wage. The cap then gets progressively lower over time for a maximum period equal to the period worked over a reference period of 24 months.)

## 7.2 Contributions

Both employer and employee have to bear the cost of social security contributions that are calculated as a percentage of salary up to the contribution ceiling. The employer deducts the employee's share from his

salary on behalf of the tax authorities. The key contributions can be summarised as follows (as at 1 October 2012):

	Employer %	Employee %
Pensions	8	8
Sickness Insurance*	0.25 (benefit in cash) + 02.80 (benefit in kind)	0.25 (benefit in cash) + 02.80 (benefit in kind)
Dependency Insurance		1.40
Accident Insurance	1.15	
Health at work	Varies according to sector	
Mutuality	Contribution depends on risk classification (from 0.42% to 2.64%)	

\* plus an extra-premium to be borne by the former blue-collar workers during a transitional period (until 2013).

Unemployment benefits are financed mainly through a solidarity tax payable by both employer and employee.

# 8. Hours of Work

The LC defines hours of work as the period of time during which the employee is at the disposal of the employer. The normal working hours of an employee cannot exceed eight hours per day and 40 hours per week. Collective bargaining agreements can establish different limits as long as they are lower than the LC thresholds.

If the weekly working hours are spread over five business days or less, the

employee can be asked to work nine hours per day, provided that weekly working hours do not exceed 40 hours.

For reasons of flexibility the LC provides that employees may work in excess of eight hours per day or 40 hours per week or other contractually defined limits provided that the average weekly hours over a reference period of four consecutive weeks do not exceed 40 hours or the maximum specified in the contract. The reference period can be extended to 12 months by a collective bargaining agreement.

In that case, a work organisation plan (plan d'organisation du travail) ("POT") covering the entire reference period will be drawn up by the employer. For any particular week during the agreed reference period average hours may not exceed 48 hours per week and 10 hours per day. Work performed beyond the limits set out in the POT is remunerated as overtime work.

Undertakings can also opt for a mobile timetable (horaire mobile) instead of a POT. It allows the option of carrying over to the next reference period a specified number of "hours worked in excess" of applicable limits. Again, working hours may not exceed 10 hours per day and 48 hours per week.

The LC working time provisions do not apply to managers (personnes occupant un poste de direction effective) or senior executives (cadres supérieurs) of a company if their presence is necessary to ensure the running and the supervision of the company.

Overtime is defined as work performed beyond the normal daily and weekly working hours, i.e. beyond the legal or contractual limits.

However, if a POT or a mobile timetable is in place in the company, overtime is defined as any work done beyond the thresholds provided in an applicable POT or mobile timetable.

Before any overtime work is carried out prior notification to or authorisation by the Minister of Labour is required. Overtime work will only be sanctioned in the following exceptional circumstances:

- (a) to prevent loss of perishable goods or to avoid compromising the technical result of the work;
- (b) to complete special tasks such as inventories and accounts;
- (c) in exceptional circumstances affecting the public interest, or in circumstances of national danger;

In circumstances which are duly justified and which have no direct impact on the labour market, overtime may be performed provided that the employer complies with the notification procedure or, as the case may be, with the authorisation procedure.

The procedure is as follows: the employer notifies the Labour Inspectorate (Inspection du Travail et des Mines), outlining the exceptional circumstances for the overtime request. The request must also contain the opinion of the staff delegation or, in the absence thereof, of the staff. Where the opinion is favourable, authorisation of the overtime is automatic. In the event of a negative opinion, the Minister of Labour takes a decision based on the reports of the Labour Inspectorate and the National Labour Office.

The daily overtime limit is normally two hours but may be more if the work is carried out in order to deal with an accident or an imminent accident or if urgent tasks need to be performed on machines or work needs to be carried out as a result of unforeseeable events ("force majeure"). The LC establishes the principle of compensation for overtime by remunerated rest time at a rate of one and a half hours of paid time off per hour of overtime worked. It is also legally possible to record overtime to a time-savings account (compte-épargne temps). If the compensation or recording to a time-savings account is not possible

for reasons which are inherent to the organisation of the undertaking or because the employee leaves the undertaking before taking the remunerated rest time to which he is entitled, overtime is remunerated at a rate of 140% of the hourly salary.

Night work is generally permitted, except in the case of adolescents (i.e. workers between 15 and 18 years of age). The remuneration for every hour worked between 1am and 6am is augmented by 25%, either in pay or in time off.

Article L.333-1 LC exempts pregnant or breast-feeding women from working between 10pm and 6am at their request and after consultation with the labour doctor.

In principle, work on Sundays is prohibited, but there are a number of exceptions linked either to the status of the employee or the nature of the work. Employees working on Sundays are entitled to their base wage augmented by 70%. Hours worked on Sundays may also be compensated by time off in lieu. Where this option is taken, the employee will only be paid the 70% augmentation but not the base wage.

Employees working on public holidays are entitled to their normal salary plus the remuneration for the hours effectively worked, augmented by 100% (i.e. the public holiday is paid whether it is worked or not. If it is worked, the worker receives in addition twice his base wage for the work performed).

## 9. Holidays and Time Off

### 9.1 Holidays

There are currently 10 public holidays per year (New Year's day, Easter Monday, 1 May, Ascension day, Whit Monday, the National Holiday, Assumption, All Saints' Day, Christmas Day, St Stephen's Day). If a public holiday falls on a Sunday, a Saturday or on a day the employee would not have to work, a further day off must be granted in lieu.

In addition to the public holidays, employees in the private sector are entitled to a minimum of 25 days paid holiday per year. The right to days off comes into existence after three months of uninterrupted work although holiday will actually accrue during the three-month period.

Collective bargaining agreements usually provide for more than 25 days holiday.

Many collective agreements also provide for customary holidays (*jours fériés d'usage*).

## 9.2 Family leave

Employees are entitled to special paid leave days for a variety of reasons, such as the death of a relative, birth of a child, to move, for a wedding etc. Employees who live in a domestic partnership have the same leave entitlement as employees who are married.

An employee who has a dependent child under 15 years of age can also be granted family leave in case of serious illness, accident or the critical illness of the child that necessitates the presence of one of the child's parents. Family leave cannot in principle exceed two days per child per year.

Special leave may also be granted to employees to take care of a relative near death.

Subject to certain conditions each parent is also entitled to parental leave. Parental leave can take two forms:

- (a) six months' full leave (i.e. no professional activity is allowed);
- (b) 12 months' part-time employment within the company (in agreement with the company).

Such leave is indemnified by the National Family Allowances Fund (*Caisse Nationale des Prestations Familiales*). The parental leave indemnity amounts to €1,778.31 per month (as at 1 October

2012) for full-time parental leave. This indemnity is financed jointly by the Employment Funds (*Fonds pour l'Emploi*) and through the state budget.

Female employees are entitled to 16 weeks' maternity leave, eight weeks of which must be taken before the expected date of birth.

If the child is born earlier than anticipated, the maternity leave is extended to ensure that the total maternity leave period is not less than 16 weeks.

If the birth occurs after the expected date of birth, employees are still entitled to eight weeks' maternity leave after the date of birth.

Maternity leave may be extended by an additional four weeks in case of breastfeeding, multiple births or premature births.

During maternity leave, employees who have been affiliated with the Social Security for at least 6 months continue to be paid benefits by the *Caisse Nationale de Santé* regardless of the employee's qualification. This benefit is equal to the sickness benefits (see below).

## 9.3 Illness

Employees are entitled to sickness benefits (*indemnité pécuniaire de maladie*) from the first day of absence up to a maximum of 52 weeks over a reference period of 104 weeks.

The employer has to pay the employee 100% of his salary until the last day of the month during which the 77th day of sickness occurs (calculated over a reference period of 12 successive calendar months). Social Security only starts to pay sickness benefits after the employer's obligation ends, subject to a cap of five times the minimum wage.

The Mutuality of Employers (*Mutualité des Employeurs*) reimburses employers

80% of the gross remuneration paid to the employees who were unable to work due to illness. The Mutuality of Employers is financed by employers' contributions. The amount of these contributions is determined according to the category of contribution to which the employer belongs, this category being determined by the rate of absenteeism of employees in the undertaking. In addition, the Mutuality of Employers is financed by an extra premium levied on workers formerly classified as 'blue-collar', during a transitional period until 31 December 2013.

## 9.4 Other Time Off

Many types of special leave are available: for example for sport, education and cultural activities, for volunteer fire brigade, rescue and lifesaving activities.

In certain circumstances, employees may also benefit from training leave, up to a maximum 80 days over the whole of a person's working life (with a maximum of 20 days in any two year period).

Employees may also ask for flexible working arrangements but the employer may refuse such requests without justification.

## 10. Health and Safety

### 10.1 Accidents

Employers are required to insure employees in respect of accidents at work.

### 10.2 Health and Safety Consultation

The LC provides measures to ensure the health and safety of employees on industrial premises and deal with the health services in the work place.

Any undertaking employing over 5,000 employees (or over 3,000 employees in cases where at least 100 of them are exposed to the risk of occupational illnesses or safety risks) is required to set up a company medical service of its own (*service de santé au travail*).

All other employers have three options:

- (a) to organise their own company medical service;
- (b) to join an inter-company medical service catering jointly for a number of undertakings; or
- (c) to use the National Occupation Health Service (Service national de santé au travail).

All potential employees must undergo a medical examination with a medical labour service, to ensure that they are fit for the position under consideration.

The examination must take place either prior to the commencement of the employment in the case of an “at risk” position (poste à risque) or in the two months following the recruitment for other positions. In the latter case, should the employee be declared medically unfit, the employment contract ends automatically by operation of law.

The Labour Inspectorate, the Ministry of Health, the Industrial Injuries Insurance Association and the Customs and Excise Administration are responsible for ensuring compliance with health and safety obligations.

Employers are required to appoint a “travailleur désigné” who will be responsible for the prevention and the protection of the professional risks in the company (if the undertaking occupies not more than 49 employees, the employer can himself perform the activities of “travailleur désigné”, assuming that he has the required qualification).

If the undertaking has a staff delegation in place, the staff delegation must appoint, among its members or among the other employees of the undertaking, a safety delegate.

## 11. Industrial Relations

### 11.1 Trade Unions

Luxembourg enjoys a very good labour/management working environment

based on a cooperative arrangement scheme involving the government, labour unions and companies. As a consequence, labour unrest and strikes are very rare.

The main trade unions are organised along ideological lines. The socialist trade union (OGBL –Onofhängege Gewerkschaftsbond Lëtzebuerg) and the Christian trade union (LCGB –Lëtzebuenger Chrëschtliche Gewerkschaftsbond) are the largest unions in Luxembourg and enjoy national representation. Among the unaffiliated unions, the ALEBA is particularly strong in the banking sector.

The notion of ‘trade union’ as well as the circumstances in which a trade union is considered to be representative at a national level or in a major sector of the economy are defined under articles 161-1 LC and following.

Most employers in the industrial sector are members of the Luxembourg Federation of Industries (Fédération des Industriels Luxembourgeois, FEDIL), whereas for example, the interests of the banking and financial sector are represented by the Bankers’ Association (Association des Banques et Banquiers, ABBL).

### 11.2 Collective Agreements

If an employer is requested to enter into negotiations with a view to concluding a collective bargaining agreement, he is legally obliged to do so. Upon execution, collective bargaining agreements must be lodged with the Labour Inspectorate. Collective bargaining agreements come into force from the date on which they are registered and remain in force for a period of between six months and three years but are deemed to be renewed by tacit agreement. Notice of termination must be given at the latest three months before expiry. If no termination has been notified parties may decide to renegotiate. In that case the parties are required to start negotiations for a new

agreement six weeks before the old agreement is due to expire.

Collective bargaining agreements can be declared generally binding, by means of a Grand Ducal regulation, in respect of all employees and employers of the trade or profession in relation to which they are concluded.

Each collective agreement must contain certain mandatory provisions (for example, a bonus for night work, additional compensation for dangerous work and guarantees of equal pay for both sexes).

Where an employer refuses to enter negotiations to renew or conclude a collective agreement, the matter is referred to the National Conciliation Office (Office National de Conciliation). The National Conciliation Office is presided by the Minister of Labour. It is composed of a joint commission (Commission paritaire) and an administrative service.

If the conciliation before the National Conciliation Office fails, the conflict may be referred to an Arbitration Committee. In that case, the arbitral decision is assimilated to a collective agreement.

### 11.3 Trade Disputes

The right to strike is enshrined in the Constitution, although the right is not legally defined. Before a strike can be implemented lawfully, the conflict must be referred to the National Conciliation Office. If no agreement is reached the case may be heard by arbitrators. Any strike which is started without compliance with the preliminary procedure is deemed to be illegal. No strike of any significance has taken place in recent years.

### 11.4 Information, Consultation and Participation

A staff delegation (délégation du personnel) must be set up in all private sector undertakings which employ at least 15 people. The size of the delegation depends upon the number of

employees: from one delegate for workplaces with 15 to 25 employees up to 25 delegates in large workplaces. Each staff delegation includes one substitute member for each full member. The members of the delegation are elected by secret ballot on a proportional representation basis. The staff delegation itself will have to appoint from amongst its members or from the employees of the company a security delegate (“délégué à la sécurité du personnel”). In addition, the staff delegation will also have to appoint among its members an equality delegate (“délégué(e) à l'égalité”).

The role of the staff delegation is to protect and to safeguard the interests of the employees in matters relating to working conditions, job security, employment and social status.

Depending on the matter concerned, the employer is only obliged to communicate relevant information to the staff delegation or has to inform and consult the staff delegation. The employer is, amongst other things, obliged to inform and consult the staff delegation on any decision which may involve important modifications to the organisation of the work and the employment contracts, including decisions in relation to the legislation concerning collective dismissals and the preservation of employees' rights in the event of a transfer of an undertaking.

In those undertakings run by incorporated companies, the employer must inform staff delegates at least once a year of the economic and financial changes affecting the undertaking and must communicate periodically any other useful information in relation to the activities of the undertaking.

When the number of employees represented by the delegation exceeds 500, the law grants a certain number of delegates time off to perform their duties on full salary.

During their mandate, the full members as well as the substitute members of the staff

delegation cannot be dismissed. The dismissals will be declared null and void at the request of the staff delegate. However, in the event there is a serious reason for dismissal, a special application may be made to the court to have the labour contract terminated. The protection against dismissal also applies to former members of the staff delegation during the first six months following the termination of their mandate as well as to the candidates for membership of the staff delegation, for a period of three months from the presentation of their candidacy.

A Works Council (Comité mixte d'entreprise) must be set up in any undertaking established in Luxembourg and habitually employing at least 150 employees over a reference period consisting of the last three years.

The Works Council is composed of an equal number of employer and employees' representatives. Its exact size depends on the size of the undertaking.

Members of the Works Council must be designated before the end of the month following the end of the elections of the staff delegations. The employees' representatives are elected among the employees of the undertaking by proportional representation in a secret ballot by the staff representatives. The management of the company appoints the employer's representatives on any basis it sees fit.

The dismissal of a member of the Works Council is mandatorily subject to the approval of the council to which he belongs. If no agreement can be reached, the member of the Works Council can only be dismissed if the competent labour court has given its authorisation. In the case of summary dismissal for grave misconduct, a special procedure is applicable.

The Works Council has a power of co-decision in relation to: (i) the introduction or the application of

technical equipment intended to control behavior and the performance of the employees in their workplace; (ii) the introduction or the modification of measures concerning the health and safety of the employees as well as the prevention of occupational diseases; and (iii) the establishment or the modification of general criteria concerning the personal selection in case of hiring, promotion, transfer, redundancy, and, if applicable, the eligibility criteria for early retirement.

The Works Council must also be informed and consulted prior to any significant decision relating to: (i) the working environment (such as the construction, transformation or extension of the production or administration facilities; (ii) the economic and financial decisions (i.e. each and every decision in economical or financial matters, which might have a determining effect on the structure of the undertaking or on the level of the workforce); and (iii) the evolution of the company: the company must inform and consult the Works Council at least twice a year on the economic and financial changes affecting the undertaking.

The Works Council must meet at least quarterly, or when requested to do so in writing by 25% of the members.

Draft legislation has been produced under which it is envisaged that Works Councils will be abolished and the number of staff delegates increased. It is also anticipated that the staff delegation will be granted power of co-decision in relation to those matters that the Works Council are informed and consulted on.

The Labour Minister currently prepares a draft bill by which the matter of staff representatives shall be reformed. In particular, it is envisaged to abolish the Works Council and to increase, as consequence, the number of staff delegates. It is also contemplated to grant to the staff delegation a power of

co-decision on the subjects for which the Works Council has currently such power.

### **European Works Council**

The European Works Council Directive 94/45/EC on the establishment of European Works Councils (Comité d'entreprise européen) has been implemented in Luxembourg.

The purpose of the European Works Council is to keep employees informed about and consult with them on strategic economic and social matters of a trans-national nature regarding the company. European Works Councils are restricted to large companies employing at least 1,000 people within the EU and EEA and at least 150 people in two or more EU countries.

### **European Company (SE)**

The European Company Statute (comprising the Workers Participation Directive and the Company Law Regulation) has been implemented in Luxembourg to provide a framework for negotiations of the rights of information, consultation and participation of the employees in the European Company (SE).

### **Employee participation in public limited company management**

In public limited liability companies (sociétés anonymes) in which the state has a financial participation of at least 25% or which have had more than 1,000 employees over the last three years, Employee Board Representatives must be elected from amongst the employees of the company. These employee representatives are elected by the staff delegation and have full voting rights. The Employee Board Representatives' contracts of employment cannot be terminated while holding Board office or for six months afterwards, without the approval of the relevant Tribunal. Once elected, they are liable for any management errors they commit in the same way as other Board Members.

## **12. Acquisitions and Mergers**

### **12.1 General**

The LC provides that in the event of a transfer of undertaking, existing employment agreements and all rights and obligations arising from the employment agreement or employment relationship are transferred from the transferor to the transferee by operation of law. A change in the shareholding is not considered to be a transfer of undertaking.

Neither the transferor, nor the transferee, nor the affected employees can contract out of this principle, which is a mandatory rule (disposition d'ordre public) of Luxembourg law. In order to qualify as a transfer coming within the scope of the legislation the transfer must involve an economic entity that retains its identity and comprises an organised grouping of people and assets that facilitate the exercise of an economic activity.

After the transfer, the transferee has to maintain the same or at least equivalent terms and conditions of employment. If the transferee fails to do so the employees are entitled to resign and their resignation would be treated as a constructive dismissal that would entitle them to claim damages in court against the transferee.

The transfer of undertaking does not of itself constitute a valid reason for the termination of the employee's employment agreement either by the transferor or by the transferee.

### **12.2 Information and Consultation Requirements**

Transferor and transferee have to inform in due time (en temps utile) their respective staff delegations on: (i) the date the transfer will take place; (ii) the reasons for the transfer; (iii) the legal, economic and social consequences of the transfer for the employees; (iv) the measures that will be taken in relation to the employees.

If no staff delegation exists within either the transferor or transferee company, the information has to be provided to the individual employees of the company in question.

This information has to be provided before the transfer of undertaking becomes effective and in writing.

The employer has a general obligation to inform and consult the staff delegation on the decisions that are likely to have a significant impact on the organisation of work or on the employment contracts, including those decisions concerning any transfer of an undertaking (see further section 11.4 above). The information and consultation of the staff delegation must occur prior to the decision being taken. No timeframe is however determined by the LC for such information and consultation.

The transferor is also obliged to inform in writing the transferee of all rights and obligations that will be transferred as a result of the transfer of undertaking.

### **12.3 Notification of Authorities**

A copy of the letter sent by the transferor to the transferee (see section 12.2 above) has to be sent to the Labour Inspectorate.

### **12.4 Liabilities**

The transferor and the transferee are, after the transfer, jointly and severally liable (obligation solidaire) for the payment of all amounts that are payable to the affected employees which became due before the date of transfer. The transferor must therefore reimburse the amounts paid by the transferee pursuant to this obligation, unless a commercial agreement has been reached in relation to the apportionment of such liabilities.

## **13. Termination**

### **13.1 Individual Termination**

Employment contracts of an indefinite duration may be terminated by either party with notice, or with immediate effect for serious reasons.

Fixed-term employment contracts cannot be terminated before the expiry of their term, except for serious reasons.

Fixed-term employment contracts and contracts of an indefinite duration may be terminated by either party by mutual consent.

**13.2 Notice**

In undertakings with at least 150 employees, an employer wishing to dismiss an employee must have a preliminary discussion with the employee before terminating the employment contract. At the meeting, the employer must explain the reasons for the proposed dismissal. Formal notice, if it is to be served, must be given between one and eight days after this preliminary meeting. Collective bargaining agreements may provide for more favourable provisions.

The termination of the employment contract with notice period must be notified in writing to the employee (or the resignation to the employer) by registered letter (or by way of a countersignature by the employee/the employer of a copy of the termination letter/resignation letter).

Notice periods are as follows:

Length of Service	Dismissal	Resignation
Under 5 years	2 months	1 month
5 years or over	4 months	2 months
10 years or over	6 months	3 months

It must be stressed that collective bargaining agreements, internal regulations or individual contracts may contain notice provisions that are more favourable to the employees than the statutory minimum.

The notice period starts to run on the 15th of the month if the notice of

termination has been served before that date, or on the first day of the following month, if the notice of termination has been served on the 15th of the previous month or later.

An employer who dismisses without complying with its notice obligations must pay compensation equal to the remuneration for the duration of the notice period, or the remaining part of the period.

Senior executives often negotiate more favourable notice provisions with the individual outcome varying according to a number of factors such as age, security, function, the situation of the job market and contractual provisions.

During the notice period, all the rights and obligations arising from the employment contract subsist. The employee will consequently have to work and will be entitled to his remuneration. The employer may nevertheless free the employee from the obligation to work. During this time, the employee must however continue to be remunerated and must benefit from all his contractual benefits (including entitlement to holidays). The employee is also entitled, if released from work, to start working for a new employer. In this case, the former employer shall bear, until the end of the notice period, in addition to the difference (if any) between the previous salary and the new salary (and the employer's social contributions related to this differential supplement), the employer's social contributions relating to the salary paid by the new employer (up to a maximum amount corresponding to the employer's social contributions calculated on the former salary).

In addition to the notice period, dismissed employees may also be entitled to a statutory severance indemnity (*indemnité de départ*) depending on their length of service within the company. To qualify for a statutory severance indemnity an employee must have at least five years' continuous employment. If an employee

has at least five years' service, he will be entitled to a statutory severance indemnity equal to one month's salary increasing to a sum equal to 12 months' salary if the employee has had at least 30 years' continuous service.

**13.3 Reasons for dismissal**

Under Luxembourg law, an employment contract may only be terminated by an employer if valid reasons for doing so exist. The termination of the employment contract is hence not an absolute right of the employer.

The reasons that may justify the termination of an employment contract falls into two categories:

- (a) the reasons that are related to the behaviour of the employee, such as underperformance, unjustified absences from work, misconducts, etc.
- (b) the reasons that are related to the running of the business and of the company (such as internal reorganization, restructuring, economic reasons, etc.)

Where an employment contract is terminated with notice, an employer does not have to state the reasons for the dismissal in the termination letter.

After having received the termination letter, the employee has a period of one month to request the reasons for the termination of his employment contract.

Where requested the employer will, again within one month, have to notify the employee by registered letter of the reasons for the dismissal. The reasons have to be indicated with precision and must be substantial.

Failure to supply written reasons for the dismissal renders the termination unfair resulting in an obligation to pay damages.

Should the employee not accept the reasons that have been notified, he may

file a court action. The employer must then prove the existence and seriousness of the notified reasons.

In the event of court proceedings it will not be possible to rely on any reasons for termination other than those notified in writing to the employee.

A claim for unfair dismissal may be made where the dismissal is contrary to the law or where the dismissal is not based on reasons connected with the aptitude or conduct of the individual or with the operating needs of the undertaking. Any claim for unfair dismissal must be lodged within three months of notification of termination or at the moment when reasons are given, whichever is later. However, if the employee submits a written protest to the employer, he then has a period of one year within which to lodge the claim starting from the date of the protest.

Any termination of the employment contract which cannot be justified by valid reasons will be considered as being unfair, and hence entitle the employee to damages for his moral and material prejudice. As a general rule, under Luxembourg law the employee will however not be entitled to claim reinstatement (subject to certain specific exceptions e.g. employees on maternity leave, staff delegates, etc).

The employment contract can be terminated with immediate effect by either party for “a serious reason” (motif grave). The LC defines “serious reason” as any fact or fault that immediately and definitively renders the continuation of the employment relationship impossible. This usually involves gross misconduct on the part of the employee.

The rules on notice period and statutory severance indemnity do not apply in the event of the employment ending because of gross misconduct.

The termination must be notified in writing by registered mail (or by way of a

countersignature on the termination letter). The preliminary meeting, if required, must take place prior to the termination of the employment contract for serious misconduct.

The termination letter must indicate the precise reasons for the dismissal.

If the employer summarily terminates the contract on the grounds of “motif grave”, which is not subsequently demonstrated or which is not considered serious enough to amount to “motif grave” by the labour court, the termination is considered to be unfair (see above).

#### 13.4 Special Protection

Certain employees have special protection against dismissal. For instance, members of the staff delegation may not be dismissed unless there is a serious fault recognised as such by the labour court (see section 11 above).

Employees on sick leave during the first 26 weeks and employees on maternity and parental leave also benefit from a specific protection against dismissal. They are however not all entitled to claim for reinstatement.

#### 13.5 Closures and Collective Dismissals

The dismissal of employees for reasons not related to the employee concerned (e.g. dismissals for reasons linked to the functioning of the undertaking (including restructuring)) are regarded as “collective” by the LC if:

- (a) there are at least seven dismissals within a 30-day period;
- (b) there are at least 15 dismissals within a 90-day period.

For the purpose of calculating the above thresholds, the LC includes any dismissals made at the employer’s initiative for one or several reasons that do not relate to the employee, if the number of such dismissals equals at least four. This rule applies, for example, in the

case of termination of employment by mutual consent or, in the case of early retirement, if the termination or early retirement is motivated by the economic situation of the employer or, by the fact that the employer has announced his intention to reduce its headcount.

If an employer is contemplating a collective dismissal it is obliged to negotiate a social plan before being entitled to proceed with the dismissals. Dismissals that are notified: (i) prior to the conclusion of a social plan or (ii) prior to the official statement released by the Conciliation Board declaring that no agreement was reached on a social plan or (iii) prior to the election of a staff delegation (if required) are null and void.

The LC provides that, prior to notifying the termination of the employment contracts, the employer must, in good time (en temps utiles), start negotiations with the representatives of the employees. Prior to the commencement of the negotiations, the employer is obliged to give the representatives, in writing, information containing at a minimum: the reasons for the contemplated collective dismissal, the number and the categories of employees affected by the dismissals, the number and categories of employees regularly employed by the company, the period over which the dismissals are contemplated, the criteria envisaged for the selection of the employees to be dismissed and the method of calculation of any indemnities in excess of the statutory amounts due, or, the reasons justifying the refusal of the employer to pay any enhanced indemnities.

The LC also provides that the employer has a general obligation to inform and consult the staff delegation on the decisions that are likely to have a significant impact on the organisation of the work or on the employment contracts, including those decisions concerning collective dismissals (see section 11.4 above). The information and

consultation of the staff delegation must be carried out prior to the decision being taken. The LC does not, however, establish a time frame for such information and consultation.

The LC provides for a detailed procedure and imposes various deadlines for the negotiation of a social plan. The LC provides that 15 days after the beginning of the negotiations, the employer together with the representatives of the employees have to execute a social plan, evidencing the parties' agreement or disagreement. In the event of disagreement on the social plan at the end of the 15 day period, the parties have to execute, without delay, detailed minutes of the negotiations evidencing their position during the negotiations.

If a social plan cannot be agreed a conciliation procedure applies. Within three days of the execution of the minutes of the negotiations, the parties must call upon the Conciliation board, which will set up and convene a joint commission that will have to deliberate according to a strict timetable.

Luxembourg law only requires compliance with the procedure and timetable outlined above and that the negotiations are in good faith. It does not require an agreement to be reached or a social plan to be executed.

The LC also contains provisions on the conclusion of an agreement on the preservation of employment (*plan de maintien dans l'emploi*) in the event of a certain number of dismissals. Any employer employing at least 15 employees is obliged to notify the secretariat of the "Comité de Conjoncture" of any dismissal for reasons not related to the employee. The "Comité de Conjoncture", can at any time invite the social partners to start discussions to establish an agreement on the preservation of employment. The Comité de Conjoncture will, in any event, invite such discussion when five employees are

dismissed for reasons not related to the individual employee during a reference period of three months or in the event of eight such dismissals during a reference period of six months. The employer and/or the staff representatives can also take the initiative to request the negotiation of such an agreement if these thresholds are not reached. In that case, the party that wants to start negotiations has to inform the 'Comité de Conjoncture'. The agreement on the preservation of employment has to address different topics, such as application of the legislation concerning partial unemployment benefits (*législation sur le chômage partiel*), the possibility of adapting working time by applying amongst other things a shorter or longer reference period, voluntary part-time work, the possibility of using time-saving accounts (*comptes épargne-temps*), the application of the legislation on the temporary secondment of the workforce (*prêt temporaire de main d'oeuvre*) etc.

## 14. Data Protection

### 14.1 Employment Records

The collection, storage and use of information held by employers about their employees (prospective, current and past) are regulated by the law dated 2 August 2002 on the Protection of Persons with regard to the Processing of Personal Data as modified by a law dated 27 July 2007 (the "Data Protection Law"), which implements the Data Protection Directive 95/46/EC (the "EU Directive").

The Data Protection Law applies to all forms of capturing, processing and dissemination of sound and image. Employers, as data controllers, have to ensure that personal data are:

- (a) processed fairly and lawfully;
- (b) collected for specified, expressly indicated and legitimate purposes and not further processed in a way incompatible with those purposes;
- (c) adequate, relevant and not excessive in relation to the

purposes for which they are collected and/or further processed;

- (d) accurate and, where necessary, kept up-to-date; every reasonable step must be taken to ensure that data which are inaccurate or incomplete, having regard to the purposes for which they were collected or for which are further processed, are deleted or rectified; and
- (e) kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed.

The Data Protection Law requires the data controller, prior to the commencement of personal data processing to notify such processing to the National Data Protection Commission (the "CNPD"), unless the processing has been expressly exempted by the Data Protection Law.

The Data Protection Law gives an exhaustive list of the exempted processing. Included amongst the exemptions from notification, is data processing exclusively linked to the administration of staff of the data controller provided that the processing does not cover data on health of the data subject, or sensitive or legal data, or data used to assess the data subjects. In addition such data may not be communicated to third parties except as required by law or regulation, or if such communication is necessary to achieve the objectives of the processing.

Breach of the requirement to process fairly and lawfully is punishable by a term of imprisonment of eight days to one year and/or a fine of €251 to €125,000.

In addition, the CNPD can, amongst other sanctions, order the destruction and deletion of any data, and prohibit the processing of personal data for a limited duration.

Breach of the Data Protection Law requirements may also give rise to civil sanctions ordered by the judge of the district where the processing was carried out (e.g. discontinuance of the processing, temporary closure of the business of the data controller)

#### 14.2 Employee access to Data

Under the Data Protection Law, data subjects have a right of information, a right of access and a right to correct inaccurate data.

Except in certain specific cases, employees, as data subjects, have the right to access personal data relating to them and to obtain a copy of such information and the right to correct it where inaccurate.

In addition the LC provides that every employee has the right to access twice a year, during working hours, the files containing data relating to him/her.

Data subjects will in certain circumstances have a right to object to the processing of personal data for amongst other things direct marketing purposes. Data subjects may also object to the disclosure of personal data to third parties and must be informed of this right.

#### 14.3 Monitoring

There are specific provisions in both the LC and the Data Protection Law addressing the processing of personal data for the purpose of monitoring employment activities. The provisions cover all means of monitoring and are equally applicable to public and private sector employers.

Data processing for the purposes of monitoring activities is only allowed:

- (a) if it is required for the health and safety of the employees;
- (b) if it is necessary for the purpose of protecting the company's assets (e.g. CCTV monitoring for safety reasons, monitoring of emails, Internet or telephone in the financial sector);
- (c) if it is required to control the mechanical production process;
- (d) on a temporary basis, in order to control or measure the productivity or performances of an employee with a view to establishing his or her salary, if such processing is the only means of determining the exact salary of the employee; or
- (e) if it is carried out in the context of a flexible working hours organisation in accordance with the law.

In case (a), (d) and (e), no monitoring may take place without the approval of the Works Council. The consent of the employee is ineffective.

Furthermore, the employer must inform the affected employees as well as the Works Council, or failing that the staff delegation, or failing that again the Labour Inspectorate of the following:

- (a) the purposes of the processing;
- (b) the period(s) of time during which the monitoring is to be carried out; and
- (c) the duration and the conditions in which the data will be stored.

The processing and monitoring of employees' activities requires the prior authorisation of the CNPD.

Beyond the scope of data protection or employment law, there are further general rules relating to the secrecy of communication and the right to privacy.

#### 14.4 Transmission of Data to Third Parties

Under the Data Protection Law transfers of data within the EU are not restricted.

The transfer to a country other than an EU Member State ("Third Country") of personal data that are subject to processing, or that will be subject to processing after their transfer, may only take place if the recipient country ensures an adequate level of protection and complies with the provisions of the Data Protection Law and its implementing regulations. The transfer of data to a Third Country, which is not assessed by the data controller as offering an adequate level of protection may however take place in certain conditions, e.g. with the consent of the data subject.

*Contributed by Clifford Chance, Luxembourg*

# Malta

## 1. Introduction

Maltese Employment Law is essentially based on the contractual relationship between the employer and employee, with certain controls being imposed by statutory intervention. Whereas certain conditions of employment are governed by statute, other conditions such as restraint of trade are unregulated and parties can therefore agree on whatever terms and conditions are acceptable to them and are reasonable in the eyes of the judicature.

The legal system is a mixed one where elements of French and Italian law are amalgamated to form the basis of Maltese contract law. The legal theories applied by Maltese courts when examining cases concerning the variation of the employment contract, for example, are heavily influenced by Continental doctrine. For historical reasons however, the legal system applied in modern employment matters such as disciplinary action or constructive dismissal is strongly influenced by common law practices.

The Employment and Industrial Relations Act of 2002 (EIRA) (Chapter 452 of the Laws of Malta), which regulates some conditions of employment and contracts of service, currently governs Maltese labour law. The Employment and Industrial Relations Act has in fact amended the pre-2002 legislative position and introduced the necessary legal framework for Malta to come in line with other European jurisdictions.

Traditionally, collective agreements are considered to be binding private agreements and are enforceable between the parties. Many disputes between employers and employees are settled in the Industrial Tribunal which has exclusive jurisdiction to hear cases relating to dismissal, trade disputes and other employment law disputes such as those related to harassment, discrimination and the observation of the working time requirements, most of which have

originated from Malta's membership of the European Union.

## 2. Categories of Employees

### 2.1 General

Generally speaking, employment legislation in Malta is equally applicable to employees at every level of the workplace. As with English legislation, some recent legislation refers to the term 'workers' which broadly speaking is a term encompassing employees, agency workers, contract staff and self-employed persons who are 'dependant' on one particular employer.

A Maltese employee is usually categorised as a full-timer, a whole-timer or a part timer. A full-timer is a person who works an average of 40 hours per week; whereas a whole-timer is a person who works a number of hours specified in an applicable Wage Regulation Order. A Wage Regulation Order (also known as a Sectoral Order) specifies a number of employment parameters and rights which are applicable only to a particular sector of the employment market (e.g. the Food Manufacturing Wage Regulation Order of 1991). One of the specified parameters is the whole-timer weekly hours rate (usually ranging between 20 and 35 hours per week). An employee working in that sector who reaches that number of hours is entitled to be given the maximum leave and benefits entitlement as a full-timer.

A part-timer under Maltese employment law is an employee who works less than the full-time or the whole time weekly hours of work. Broadly speaking, part-timers are not to be treated less favourably than full or whole-timers in so far as remuneration and benefits are concerned. Pro-rata calculations and payments as compared to whole-timers or full-timers are usually applicable to part-timers. Also, under the Part Time Employees Regulations of 2002 (as amended) part-timers are entitled to *pro*

*rata* benefits, leave etc. notwithstanding the number of hours worked.

A similar right not to be treated less favourably also applies to fixed-term contract employees as compared to those comparable employees employed on an indefinite-term contract.

### 2.2 Directors

The Companies Act of 1995 regulates the position of directors of private and public limited liability companies, who may or may not also be employees of the company.

## 3. Hiring

### 3.1 Recruitment

Maltese employers recruit through a variety of sources, the most popular being advertising in newspapers and fee-charging employment agencies. The Employment and Training Corporation (ETC) is a government run agency which provides a free recruitment service, normally used by employers to recruit less senior employees. Private employment agencies require a licence to operate. The latter is issued by the Department of Employment and Industrial Relations after the prospective applicants go through an ad hoc application process.

### 3.2 Work Permits

As Malta is an island of 390 sq km in size, it is necessary to impose certain immigration regulations to control the influx of labour within acceptable limits. Accordingly, those who intend to set up shop in Malta, or private individuals who wish to work in Malta, should make reference to the local laws, principally the Immigration Act of 1970 (Chapter 217 of the Laws of Malta) and the Immigration Regulations of 2004 (LN 205 of 2004). Since the freedom of movement principles in relation to citizens of the European Union are respected, the latter have not required a work permit to work in Malta since June 2011. Non-EU citizens always require a work permit in order to work in Malta. A work permit can

be obtained within three months and costs from €230 for a permit for one year and can be renewed for further periods of one year at a price of €230 per year. If a Non-EU citizen wishes to be employed in Malta, he/she must have a genuine prospect of securing employment before entering Malta to work and the employer needs to prove that the employee's skills are not easily found within the Maltese Islands. Once a prospective employer has been identified, the applicant may be issued with an entry visa if required, that is valid for a fixed period (from three to six months as determined by the Immigration Police) until the work permit is issued.

Once a work permit has been obtained by a non-EU citizen, his dependants (namely his/her spouse and children below the age of 21) are also given the right of residence and the right to work in Malta upon application for and issue of a valid work permit as described above. As far as non-EU citizens are concerned, an entry visa may be required from some countries that do not have a free movement agreement with Malta (a list of countries which have a free movement agreement with Malta can be found at [www.foreign.gov.mt](http://www.foreign.gov.mt)).

#### 4. Discrimination

The Constitution of Malta and other Maltese employment statutes protect employees from discrimination on the grounds of sex, religion, race, disability, age and sexual orientation. Discrimination against part-timers and persons employed on fixed-term contracts is also regulated.

Discrimination in the work place is unlawful as far as recruitment, treatment during the course of employment and termination is concerned. Chapter Four of the Maltese Constitution protects persons from being discriminated against on a number of grounds in every aspect of life, including work. With the advent of European Union membership, a number of anti-discrimination provisions with direct relevance to the workplace were

included in the new Employment and Industrial Relations Act of 2002 and a number of statutory instruments were introduced in order to expand upon the general principles found in EIRA.

Such instruments include the Equality for Men and Women Act 2003 (as amended) which focuses on sexual discrimination; the Employment and Industrial Relations Interpretation Order of 2003 which instructs the Industrial Tribunal to refer to the European Directives on discrimination and the Equal Treatment in Employment Regulations 2004 (as amended) which focuses on the principle of equal treatment in relation to religion and religious belief; racial or ethnic origin; disability; age and sexual orientation.

## 5. Contracts of Employment

### 5.1 Freedom of Contract

It is a basic principle of Maltese Civil law that parties are free to contract on whatever terms they choose. Freedom of contract is however limited by statutory intervention in that no parties may agree to terms that are below the minimum rights granted by statute. The Employment and Industrial Relations Act 2002 in fact specifies that if a contract of employment specifies conditions that are less favourable to the employee than those specified in the Act or in regulations issued under it the statutory conditions shall prevail.

Contracts of employment can be entered into for a fixed term or for an indefinite term. Fixed-term contracts or those entered into for a specified task can be entered into as long as the employee is not continuously employed with the same employer on a fixed-term contract for more than four years. As soon as the four years are up, the employee's contract of employment becomes an indefinite one unless the employer has objective reasons to justify the renewal of the fixed-term contract. Casual employment is also possible.

### 5.2 Form

Under Maltese law, every employee must have a written contract of employment or a Minimum Statement of Conditions. Such a contract of employment may be written or verbal. However, if the contract entered into is verbal, the employer then has eight working days to give the employee either a contract of employment or a written statement of minimum conditions according to the Information to Employees Regulations of 2002. Such information includes normal rates of pay, overtime rates, hours of work, place of work, and a reference to all the leave to which an employee is entitled.

### 5.3 Trial Periods

The probationary period within which the employer may terminate the employment of the employee without assigning any reason is set at a maximum of six months for lower grade employees. However if the employee's employment is of a technical, executive, administrative or managerial nature and the employee's wages are at least double the minimum wage during that year, the probationary period is usually set at one year.

### 5.4 Confidentiality and Non Competition

Although there are no statutory rules governing confidential information, the Maltese courts have adopted the English doctrine that an employee is bound by a general duty of good faith and a duty not to disclose the employer's confidential information.

Recent jurisprudence has held enforceable a clause which prohibits the employee from soliciting clients of the employer with whom he had contact. A general clause which prohibits direct competition with the employer after the employment has been terminated has been declared by the Maltese courts to be unenforceable. Similarly, provisions which purport to restrict employees working for competitors after termination of the employment will rarely be enforceable, even if they are reasonable

and the employer has a legitimate interest to protect (i.e. confidential information or trade secrets). The Maltese courts have emphasised that the limitations of time and market have to be reasonable within a small area such as the Maltese islands. An ex-employee cannot be forced to leave his country in order to pursue his vocation.

A decision of the Maltese Court of Appeal held that giving an employee adequate compensation for the restriction is not sufficient to render it enforceable. In addition, if any financial penalty is specified in the contract of employment with the intention of creating a deterrent or a prohibition on the freedom of the individual, the penalty in question will be considered null on public policy grounds, unless it arises from a specific provision of the law. The court also held that anything that goes beyond the specific provisions of the Employment and Industrial Relations Act of 2002 cannot be enforced.

### **5.5 Intellectual Property**

Broadly speaking, according to the Copyright Act, if intellectual property is created or discovered by an employee during the course of his employment, it will belong to the employer.

## **6. Pay and Benefits**

### **6.1 Basic Pay**

There is a national minimum wage of €158.11 per week (€151.33 per week in the case of young people and trainees aged 17 and €148.49 per week in the case of young people and trainees aged 16 and younger).

Lower-grade workers in Malta are generally paid monthly on the basis of a weekly wage, although in some industries it is customary for workers to be paid “piece-rates” according to the amount of work done. Overtime at one and a half times the normal rate is generally paid in respect of additional hours worked in excess of 40 hours per week.

More senior employees are normally paid monthly in arrears and are not generally paid for overtime since their remuneration package is deemed to compensate them for any overtime worked.

Although it is not common for pay to be index-linked, subject to the national minimum wage, there is a legal obligation on employers to increase wages according to a cost of living index that is published annually by the Maltese government. This year’s cost of living increase was €4.66 a week.

### **6.2 Pensions**

Although state pensions are provided under the social security system, private pension schemes are increasing in popularity. Private pension provision may be by way of an employer-sponsored occupational pension scheme, or by an individual employee’s own personal pension scheme.

The Maltese state pension scheme is currently under review and there are plans to incentivise workers (especially those below the age of 35) to participate in private pension schemes in order to lessen the burden on the state. Tax incentives for employers wishing to set up occupational pension schemes are also in the pipeline.

### **6.3 Incentive Schemes**

Share schemes are not mandatory in Malta but are increasing in popularity within the financial services sector because of the popularity that such schemes enjoy within similar sectors in other European countries.

### **6.4 Fringe Benefits**

Common fringe benefits may typically include private health insurance and cars (for more senior employees particularly). Such fringe benefits are usually contractual and employers may not unilaterally withdraw them.

### **6.5 Deductions**

Although generally, according to EIRA employers are prohibited from making

deductions from pay, they are obliged to deduct income tax at source through the “Final Settlement System” (FSS) scheme. They are also obliged to deduct employees’ National Insurance contributions (social security contributions). Further deductions such as trade union membership fees or occupational pension scheme contributions may only be deducted with the written consent of the employee.

## **7. Social Security System**

### **7.1 Coverage**

The single state administered social security system provides benefits by way of pensions, unemployment benefits, family-based benefits, medical benefits and sickness and injury benefits. Employers should be aware both of the costs involved and of the administrative burden of some state guaranteed benefits (for example, sick leave pay and statutory maternity pay) responsibility for which has been devolved to employers.

Health care has, traditionally, been provided by the state. However, there has been an increased use of private medical insurance and private medical insurance has become an increasingly common employee benefit.

### **7.2 Contributions**

According to the Social Security Act (Chapter 213 of the Laws of Malta) employers must deduct from employees’ pay National Insurance contributions payable by employees and make an employer’s contributions in respect of each employee. National Insurance contributions are payable by employees at a rate of 10% of earnings between the lower and upper earnings limit which are fixed each year, (and for the year 2012/13 are €158.11 and €378.50 per week respectively). Employer’s contributions are the equivalent of the employee’s.

## **8. Hours of Work**

The usual working week is 40 hours in most sectors of employment. Specific

limitations on the hours of work are imposed by the Working Time Regulations of 2003 on the hours worked each day and each week by “workers” (this includes employees and agency workers). Generally working time must not average more than 48 hours per week over a reference period of 17 weeks. Manufacturing and tourism industries have a reference period of 52 weeks and Collective Agreements may also extend the reference period from 17 weeks up to a maximum of 52 weeks. Under the Working Time Regulations however, a Maltese worker may opt out of the regulations in order to work more than the 48-hour average stipulated by law.

Workers are also entitled to a daily rest of at least 11 consecutive hours in each 24-hour period and a weekly rest period of not less than 24 hours in any seven-day period. Night workers (i.e. where at least three hours of daily working time is worked at night as a matter of course) must not work in excess of eight hours in each period of 24 hours if the type of work carried out is particularly strenuous.

## 9. Holidays and Time Off

### 9.1 Holidays

The Working Time Regulations of 2003 give the employee a right to four working weeks and four working days of paid vacation leave. Any leave taken beyond that period is taken at the option of the employer and is usually unpaid. Annual leave accrues on a *pro rata* basis from the first day of employment. Money may not be paid in lieu of untaken statutory holiday entitlement except on termination of employment. According to the National Holidays and other Public Holidays Act (Chapter 252 of the Laws of Malta) there are 14 national and public paid holidays per annum. These are to be given over and above the statutory annual vacation leave, to the extent they fall on a working day for the employee.

### 9.2 Family Leave

Subject to satisfying the necessary statutory criteria, a woman is entitled to 18 weeks’ ordinary maternity leave on full pay, with effect 1 January 2013. If sickness or other complications related to the pregnancy and/or birth arise, the employee may ask for up to eight weeks’ special leave during which an entitlement equal to the minimum wage is payable. Any further special leave is unpaid.

Men and women with one year’s continuous service are entitled to four months’ unpaid parental leave in respect of children under eight years of age. Employees are also allowed 15 hours of paid time off to deal with emergencies arising in relation to persons related to them up to the first degree.

### 9.3 Illness

Employees absent from work by reason of sickness have a right to receive sick pay from their employer. The number of days that may be taken as sick leave varies according to sector, however, in terms of the Minimum Special Leave Entitlement Regulations of 2007, in default of an applicable Wage Regulation Order, an employee is entitled to the equivalent in hours of two working weeks per year. Part of the cost may be recouped from the Social Security Department in that employers may deduct the benefits that are received by the employee from the wages due.

### 9.4 Other time off

Employees are entitled to injury leave of up to one year on full pay. Such benefit is payable by the employer and may be reduced by the injury benefit which the employee receives from the state.

Employees are also entitled to one day of bereavement leave, two days of marriage leave, one day of birth leave, and jury service leave for as long as it is necessary.

## 10. Health and Safety

### 10.1 Accidents

Employers are obliged by the Occupational Health and Safety Authority Act of 2000 to safeguard the physical and psychological well being of their employees at any place of work. Breach of the Occupational Health and Safety statutes is a criminal offence which may be coupled with a civil suit for damages. The statutes are coherent with the European directives in place and are therefore both general and work specific.

There are no compulsory employer’s liability insurance rules in Malta, although most employers are insured under such policies.

### 10.2 Health and Safety Consultation

Employers in Malta are under an obligation to consult and inform their employees on all health and safety matters. There is no obligation to have a health and safety company policy but risk assessments must be carried out on all types of work. Consultation must be carried out through an elected Workers’ Health and Safety Representative or with a Health and Safety Committee.

## 11. Industrial Relations

### 11.1 Trade Unions

Although union membership is stronger in some industries than in others, it can easily be said that the Maltese working population is still highly unionised. Major unions include the General Workers Union (GWU) and the UHM (Union Haddiema Maqghudin) (these are general unions covering various sectors) and the sector specific unions such as the MUBE (Malta Union of Bank Employees) and the MUT (Malta Union of Teachers). Employer’s unions such as the MEA (Malta Employer’s Association) are also popular.

Although statute regulates the functions and proceedings of a trade union in certain instances, there is no statute to regulate recognition. In cases of

recognition, a majority of member workers within a given bargaining unit is usually recognised due to a long-standing custom. Although method of bargaining is left up to the parties, industrial action and its consequences are regulated by statute.

### 11.2 Collective Agreements

Collective agreements are popular in the traditional sectors of employment such as manufacturing and tourism and these agreements usually regulate matters such as pay, working hours, holidays, dispute procedures and procedures to deal with redundancy. Collective agreements are considered to be private agreements that are binding on the parties.

### 11.3 Trade Disputes

Maltese law does not have a comprehensive “strike law” or any enshrined right to strike. Rather, unions are granted statutory protection from liability, which they would otherwise incur under the tort law, when taking industrial action pursuant to a trade dispute. It is debatable whether an employee who takes industrial action loses the right to pay during that period. It is however unfair to dismiss an employee who is taking part in “official” industrial action.

### 11.4 Information, Consultation and Participation

There are at present no formalised requirements for employee participation in Malta, although some employers operate share schemes as an additional remuneration incentive. However, obligations do arise with respect to consultation and the provision of information to appropriate representatives (these are usually either elected employee representatives or representatives of a recognised trade union).

The obligations are:

Where a collective redundancy (as defined in the Collective Redundancies (Protection of Employment) Regulations 2002) is proposed to take place within a period of

30 days, consultation with appropriate representatives must take place at the earliest possible opportunity. Minimum time limits for consultation are laid down and failure to consult or comply with the time limits gives the Director of Employment and Industrial relations the right to issue a fine which is equal to €1,165 per employee declared redundant.

Employers are required to provide certain information to appropriate representatives upon the transfer of an undertaking as defined in the Transfer of Business (Protection of Employment) Regulations 2002.

Employers must consult with employees on health and safety matters. Consultation has to be with the Worker's Health and Safety Representatives as elected by the workforce or with employees directly.

Under the European Works Council Directive, any undertaking or group of undertakings with at least 1,000 employees in the EU and 150 employees in more than one EU state may have to set up a Works Council or a procedure for informing and consulting employees at European level. The Directive has now been implemented in Malta, and while the initial establishment of the employee negotiating body is quite clearly regulated, subsequent negotiations are generally up to the parties to regulate.

Following the European Parliament's approval of the Workers Participation Directive, Malta has implemented legislation in 2004 in respect of worker involvement in the affairs of European Companies. This will lead to the regular consultation of, and provision of information to, a body representing the employees of the companies that have formed the European company, in respect of current and future business plans, production levels, management changes, collective redundancies, closures, transfers, mergers and so on.

The Maltese government has also implemented the Employee Information and Consultation Regulations of 2006 which oblige employers who employ 50 employees and above to have a system of information and consultation with the employee's representatives on matters which are likely to lead to substantial changes in the work organisation or contractual relations.

## 12. Acquisitions and Mergers

### 12.1 General

Upon the transfer of an undertaking, the contracts of employment of the transferor's employees automatically transfer from the transferor to the transferee, unless those employees can genuinely be made redundant. Any dismissal connected with the transfer will, in principle, be unfair and give rise to an entitlement to claim compensation. Changes to terms and conditions of employment by reason of the transfer are voidable, even if agreed to by the employees.

### 12.2 Information and Consultation Requirements

When the undertaking carrying out the transfer (transferor) employs 20 or more employees, Section 38 (2) of EIRA requires both the transferor and the transferee to give the employees' representatives the following information:

- (a) the date or proposed date of the transfer;
- (b) the reasons for the transfer;
- (c) the legal, economic and social implications of the transfer for the employees; and
- (d) the measures envisaged in relation to the employees.

The employees' representatives are the officials of a recognised trade union or a number of employees elected specifically for the purpose of negotiation in relation to the business transfer.

The requisite information must be provided by means of a written statement given to the employee representatives at least 15 working days before the transfer is carried out or before the changes in conditions of employment of the employees come into effect, whichever is the earlier.

If the employment conditions of the affected employees will change as a consequence of the transfer, consultation on the impact of the changes has to begin with the employees' representatives seven working days after the information statement is received by the representatives. Although statute does not stipulate whether a sale and purchase agreement can be signed before the information/consultation obligations are fulfilled, employers are discouraged from doing so.

### 12.3 Notification of authorities

On the same day that the statement is sent to the employees' representatives, a copy of the statement must be sent to the Director of Employment and Industrial Relations.

### 12.4 Liabilities

Contravention of any of the regulatory provisions is a criminal offence punishable with a fine of €1165 per employee treated illegally in connection with the transfer.

## 13. Termination

### 13.1 Individual Termination

An employer wishing to terminate the employment relationship must be careful to comply with both the statutory and contractual requirements with regard to reasons for and procedures leading to dismissal.

### 13.2 Notice

Statute lays down a minimum period of notice that will apply where the contract of employment does not make any provision for notice. Where the contract of employment stipulates a notice period such a notice period will only stand if the

notice is more favourable to the employee. Notice periods only apply in cases of redundancy or resignation. There are no notice periods for termination for good and sufficient cause (e.g. gross misconduct).

The statutory minimum period of notice depends on the length of time the employee has been in employment with a particular employer. The notice cannot however exceed a maximum of 12 weeks. These notice periods apply to all categories of employees irrespective of seniority.

If an employer prefers that an employee does not work his or her notice period, the general practice is for employers to pay salary in lieu of the notice period. There are no special formalities for making such payments (except as to the deduction of tax where required).

### 13.3 Reasons for Dismissal

Although the employer is always free to terminate the employment, it may only do so for a good and sufficient cause or in cases of redundancy. Even so, the employee may always contest the redundancy or the actual termination in the Industrial Tribunal. In cases where the employee is engaged on a fixed-term contract, the law stipulates that if either party wishes to terminate the employment before the time stipulated at law, the defaulting party has to pay to the other an amount which is equal to half the wages that the employee would have earned in the period remaining. Also, according to statute, fixed-term contracts may not be terminated on the basis of redundancy.

Generally, it is accepted that theft, misconduct and a genuine redundancy are a good and sufficient cause for termination. As with most common law jurisdictions, the employer must show that he has a good reason for the dismissal and that a fair and reasonable procedure has been followed when implementing the dismissal.

There is no minimum qualifying period for an employee to refer the case to the industrial tribunal and there is no minimum or maximum cap on the award that the tribunals may give. The most common type of tribunal award is financial compensation although if the employee was not in a position of trust, he may ask for, and be granted, reinstatement.

### 13.4 Special Protection

The same rules apply to dismissals connected with pregnancy or maternity, parental leave, health and safety, trade union membership or activities, transfers of undertakings, breach of the Organisation of Working Time Regulations and making a disclosure to the proper public authority ("whistle-blowing") although if the termination is found to be made for reasons connected with the employee wanting to exercise his statutory rights in relation to the above mentioned topics, the dismissal is statutorily one which is unfair.

The only instance in which the law expressly prohibits termination of employment is when the employee is on injury leave.

### 13.5 Closures and Collective Dismissals

As stated above, redundancy constitutes a good and sufficient cause for dismissal. Although it may be applicable to individual termination, it is commonly associated with the partial or total closure of a business.

Redundancy is not a statutorily defined term and Tribunals tend to rely on the definition as found in the ILO Recommendation no. 119 on the Termination of Employment and English judgments. The redundancy must therefore be based on a re-organisation of the company or on financial difficulties. Statute also defines which employees must be made redundant as the EIRA dictates that in cases of redundancy, an employer shall terminate the employment of the last person to be

engaged in the pool of employees affected by the redundancy.

There is no eligibility criterion for redundancy and the law establishes that the notice period that is applicable to resignations also applies in cases of redundancy. In some industries there may be enhanced contractual redundancy packages available but these usually depend upon the collective agreements in place. Employers should take care to comply with applicable consultation and information requirements that are found in the Collective Redundancies Regulations as described under 11.4 above.

## **14. Data Protection**

### **14.1 Employment Records**

The collection, storage and use of information held by employers about their employees and workers (prospective, current and past) are regulated by the Data Protection Act 2001 (DPA), which implements the EU Data Protection Directive.

There is currently no Data Protection Guidance Note or Code of Practice that focuses on employment issues although such a code is in the pipeline. Infringement of data protection law can lead to fines and compensation claims from affected employees or regulatory action.

Essentially employers, as data controllers, are under an obligation to ensure that they process personal data about their employees (whether held on manual files or on computer) in accordance with specified principles including the principles of proportionality and transparency. It is also recommended that the workforce is informed of any procedure being implemented due to the provisions of the DPA.

### **14.2 Employee Access to Data**

Employees, as data subjects, have the right to make a subject access request. This entitles them, subject to certain limited exceptions, to be told what data is held about them, to whom it is disclosed and to be provided with a copy of such personal data. Subject access requests cover personal data held in manual and electronic records such as email. There is no regulation on charges levied on employees although the authorities tend to look down upon such initiatives.

### **14.3 Monitoring**

Although there is no direct legislation on this topic, the monitoring of employee email, internet and telephone usage and closed circuit TV monitoring is regulated by the general principles founding the DPA. Although there have been no decisions on the subject as yet,

monitoring is so far permissible provided that it is carried out in accordance with the DPA principles in that it should be adequate, relevant and not excessive and it should be carried out in the least intrusive way possible. Any adverse impact of monitoring on employees must be justified by its benefit to the employer and/or others. Express employee consent to monitoring is not usually required, however, employees should be made aware that monitoring is being carried out, the purpose for which it is being conducted and to whom the data will be supplied. Where disciplinary action is a possible consequence of anything discovered this too should be made clear to employees.

### **14.4 Transmission of Data to Third Parties**

An employer who wishes to provide employee data to third parties must do so in accordance with the DPA principles and processing conditions. It should be noted that the DPA prohibits the transfer of data to a country outside the EEA unless that country ensures an adequate level of protection for personal data or one of a series of limited exceptions apply.

*Contributed by Ganado & Associates*

# The Netherlands

## 1. Introduction

In the Netherlands employment relations are regulated by the Dutch Civil Code and by a large number of specific rules and regulations. These employment rules and regulations apply to private employment contracts. Employment conditions for civil servants are regulated by a different system, that is not addressed here. In addition, collective labour agreements may apply for certain branches of industry or at company level. The employment provisions of the Civil Code and the associated rules and regulations lay down various mandatory rules, which are mainly designed to protect employees. The Dutch Civil Code is largely influenced by EU laws and regulations.

## 2. Categories of Employees

### 2.1 General

Most employees work on the basis of a permanent or temporary contract with their employer. There are limits on the ability to extend temporary contracts.

Many companies use temporary workers supplied through special employment agencies. Such agency workers are employed by the agencies and are therefore not considered to be employees of the company using them. Agency workers do not necessarily have the same employment conditions as regular employees. As a general rule, agencies are liable to pay temporary workers salaries equal to the salaries paid by the hiring company to its own employees. Depending on the applicable collective labour agreement, exceptions to this rule may apply.

Regulations regarding the position of on-call workers include a minimum level of pay per call and presumptions pursuant to which the on-call worker can be deemed to have an employment agreement and/ or an employment agreement of a certain number of hours with the company using his services.

Provisions of the Civil Code and other employment legislation shall in principle apply equally to part-time employees. As a general rule, employees that work part-time must be treated equally to full-time employees, unless objective reasons justify different treatment.

### 2.2 Directors

The general meeting of shareholders or the supervisory board of the company appoints a managing director (statutair bestuurder). Managing directors are usually also employed by the company or a group company and as such, they are generally protected by the same rules that are applicable to regular employees, except in connection with the termination of their employment (see further below). With effect from the implementation of the Act on Management and Supervision (Wet Bestuur en Toezicht) (see further below), managing directors of listed Dutch companies can no longer be employed on the basis of an employment agreement. They must provide their services on the basis of an assignment agreement (overeenkomst van opdracht) instead.

The duties and obligations of managing directors are regulated by law, by the company's articles of association and, for listed Dutch companies, also by the Dutch Corporate Governance Code. The Corporate Governance Code, amongst other things, deals with issues such as fixed and variable remuneration, termination fees and the term of appointment. Listed Dutch companies that do not comply with the Code will need to explain in their annual accounts why they deviate from the Code (in accordance with the so-called 'comply or explain' - principle).

With effect from 1 January 2013, the Act on Management and Supervision entered into force. This introduced the statutory basis for the so-called one-tier board and imposes a limit on the number of supervising roles that managing and supervising directors of qualifying entities may hold. Prior to this the management

of Dutch companies was often organised between the management board and a (separate) board of supervisory directors.

The annual reports of all Dutch companies should include individual details regarding salary, compensation, bonuses, termination fees, share options and shareholdings of the managing directors, past and present.

## 3. Hiring

### 3.1 Recruitment

State recruitment agencies are not extensively used and employers are not obliged to inform these agencies of any vacancies (except for certain work permit procedures).

Certain collective labour agreements require employers to ensure that a certain percentage of the employer's workforce consists of disabled persons.

### 3.2 Work Permits

The principle rule is that for a non-EEA national the employer is obliged to obtain a work permit before the individual is allowed to work in The Netherlands. Work permits will in principle only be granted if the employer proves that he is not able to fill the vacancy with an equally suitable/qualified national from one of the EEA-countries. There are certain exemptions to this procedure, for example in the case of intra-group transfers.

In addition to a work permit, a residence permit must be obtained by a non-EEA national for a stay in The Netherlands of three months or more. Nationals from a number of countries also need a temporary residence permit in order to be allowed to enter The Netherlands. Residence permits are in principle granted for the duration of one year, but can be extended. During the first five years of the foreign national's stay in The Netherlands, the residence permit needs to be extended each year.

Employees from EU member states who intend to stay more than three months in

The Netherlands need to register with the Immigration Authorities as citizens of the European Union.

The Knowledge Workers Procedure (kennismigrantenprocedure) is an accelerated procedure for obtaining a residence permit for non-EEA nationals who come to The Netherlands for the purpose of paid employment with a Dutch employer and who earn more than €51,239 (and €37,575 if the individual is younger than 30). The knowledge workers procedure is also open to Dutch employers to whom foreign nationals are seconded within a group of companies (i.e. the employment agreement remains with the non-Dutch employer). The benefit of this procedure is that the knowledge worker does not need to apply for a separate work permit. The Knowledge Workers Procedure can only be used if the Dutch employer has concluded a so-called covenant with the Immigration Authorities. As part of a pilot which runs until 31 December 2013, the Knowledge Workers Procedure is also applicable for non-EEA nationals who come to the Netherlands for a short stay of up to three months.

## 4. Discrimination

Employers should, based on their statutory obligation to act as a good employer, treat employees equally. In addition, employment law as well as specific legislation prohibits discrimination and provide for equal treatment.

An employer may not discriminate on the grounds of sex, religion, life principles, political persuasion, nationality, sexual disposition, race, marital status, physical fitness, age or employment status, either directly or indirectly and in general not at any stage of the employment (from recruitment, negotiation of the employment agreement, promotion or training, to the termination of employment). In some cases discrimination is permitted, provided it can be justified (on objective grounds).

An employee may claim damages in the event of discrimination by the employer. Persons who are discriminated against and/or parties concerned may bring a claim before the Equal Treatment Committee (the "Committee"). The Committee can also act on its own initiative. The decisions of the Committee are not legally binding but may support a petition to the relevant court for a declaration that the discriminatory act is wrongful or for an injunction to be issued. In general, courts tend to follow the decisions of the Committee. It is common for individuals to approach the relevant court if the Committee has concluded that there has been a breach of equal treatment legislation.

## 5. Contracts of Employment

### 5.1 Freedom of Contract

Parties are free to negotiate individual employment agreements within the limits of mandatory employment legislation and applicable collective labour agreements, if any.

### 5.2 Form

According to the Dutch Civil Code, an employment agreement exists where an employee personally undertakes work during a given period in the service and under the supervision of an employer in return for remuneration. The agreement need not be in writing to be legally binding. However, certain provisions, such as those relating to non-competition and a trial period, must be in writing. Furthermore, an employer must inform an employee in writing of the essential aspects of the employment within one month of the start of the employment.

Employment agreements can be entered into for a fixed or indefinite period of time. Fixed-term agreements, in principle, automatically terminate at the end of the agreed term. Parties may enter into a maximum of three consecutive fixed-term agreements, which together should not last longer

than three years. If the parties enter into more than one agreement and three years have passed, or more than three fixed-term agreements have been entered into consecutively, the last employment agreement will be deemed to be for an indefinite period of time. Consequently, the employment agreement will not end automatically upon the expiry of the extended period, and the applicable regulations in relation to termination (see further below) will have to be complied with. If the fixed-term agreement provides for interim termination, this right can only be exercised if the termination regulations are complied with.

Employment agreements are deemed to be consecutive if entered into within a three-month period after termination of the previous agreement and concluded by the same parties or parties that appear to be their successors.

### 5.3 Trial Periods

Parties may agree a trial period, provided that it is agreed in writing. The maximum trial period is two months, except in the case of a fixed-term employment agreement for a period shorter than two years (in which case the maximum trial period is one month). During the trial period, either party can terminate the employment agreement at any time without notice or the need for financial compensation. Upon the employee's request, the employer must announce the reasons for the dismissal to the employee. Reasons of a discriminatory nature are prohibited.

### 5.4 Confidentiality and Non-Competition

Employees are subject to an implied duty of confidentiality in relation to their employer's business and an employer may claim damages if an employee breaches this duty. In practice, many employers include a provision in the employment agreement in order to protect their interests.

In order for a non-competition clause to be valid, it should be agreed in writing between the employer and an employee of age (meerderjarig). Restrictions on post-employment competition must be reasonable in time, area and scope and can be set aside or amended by a relevant court. Non-competition provisions are subject to the principles of reasonableness and fairness and they will have to be reviewed (and, where necessary, renewed) when the employee's position within the company changes and as a consequence the impact of the non-competition undertaking on the employee changes (unless this change of position could be anticipated at the time the original non-compete undertaking was concluded).

It is common to impose a penalty for breach of the confidentiality and/or non-competition provisions. Post employment non-competition provisions will not, however, bind an employee if the employer is liable for damages arising from the manner of terminating the employment agreement.

## 5.5 Intellectual Property

Intellectual property created by an employee in the course of his employment generally belongs to the employer. Patentable inventions and copyright normally belong to the employee, unless agreed otherwise. In limited circumstances an employer can be held liable to pay compensation for patentable inventions and copyrights. Provisions in the employment agreement relating to the protection of intellectual property rights are common in certain industrial sectors, such as the information technology industry.

## 6. Pay and Benefits

### 6.1 Basic Pay

The law provides for a minimum wage, which varies according to the employee's age. The government determines the statutory minimum wage biannually. With effect from 1 January 2013, the minimum

monthly gross wage for a full-time employee aged 23 or over amounts to €1,469.40 (excluding holiday allowance).

If an industry or trade-wide collective labour agreement applies, it will usually contain a remuneration scheme, determining the minimum remuneration. In addition, an employer is obliged to provide a minimum holiday allowance amounting to 8% of the employee's gross annual salary. Employment agreements can provide that the holiday allowance is considered to be included in the agreed salary provided that the agreed salary is at least three times higher than the statutory minimum wage increased by 8%. It is common practice for wages to be index-linked.

Pursuant to new legislation on the standardization of the remuneration of senior officials in the public and semi-public sector (Wet normering topinkomens), specific remuneration requirements apply to a targeted group of individuals within the relevant sector. The maximum salary amount to which such senior officials are entitled is €187,340 (130% of a Dutch Minister's salary). When the expense allowances and pension contributions are included, the relevant maximum amount is €228,599. The maximum level of severance payment for relevant individuals is €75,000.

The new legislation also provides for specific publication requirements.

In recent years, various initiatives have been taken to regulate the remuneration within financial institutions. A prohibition on bonuses applies to board members and policy makers of financial institutions receiving state aid.

### 6.2 Pensions

Employees are entitled to the benefits of the obligatory state pension scheme (Algemene Ouderdomswet) as of the day they reach the age of 65. As of 1 January 2013, the pensionable age will be

gradually increased up to the age of 67 in the year of 2023.

In addition to the obligatory state pension scheme ("old age pension"), many employers grant pension benefits to their employees. There is no legal obligation for employers to make pensions arrangements unless one of the approximately 80 mandatory industry or trade-wide pensions schemes apply. According to the Pensions Act ("Pensioenwet") pension obligations should be funded through a separate legal entity. This can be a pension insurance company, an industry-wide pension fund, a company pension fund or a pension institution seated in another Member State. In addition, the Pensions Act confers rights on employees in specified circumstances (e.g. termination of employment, divorce).

### 6.3 Incentive Schemes

Share option schemes and share purchase schemes are a popular incentive instrument, particularly for key employees. Employees can derive tax benefits from such schemes, provided that certain conditions are met. Clauses that provide that option rights shall automatically lapse upon termination of employment may not always appear fully enforceable or may result in compensation being payable to employees upon termination of employment.

Many employers operate voluntary profit-sharing plans, which entitle employees to a bonus related to profits. Such a bonus is often calculated as a percentage of the employee's earnings and is taxed as regular salary.

### 6.4 Fringe Benefits

Company cars, telephones and laptop computers, cost allowances, gifts on special occasions (such as anniversaries and jubilees) and childcare arrangements are frequently provided for various categories of employees and

specific tax favourable regulations may apply in this regard.

## 6.5 Deductions

Wage tax is deducted from pay at source in accordance with published rates. The tax year runs from 1 January to 31 December. The employment income tax rates applicable in 2012 were as follows:

Income	Tax rate
€0 – €18,945	33.10%
€18,945 – €33,863	41.95%
€33,863 – €56,491	42%
€56,491 or more	52%

Depending on the personal circumstances of the employee (for example marital status), a levy rebate may be available. Subject to certain conditions, foreign employees who are assigned to the Netherlands may benefit from a tax exemption of 30% of their gross salary as a tax-free cost allowance, on the assumption that 30% of their income will be expressly classified as extraterritorial expenses. This exemption does not apply to employees who live within a radius of 150 kilometers from the Dutch border and are assigned to the Netherlands.

## 7. Social Security

### 7.1 Coverage

The social security system is split into a national insurance scheme covering all residents of The Netherlands (“volksverzekeringen”) and an employees’ insurance scheme for employees only (“werknemersverzekeringen”). Old age pension (AOW), dependant’s pension (ANW), exceptional medical expenses (AWBZ) and child benefits (Kinderbijslag) are provided by the state within the national insurance scheme. The employees’ insurance scheme provides for benefits in the event of illness (ZW), disability (WIA) or unemployment (WW).

### 7.2 Contributions

The premiums for the national insurance scheme (“volksverzekeringen”) are included in the wage tax.

The premiums for the employees’ insurance scheme (“werknemersverzekeringen”) are due up to a maximum income amount of €50,064. The percentages of the premiums depend, amongst other things, on the business sector of the employer. The premiums are due by the employer, and the employer may only withhold part of the premium from the employee’s income.

In addition, under the health insurance scheme (ZVW), each Dutch citizen pays a nominal premium, which depends on the health insurer of his or her choice. In addition, an income dependent contribution of 7.1% of the employee’s yearly income is due (up to a maximum income amount of €50,064). Employers are obliged to reimburse this income dependent contribution to their employees.

## 8. Hours of Work

According to the Dutch Working Hours Act (“Arbeidstijdenwet”) employers have the flexibility to adjust working hours to the circumstances within the company or sector. In any event, an employee is only allowed to work a maximum of 12 hours per shift and a total of 60 hours per week.

The employer may, within reasonable limits, require employees to work overtime. In general, overtime is either paid for or compensated in another way (for example time off in lieu). In order to be able to oblige employees to work on Sundays, an express agreement must be reached in advance. Various collective labour agreements include provisions on the reduction of working hours.

Employees can request an adjustment to their working hours after one year of employment, whereby certain formalities should be complied with. Such a request

may only be refused by an employer on the grounds of significant business interests, and it is generally difficult for employers to demonstrate this.

## 9. Holidays and Time Off

### 9.1 Holidays

Full-time employees are entitled to a minimum of 20 days’ paid holiday per year (the “Statutory Minimum”). Collective labour agreements or individual employment agreements usually provide for a more generous annual holiday entitlement per year. In addition, there are nine public holidays in the Netherlands. Relatively new legislation that came into force on 1 January 2012 provides that accrued, but untaken, holiday that falls within the Statutory Minimum in principle lapses six months after the last day of the year in which they accrued, unless the employer elects to carry over period. Holidays exceeding the Statutory Minimum expire five years after the last day of the year in which they accrued. The new legislation also contains transitional provisions applicable to holiday entitlement that accrued prior to 1 January 2012.

### 9.2 Family Leave

According to the Employment and Care Act (Wet Arbeid en Zorg), employees are entitled to a number of different forms of temporary leave, either paid or unpaid.

Pregnant women are entitled to 16 weeks’ maternity leave, which must start no later than four weeks before the expected date of childbirth. Maternity benefits paid by social security are equal to 100% of the employee’s salary, provided that the salary does not exceed the maximum daily wage, which is €193.09 per day with effect from 1 July 2012. In practice, the employee’s full salary is often continued during maternity leave (except for travelling expenses and a fixed expenses allowance).

The mother’s partner is entitled to two days’ paid paternity leave, to be taken

within four weeks of the child's birth. Paternity benefits are equal to 100% of the employee's salary. However, these rules may be deviated from by collective labour agreement or an agreement with the employee representation body.

For each child up to the age of eight, each parent is entitled to unpaid parental leave. Since 1 January 2009, parental leave is extended from 13 weeks to 26 weeks for new claims. The basic statutory arrangement is that parental leave may be taken up to a maximum of half of the employee's weekly working hours averaged over a period of 12 months. The employee can apply to deviate from these arrangements so that:

- (a) leave may be taken over a longer period than 12 months;
- (b) more hours of leave may be taken per week, for instance on a full-time basis; and
- (c) leave may be divided into parts (subject to a maximum of six) with each part lasting at least one month;

but the employer can reject such an application on the grounds of substantial business interests. Employers and employees may (and often do) deviate from these rule by means of a collective labour agreement.

After having taken the full parental leave entitlement, the employee may request an adjustment to his or her working pattern for a period of one year after the end of the parental leave or for such period as agreed between the parties.

In the case of adoption or foster care of a child, the future/foster parents are entitled to four weeks' parental leave, which should be taken in the period commencing two weeks prior to the adoption and ending 16 weeks after the adoption. During this leave, the salary payments are continued by the social security authorities, up to the maximum daily wage.

In the event of an emergency, employees are entitled to temporary paid leave for a few days or hours, depending on to the nature of the emergency.

Employees are entitled to a short period of leave of no more than 10 days per year to take care of a seriously ill close relative, during which period the employee is entitled to 70% of his normal wage. However, the employer is not obliged to grant such leave if it has significant reasons for refusing it. These rules may be deviated from by collective labour agreement or an agreement with the employee representation body.

The Employment and Care Act sets out the entitlement to long-term care leave. This type of leave entitles the employee to take care of a partner, child or parent, who suffers from a life-threatening illness. The leave is comprised of a maximum of six times the employee's weekly agreed working hours during a period of 12 months. In principle such leave should be taken in one continuous period and should not amount to more than half the employee's agreed working hours per week.

### 9.3 Illness

The employer is in principle obliged to pay employees absent due to illness for up to 104 consecutive weeks of illness. During the first 52-weeks of an employee's illness, the employer will have to pay the employee at least 70% of his salary up to a maximum of 70% of the maximum daily wage.

If this 70% payment is less than the minimum wage, the employer will have to supplement the payment in order to bring it up to the minimum wage. During the second 52-week period of illness, the employer will also have to continue to pay at least 70% of the employee's salary. The employee is however no longer entitled to receive at least the minimum wage from his employer.

Collective labour agreements and individual employment agreements may

provide that employers will supplement the employee's salary up to a percentage of 100% of his usual salary and the percentage of salary payable may also vary during the 104 week period.

Both employer and employee are legally obliged to actively seek to reintegrate the employee into the workplace. Failure to do so by the employer may lead to an extension of the period during which the employer is obliged to pay the employee's salary. Failure to do so by the employee may cause the employee to lose his entitlement to continued salary payments. Generally, the employment agreement cannot be terminated during the first two consecutive years of illness, except in the case of redundancy.

The risks of payment during illness can be privately insured.

After two consecutive years of illness, the employee may be entitled to social security benefits, the amount and duration of which mainly depends on the degree of incapacity for work of the relevant employee and his or her labour history. No entitlement to social security benefits exists if the employee, after the first two years of illness, is capable of earning at least 65% of the salary he last earned. If, however, the employee's earning capacity is between 20% and 65% of the salary last earned, it will be beneficial for the employee to try to generate income with his own or another employer, as this generally increases the social security benefit payable to the employee.

For employees with little or no remaining earning capacity and little or no prospect of recovery, permanent social security benefit is available.

## 10. Health and Safety

### 10.1 Accidents

Employers have a duty of care in relation to the health and safety of their employees while they are at work. Health and safety rules and regulations need to

be observed by an employer when organising work and by employees whilst performing work. The Labour Inspectorate is responsible for enforcing the law in relation to working conditions (Working Conditions Act; Arbeidsomstandighedenwet), and is entitled to make binding orders and/or impose fines on an employer in the event of violation of the regulations. The Working Conditions Act provides target regulations, i.e. regulations that require the employer to reach a level of protection for its employees, which enables them to work in a safe and healthy manner. Employees have the right to cease all work-related activities and call in the Labour Inspectorate in the event of a serious risk to health and safety. In light of the employer's health and safety obligations employers are in principle obliged to engage a company doctor or other expert support.

Employers and employees (and their representative bodies) are responsible for drawing up so-called working conditions catalogues, wherein they describe how they intend to implement the Working Conditions Act's target regulations. The Ministry of Social Affairs and Employment will perform a check on these working conditions catalogues, which will determine the reference framework for control by the Labour Inspectorate. The Working Conditions Act and regulations also contain additional standards with respect to working conditions that cause serious risk to the health and safety of employees.

An employee has a statutory right to work in an environment that is free of carcinogenic substances (such as tobacco smoke). Non-compliance by the employer with the health and safety regulations may constitute an economic offence and theoretically, the employer may even be liable for damages suffered by the employee due to non-compliance.

### **10.2 Health and Safety Consultation**

The company's works council (see below) has a right to receive information and to

be consulted on matters relating to health and safety in the workplace.

## **11. Industrial Relations**

### **11.1 Trade Unions**

Some 20% of the Dutch workforce is a member of a trade union. Most of them are members of a trade union affiliated to the Federation of Dutch Trade Unions ("Federatie Nederlandse Vakbeweging – FNV") and to the Christian Trade Union Federation ("Christelijk Nationaal Vakverbond – CNV"). A small number of employees belong to unions that are members of smaller federations.

Unions are well organised in the manufacturing industry sector and the semi-public or privatised sectors, but less organised in the service sector and new technology industries.

The main employers' association is called the VNO-NCW.

### **11.2 Collective Agreements**

Trade unions and employers' organisations may negotiate minimum wages and basic employment rights at a national level for certain branches of industry or trade. The agreements that are reached are used as standards for similar bargaining at sector level. In principle, employers may choose the trade unions with whom they wish to negotiate a collective labour agreement. However, for the purposes of maintaining good industrial relations, employers tend to recognise those trade unions that are strongly represented in the relevant sector of industry or trade.

A collective agreement can also be agreed for one single company.

The Minister of Social Affairs and Employment can declare a particular collective labour agreement to be generally binding on an entire sector of industry or trade. Consequently, the collective labour agreement is applicable to all employers and employees in that

sector, even to those employers that are not members of an employer's association and employees who are not members of a trade union.

### **11.3 Trade Disputes**

The Dutch Civil Code does not recognise the right to strike. However, in accordance with international treaties, the right is recognised in certain circumstances. In general, courts allow strikes organised by trade unions if the aim of the strike is considered reasonable and if other means to achieve that aim have been exhausted. Strike action is not common in the Netherlands.

Picketing is usually unlawful because it is generally considered an unreasonable form of industrial action.

### **11.4 Information, Consultation and Participation**

The extent of employee influence in the management of a company depends on the size of the company. In companies with 50 or more employees, a works council must be established. The works council consists of and is elected by the company's employees.

The company's management will have to meet with its works council at least twice a year to discuss the general affairs of the company. The works council has a right to receive information on various topics (e.g. on financial information regarding the company, the various categories of employees within the company, remuneration arrangements etc.)

In addition, the works council must be informed of and consulted on certain decisions such as change of control, take-over, closure or reorganisation. The works council will also have to be consulted by the company's management on various intended financial decisions, for example significant financial investments, capital investments and substantial loans to the company. The company's management is furthermore obliged to consult the works council on decisions regarding technology

facilities and important decisions on environmental issues. The management of the company will require the approval of the works council for certain matters relating to working conditions, health and safety and job evaluation. The length of the entire consultation procedure is dependent on the circumstances (i.e. complexity of the case, time pressure and what is reasonable).

A management decision may not be implemented for a period of one month if it was subject to works council consultation and the decision was opposed by the works council, or if the requirements to consult the works council have been neglected. During this one-month period, the works council may appeal to the special Enterprise Chamber of the Amsterdam Court of Appeal (the "Chamber"). If the Chamber finds the decision unreasonable, it can require the employer to withdraw the decision, in whole or in part, or to refrain from taking any further action pursuant to it. In practice, the Chamber is reluctant to conclude that a management decision was unreasonable. Intervention by the Chamber is most likely when there have been procedural irregularities. If a management decision is subject to approval by the works council and such approval is not granted, the management may petition the relevant cantonal court for approval.

In addition, a works council is entitled to give its opinion on the proposed appointment or dismissal of the highest authority (usually a director) who has responsibility, alone or with others, for the organisation of employment within a company.

Works councils of companies that are subject to the large company regime, i.e. companies with an issued capital of at least €16 million, at least 100 employees and for which a works council has been established, have the right to nominate one third of the candidates for the supervisory board of the company.

The management of a company with a workforce of between 10 and 50 employees is required to meet with the employees at least twice a year as well as upon the request of at least 25% of the workforce. The general course of business must be discussed at least once a year and the company's management must consult the employees on certain proposed decisions that may affect at least a quarter of the company's workforce.

## 12. Acquisitions and Mergers

### 12.1 General

Dutch law has implemented the EU Acquired Rights Directive. Upon a transfer of a business, the employees dedicated to this business are in principle automatically transferred to the employment of the transferee on the same terms and conditions as provided for in their employment agreements with the transferor. However, specific provisions apply with respect to pension entitlements. In the case of a business transfer, employees, or the works council if established, will need to be consulted on the intended transfer of a business.

### 12.2 Information and Consultation Requirements

Companies are generally required to consult with the works council on acquisitions. Collective labour agreements may also impose a duty on a company's management to consult with the trade unions and the works council in cases of an intended merger or acquisition. A works council will have to be involved at a point in time where they can still influence the intended decision (i.e. before the signing of, for example, a sale and purchase agreement or even a letter of intent).

The Dutch Merger Code ("SER-besluit Fusiegedragsregels 2000") also requires notification of and consultation with the trade unions at an early stage of negotiations between the parties to a transaction, involving the acquisition of direct or indirect control over the activities

of a company (or part thereof) that has a business in The Netherlands and where one of the parties is a company (or part of a group of companies) employing more than 50 employees in the Netherlands. The relevant trade unions must be notified and consulted before agreement will be reached.

### 12.3 Notification of Authorities

The Merger Committee has to be informed that the trade unions have been notified of a contemplated acquisition.

### 12.4 Liabilities

The trade unions and/or parties to a merger can submit complaints in relation to non-observance of the Merger Code to the Merger Commission who may then issue a public statement addressing non-observance of the Merger Code by the parties. In addition, an infringement of the Merger Code may give rise to claims by trade unions in tort for injunctive relief and/or compensatory damages for lost membership income, costs incurred or reputational risk in respect of a breach of the collective labour agreement that provides that the provisions of the Merger Code should be adhered to.

## 13. Termination

### 13.1 Individual Termination

Dutch law provides extensive employee protection. Failure on the part of the employer to observe the rules relating to termination may result in a liability to pay substantial damages to the employee. An employment agreement for an indefinite period cannot be terminated unilaterally without the prior approval of a semi-governmental body called UWV WERKbedrijf or through a court decision, except: (i) during the trial period or (ii) in circumstances allowing the employer to dismiss the employee summarily for significant reasons, such as theft. Settlement negotiations often result in a termination by mutual consent (which is common and in principle does not disqualify the employee from state employment payment benefits).

### 13.2 Notice

Once the permission of the UWV WERKbedrijf has been obtained, the employment agreement may be terminated by serving the statutory notice, or if a different notice period is agreed, the contractual notice. If the employment is terminated after having obtained a dismissal permit from the UWV WERKbedrijf the notice period can be reduced by one month, subject to a minimum notice period of one month. The statutory notice period for an employer depends on the length of service of the employee. The employer shall observe a statutory notice period of one month for employees with less than five years of service and an additional month for every period of five years' service. The maximum statutory notice period of four months applies if the employee has been employed for 15 years or more. The statutory notice period for the employee is one month.

In order to be valid, a notice period differing from the statutory notice period has to be agreed in writing and the employer's notice period must be at least twice as long as the notice period that the employee is required to observe. The maximum contractual notice period that can be agreed is 12 months for the employer and six months for the employee. Notice of termination should be given in such a manner that the employment agreement terminates at the end of a calendar month (but these rules may be deviated from by written agreement).

No notice has to be given if the court terminates the employment agreement. In such cases the employment automatically terminates on the date stipulated by the relevant court.

### 13.3 Reasons for Dismissal

As outlined above, an employer who wishes to terminate an individual employment agreement needs to obtain the permission of the UWV WERKbedrijf before notice of termination can be validly given. The request for permission must

state the reasons for the intended termination. Various guidelines issued by the UWV WERKbedrijf determine the circumstances in which permission can be expected to be given. In practice, the reasonableness of the grounds for termination is the main criterion. Specific requirements apply to each ground of termination, e.g. business organisational reason or a non-performing employee. The procedure for obtaining permission generally takes two to four months. The UWV WERKbedrijf has no authority to order the employer to pay compensation, however, it may take into account whether appropriate compensation has been offered.

After any dismissal, whether legally valid or not, an employee may initiate court proceedings in order to obtain compensation, or higher compensation, from the employer on the basis that the termination was "apparently unreasonable".

Alternatively, each party to an employment agreement is at all times entitled to petition the relevant court to terminate the agreement. The relevant court will examine the reasons given for termination, the fairness of the proposed termination and the consequences of continuation or termination of the employment agreement for the employee. The relevant court may award compensation to the employee. Such a court decision is not subject to appeal unless the relevant court misjudged the applicability of the procedure or violated fundamental rules of law in its judgement. In the case of termination of an employment agreement by the relevant court, an employee will be subject to a cut in his state unemployment benefits over the applicable notice period which starts running from the date of the court ruling.

Managing directors (statutair directeuren) have less protection in the event of termination of their employment. Once their corporate relationship has been validly terminated by a resolution of the general meeting of shareholders or the supervisory board of the company, their

employment with the company is in principle deemed to have terminated as well (after the relevant notice period has expired). No dismissal permit from the UWV WERKbedrijf or court interference is required. Directors may be granted the same level of compensation as that payable to regular employees.

In order to determine the amount of compensation upon termination of the employment (other than for fundamental breach or as a result of expiry of the term), the Cantonal Court formula is generally applied. According to this formula, the amount of compensation is determined by the employee's age and years of service. Each year of service until the age of 35 counts as half a month's salary. Each year of service between the age of 35 and 45 counts as one month's salary. Each year of service between the age of 45 and 55 counts as one and a half month's salary and each year of service from the age of 55 counts as two month's salary. In principle, this calculation method may apply when the reasons for the dismissal are neutral, meaning that none of the parties in particular can be blamed for the dismissal. The neutral formula is often used, amongst other situations, in case of dismissal for economic reasons. In some circumstances payment in accordance with the neutral formula may be deemed insufficient. In such cases the sum payable under the neutral formula could be multiplied. Occasionally, circumstances lead to no payment of compensation or payment equal to less than the neutral formula. This is possible if the employee is largely to blame for the dismissal or when the employer can prove that it has insufficient funds to pay compensation. When calculating the amount of compensation the employee's market position may be taken into account by the relevant court as well as the financial position of the employer. For those employees who will soon retire, the amount of compensation may not exceed the employee's salary until the applicable retirement date.

The Civil Code provides examples of circumstances justifying a summary dismissal without compensation. If an employee disputes the summary dismissal, it is a matter for the relevant court to decide whether there is sufficient reason for the employer to summarily dismiss the employee without compensation. The employer cannot validly pre-determine in the employment agreement what conduct it considers gross misconduct. The reasons for the dismissal must be communicated to the employee immediately after they have become known to the employer and a summary dismissal should be effected as soon as reasonably practical after the relevant event, although the employer is entitled to take time to investigate the specific circumstances.

#### 13.4 Special Protection

Certain categories of employees are specially protected against dismissal, for example, pregnant women, members and former members of the works council and employees absent by reason of illness.

#### 13.5 Closures and Collective Dismissals

An employer contemplating a dismissal of 20 or more employees within the same region in any three-month period must notify the UWV WERKbedrijf and the relevant trade unions of its intentions. The employer is, furthermore, obliged to consult the relevant trade unions. In the case of a failure to comply with the requirements of the Collective Redundancy Act, the dismissals will be voidable.

In practice parties often try to agree to a social plan, although the law does not require an employer to draw up a social plan, nor does the law require that the contents of a social plan are to be agreed with the relevant trade unions or the works council. Agreeing to a social plan, however, is very common in reorganisation processes and usually speeds up and smoothes the procedure.

## 14. Data Protection

### 14.1 Employment Records

The collection, storage and use of information held by employers about their employees and workers (prospective, current and past) is regulated by the Dutch Data Protection Act of 6 July 2000 ("DDPA"), which implements the EU Data Protection Directive.

The term "personal data" means any data relating to an identifiable natural person. The term "processing" covers virtually all actions performed on personal data, from collection until deletion of the data.

Relevant matters for employers that are covered by the DDPA vary from, for example, the processing of personal data for salary administration to the monitoring of the employees' use of telephone, internet and email facilities.

Employers are generally advised to ensure they have some sort of document retention policy in place and to ensure that the employees are aware of their data protection obligations.

Under the DDPA, the processing of personal data is permitted only if the processing is based on one or more of the limited grounds listed in the DDPA. For commercial organisations the relevant grounds are likely to be that:

- (a) the employee has unambiguously given his consent to the processing of his personal data;
- (b) the processing is necessary for the performance of an agreement to which the employee is party, or in order to take steps at the request of the employee which are necessary for entering into an agreement;
- (c) the processing is necessary for compliance with a legal obligation; or
- (d) the processing is necessary for the purposes of legitimate interests

pursued by the employer or by the third party to whom the data is disclosed, except where such interests are overridden by the interests or fundamental rights and freedoms of the employee. In other words, the employer is allowed to process personal data of the employee, unless the employee would be unduly prejudiced.

The processing of sensitive personal data (i.e. data relating to a person's religious or philosophical beliefs, race, political opinions, health and sexual life, trade union membership or criminal behaviour) is subject to stricter rules. The general rule is that such data may not be processed. There are, however, several specific and some general exemptions to this rule.

In principle, all processing of personal data must be notified to the Dutch Data Protection Committee (which is the Dutch data protection supervisory authority), prior to the collection of the personal data. Depending on what personal data will be processed and for what purposes, the data processing may be exempt from notification under the Dutch Decree on Standardised Exemptions.

The employer is required to implement appropriate technical and organisational measures to guarantee that its employees' personal data is kept securely. Specific protection should be put in place to prevent the unauthorised disclosure of and access to personal data. For example, employers must ensure that access to personal data within the organisation is restricted to employees whose job description objectively requires them to have access.

### 14.2 Employee Access to Data

Prior to the collection of personal data, the employer must inform its employees of (i) the contact details for queries and requests and (ii) the purposes of the intended data processing. Depending on factors such as the sensitivity of the data

in question and whether personal data will be internationally transferred, the employer is required to provide more detailed information in order to ensure that the processing is carried out in an appropriate and careful manner. Under the provisions of the DDPA, employees have the right to ask the employer periodically to be informed whether his or her personal data are being processed and to receive an overview of the data processed.

The employer could, for example, provide the necessary information by attaching a data protection policy to the employment agreement (ideally, the employment agreement would contain a data protection clause referring to this policy). For the sake of clarity, it can sometimes be advisable to use different privacy policies, for example a general privacy policy explaining the organisation's general approach towards privacy and a separate privacy policy specifically aimed at the monitoring of employees.

### **14.3 Monitoring**

Monitoring employee's telephone calls, electronic communications and internet access is only allowed if certain conditions are met (including the obligation to inform the employee that his activities are monitored). Electronic communications of the works council regarding their activities may not be monitored. Guidelines have been issued by the Dutch Data Protection Committee regarding the monitoring of employee email and internet use, which, although not legally binding, are intended to provide "assistance for employers and employees in formulating a company policy with respect to the monitoring of the use by employees of email and the internet in accordance with privacy law".

The employer should request the prior consent of the works council, if any, before any policy regarding the monitoring of telephone calls, email and internet use can be introduced.

### **14.4 Transmission of Data to Third Parties**

An employer who wishes to provide employee data to third parties must do so in accordance with the DDPA. There are additional requirements that need to be observed if personal data is to be transferred from EU countries to countries outside the EU. In principle, such transfers may only take place if the country of destination offers an adequate level of protection for the transferred data. (e.g. the US is not deemed to provide an adequate level of protection and transfers of personal data to the US are, consequently, not allowed). There are, however, ways to legitimise international transfers, even if an adequate level of protection is not in place in the country of destination. Transfers within the EU are not restricted.

*Contributed by Clifford Chance,  
Amsterdam*

# Poland

## 1. Introduction

The principal source of law regulating employment relationships in Poland is the Polish Labour Code of 26 June 1974 (the "Code"). The Code has been subsequently amended in order to implement numerous EC directives.

Poland is also a member of the International Labour Organisation and it has ratified various international agreements relating to labour law, e.g. regarding unemployment, the employment of women and juveniles, freedom of trade unions and accidents at work.

Collective agreements are legally enforceable and are of some importance. Collective agreements or internal rules of employment may provide for different, more favourable working conditions for employees than the provisions of the Code. They cannot, in any case, provide for less beneficial terms in comparison to those provided by the Code and other binding regulations of labour law.

Disputes between an employer and an employee are settled in special divisions of the regular courts. Special provisions of the Polish Code of Civil Procedure govern disputes under employment contracts. They are designed to provide protection for the employee and enable employees to receive help quicker and in a more cost-efficient and effective manner involving less amount of bureaucracy.

In general, under Polish law it is not possible to contract out of statutory employee protection. In addition, the Code states expressly that if the contractual provisions of the employment contract are less beneficial to the employee than the provisions of labour law, the contractual provisions will be considered void and the more beneficial provisions of labour law will replace them.

## 2. Categories of Employees

### 2.1 General

Polish law generally does not differentiate between various categories of employees, in particular blue-collar and white-collar employees.

### 2.2 Directors

There are some regulations that apply only to the top management employees (e.g. less restrictive regulations regarding working overtime by such employees).

### 2.3 Other

Most provisions of the Code and other employment legislation apply equally to part time employees. As a general rule, employees that work part time are entitled to be treated on an equal basis with full time employees, unless objective reasons justify different treatment.

## 3. Hiring

### 3.1 Recruitment

Employers recruit employees through a variety of sources, including through the internet and by advertising in newspapers or journals.

Private recruitment agencies and agencies providing temporary staff are becoming more popular, and there are many agencies that specialise in the recruitment of staff from specific professional groups. Such agencies do not require any licences before they can operate, but they have to be recorded in the register maintained by the marshal of the voivodeship (*marszałek województwa* – local governmental authority).

### 3.2 Work Permits

Polish law is highly complex with regard to the issuance of work permits, therefore only a high level overview of the legal position is set out below.

Citizens of all European Economic Area countries and of countries with which the EU has signed Free Movement of Persons Agreements have free access to the Polish labour market.

The employment of foreigners, with the exception of those from EEA countries, is regulated by the Act on Promotion of Employment and Labour Market Institutions of 20 April 2004.

Under the provisions of this Act, a foreigner is allowed to carry out work in Poland if the employer obtains a work permit conditional upon the foreigner obtaining an appropriate visa or a residence permit for a specified period of time. The work permit is issued by the voivode (*wojewoda* – governmental authority) appropriate to the place of the employer's registered place of business, upon the application of the employer.

The work permit allows the foreigner to apply to either: a Polish consulate for a visa for the right to reside in Poland with the right to work, or to the appropriate voivode for a residence permit for a specified period of time. A number of documents must be attached to the work permit applications (the relevant list can be obtained in the Voivodeship Office).

A specific, less formalized procedure applies to highly qualified foreigners seeking to acquire the right to work and stay in Poland. Such employees only have to apply for only one type of permit, which allows them to both work and stay in Poland.

In most cases, a work permit is issued for a three year period however in some situations it is issued for no longer than one year.

An employment agreement or other agreement on performing paid work (e.g. mandate agreement, specific task agreement) may only be entered into for the period specified in the work permit. The Voivode may revoke the work permit if, for example, the conditions of the permit are breached or if the employee loses the qualifications necessary to carry out the specific type of employment (e.g. driver's licence). In such cases, the relevant agreement must be terminated as soon as possible.

Foreigners who have permanent residence or refugee status in Poland (or who have temporary protection) or in certain circumstances, who are relatives of a Polish citizen, do not have to obtain a work permit. There are a number of additional exceptions including a key exception for foreigners who permanently reside abroad and are members of the management board of a legal entity, if they plan to reside in Poland for no more than six months in any 12-month period. Individuals who are non-EU nationals seconded by their foreign employer to work in a Polish branch of the employer for no longer than 30 days in a calendar year or for no longer than three months in a six-month period do not need a work permit. Note however that an exception applies to employees temporarily seconded to Poland in relation to the performance of export services by a foreign employer, (when the work permit is required from the first day of secondment). Pursuant to the provisions of the Code which implement Directive 96/71/EC, the working conditions of seconded employees cannot be worse than the minimum prescribed in the Code.

An employer is obliged to pay a work permit fee in the amount of:

- (a) PLN 50 if the employer intends to employ the employee for a period not exceeding three months;
- (b) PLN 100 if the employer intends to employ the employee for a period exceeding three months; or

When a work permit is extended, this fee is halved. Illegal employment (i.e. without a work permit or in breach of its conditions) is penalised by fines of at least PLN 3,000 for the employer and at least PLN 1,000 for the employee. Moreover, the employee may be deported from Poland (the deportation costs are borne by the employer).

## 4. Discrimination

Direct or indirect discrimination on the grounds of sex, gender, age, disability,

race, religion, nationality, sexual orientation, ethnic origin, political views, membership of any kind, is forbidden when hiring employees, whether for employment for a fixed or indefinite term, full time or part time.

The employer is expressly obliged to actively prevent such discrimination as well as any harassment or bullying.

Under Polish law bullying means action or behaviour towards an employee or directed against an employee, that involves persistent and long-lasting badgering or threats causing him/her to have a lower sense of professional worth, ridiculing an employee or humiliating him/her, ostracizing or eliminating him/her from the team of his colleagues.

## 5. Contracts of Employment

### 5.1 Freedom of Contract

Generally, parties are free to contract on whatever terms they choose and agree upon provided that such terms are not less favourable to the employee than the provisions of the binding regulations of labour law and the employer's internal employment regulations. In addition, there are some provisions that have to be included in every employment contract as a matter of law (e.g. type of work, place of work, working hours and remuneration). These requirements cannot be contracted out of by the parties.

### 5.2 Form

Employment contracts may be executed for an indefinite period of time, for a fixed term, and for a certain period to perform specified work. All of the above can be preceded by an employment contract for a probationary period, which cannot exceed three months.

Employment contracts have to be concluded in writing. If they are not, the employer is obliged to inform an employee in writing of the basic terms and conditions of employment within

seven days of the date the employment contract is concluded. However, a failure to comply with this requirement does not render the contract invalid or void.

The employer may be fined up to PLN 30,000 if the employment contract is not confirmed in writing.

### 5.3 Trial Periods

Any employment contract can be preceded by an employment contract for a probationary period. Such an agreement is a separate independent employment contract that applies only to the probationary period. Usually the parties decide on the length of the probationary period; however, it cannot exceed three months. After the lapse of the term indicated in the contract, the contract terminates. If an employer intends to extend the employment relationship, a new employment contract has to be concluded.

### 5.4 Confidentiality and Non-Competition

An employee is obliged to perform his work conscientiously and carefully, and to abide by the instructions given by the employer. He is also obliged to look after the interests of the employer, protect his property and to keep confidential any information the disclosure of which could result in damage to the employer. However, there is no statutory non-compete obligation for employees.

Therefore, the employer may, and often does, conclude a separate non-compete contract for the duration of the employment contract. In such a contract, the employee may be obliged neither to directly undertake competitive activities himself nor to provide, indirectly by any means whatsoever, services for the benefit of any institution or entity that competes with his employer.

When an employee has access to vitally important information the disclosure of which could result in damage to the employer, the parties to the employment

contract can conclude a non-competition contract that will also be binding after the termination or expiry of the employment contract. The non-competition contract should set out the duration of the obligation and provide for compensation to be payable to the employee. Regardless of its duration, a non-competition obligation of the employee ceases to be binding once the reasons justifying this obligation cease to exist or if the employer fails to pay compensation to the former employee.

The amount of compensation cannot be less than 25% of the remuneration received by the employee under the employment contract during the non-competition period.

The general confidentiality obligation of an employee is also regulated by the Unfair Competition Act; however, very often more stringent provisions are included in employment contracts.

## 5.5 Intellectual Property

Under Polish law, unless the employment contract provides otherwise, the employer is entitled to any intellectual property rights that the employee creates as a result of performing his duties under his employment within the mutually envisaged scope of the employment contract.

## 6. Pay and Benefits

### 6.1 Basic Pay

There is a national minimum wage, which is set out for each calendar year in an ordinance from the Ministry of Labour. In 2013 the minimum wage is PLN 1,600 per month gross (this is approximately €400).

There are no legal obligations on employers to increase wages. However, collective agreements or internal remuneration rules may provide otherwise.

### 6.2 Pensions

Private pensions schemes are of some importance, but for the time being they are not very common and most employers apply only state provisions.

Submitting contributions to the State Social Security Fund is compulsory for every employer, regardless of its legal status. An employee is entitled to receive a state pension from the pension fund. The amount of the pension depends on various factors (e.g. the duration of contribution and non-contribution periods, the amount of contributions paid by the employer).

The contribution that is paid by the employer is split into two parts – generally one of them is transferred to the Social Security Fund and the other to a private open pension fund chosen by the employee. As the institution of private pensions was implemented in 1998, there are some groups of people that are not obliged to choose a “private open pension”. People born before 1 January 1949 cannot contribute towards the private open pension; people born after 31 December 1948 and before 1 January 1969 may voluntarily contribute towards a private open pension apart from the state pension, however they may contribute only towards the state pension; people born after 31 December 1968 must contribute towards a private open pension apart from the state pension.

Apart from the pensions from the Social Security Fund, the employee may receive a pension from private pension funds if he has paid premiums into the relevant private pension fund himself.

### 6.3 Incentive Schemes

Incentive schemes are voluntary in Poland and they come in various forms. They may operate on a monthly, quarterly or annual basis and may be linked to such factors as market share performance, revenue increase, or PTI (pre-tax income) results. Each employer devises the terms of its incentive schemes, if any, according to its requirements.

### 6.4 Fringe Benefits

Common fringe benefits include private medical insurance for treatment outside the national health service and company

cars. Generally, additional charges related to such fringe benefits (e.g. costs of fuel) are covered by the employer; however the value of certain fringe benefits (e.g. private medical insurance) constitutes taxable income for the employee.

### 6.5 Deductions

Employers are obliged to deduct income tax at source. They are also obliged to deduct health and social security contributions.

## 7. Social Security

### 7.1 Coverage

The state-administered social security system provides benefits by way of pensions, family benefits and compensation benefits.

There are the following social security benefits:

- (a) pensions; and
- (b) sick pay, accident at work, rehabilitation, maternity and compensation benefits.

Employers and employees are obliged to pay certain contributions with respect to social security benefits. These contributions are paid to the Social Security Fund (or an accident fund that is a part of the Social Security Fund).

### 7.2 Contributions

The level of an employer's tax and social security contributions depends on the amount of an employee's remuneration.

Personal income tax is calculated as follows:

- (a) 18% of annual remuneration up to PLN 85,528, the amount of tax received from the above calculation is decreased by PLN 556.02;
- (b) Then, if annual remuneration exceeds PLN 85,528, personal income tax amounts to PLN 14,839.02 plus 32% from the amount in excess of PLN 85,528.

The social security contributions are as follows:

- (a) 19.52% of the remuneration is paid in relation to pensions benefits (this premium is paid in equal parts by the employer and the employee);
- (b) 8% of the remuneration is paid in relation to disability pensions benefits (6.5% is paid by the employer and 1.5% is paid by the employee);
- (c) 2.45% of the remuneration is paid in relation to sickness benefits (the premium is paid entirely by the employee);
- (d) 2.45% of the remuneration is paid in relation to the Labour Fund (the premium is paid entirely by the employer);
- (e) 0.10% of the remuneration is paid in relation to the Guaranteed Employees Benefits Fund (the premium is paid entirely by the employer);
- (f) from 0.67% up to 3.60% of the remuneration is paid in relation to accident at work benefits (the premium is paid entirely by the employer).

Retirement and pension insurance contributions do not have to be paid on that part of any employee's salary exceeding 30 times the forecasted national average salary (i.e. in 2012 it was PLN 105,780). Therefore, for employees earning in excess of this cap, the employee keeps most of the grossed-up amount and the employer enjoys a reduction in the overall contributions it has to make.

## 8. Hours of Work

The Labour Code provides that generally working hours in Poland may not exceed eight hours in a 24-hour period and an average of 40 hours per average five-day week in a given calculation period not

exceeding four months. It is anticipated that in 2013 the maximum length of the calculation period will be extended to 12 months, but the new regulations have not yet been adopted by Parliament. Applicable working time regimes are set out either in the employer's general internal works regulations or in individual employment contracts.

The working time schedule may vary in different working time regimes applicable to a given employer.

Generally, in each 24-hour period, an employee is entitled to at least 11 hours of uninterrupted rest and to a minimum 35-hour period of weekly uninterrupted rest.

The number of overtime hours must not exceed 150 hours per calendar year for any individual employee (a different overtime hours limit may be established by internal works regulations or employment contracts - up to about approx. 416 hours annually). In any event, weekly working hours together with overtime hours may not exceed an average of 48 hours in a given settlement period.

Under the Labour Code, in addition to basic remuneration, additional remuneration for overtime work will be paid in the amount of:

- (a) 100% of the employee's hourly remuneration - for each hour of overtime worked at night, on days which are not working days for the employee pursuant to the work schedule an employee is obliged to comply with, on a day off granted to an employee in exchange for work on Sunday, or on a holiday pursuant to the employee's work schedule;
- (b) 50% of the employee's hourly remuneration - for each hour of overtime worked during the employee's normal working days.

## 9. Holidays and Time Off

### 9.1 Holidays

In Poland, there are 13 public holidays. These include e.g. New Year's Day, Easter Monday and Christmas. All workers are entitled to a minimum of 20 days' paid annual leave, which accrues on a *pro rata* basis from the first day of employment up to 10 years' employment. Employees with more than 10 years' service are entitled to 26 days' paid annual leave.

### 9.2 Family Leave

A woman is entitled to: (i) 20 weeks' leave for the birth of one child, (ii) 31 weeks' leave for the birth of twins; (iii) 33 weeks' leave for the birth of triplets; (iv) 35 weeks' leave for the birth of quadruplets; and (v) 37 weeks' leave for the birth of quintuplets (or more).

A man is entitled to paternity leave if his wife returns to work after taking maternity leave and having used at least 14 weeks. In such an event, the unused part of the maternity leave may be granted to the man as paternity leave.

After the basic period of maternity leave is used, an employee is entitled to an additional voluntary paid leave of up to six weeks (in the case of one birth) or up to eight weeks (in the case of a multiple birth) from 2014. However, there is a transition period and in 2013 the additional paid leave will last up to four weeks (up to six weeks in the case of a multiple birth).

The father of the child is entitled to special paternity leave of two weeks, which should be used during the child's first 12 months.

It is anticipated that in 2013 the maximum length of maternity leave will be extended to 12 months and paternity leave - to eight weeks, but the new regulations have not yet been adopted by Parliament.

An employee is entitled to maternity/paternity leave if she/he assumes responsibility for bringing up somebody else's child and wants to adopt it.

During maternity/paternity leave the employee is entitled to maternity/paternity pay of up to 100% of her/his remuneration.

### 9.3 Illness

Employees absent from work by reason of ill-health or injury are entitled to sick pay, in principle for 182 days per calendar year. Generally sick pay amounts to 80% of the employee's remuneration. (100% is payable for sickness during pregnancy or sickness resulting from an accident at work.) The employer pays sick pay for an aggregate of 33 days' illness during the year. After this period, sick pay is covered by social security.

### 9.4 Other Time Off

Both parents are entitled to three years' unpaid childcare leave until the child's fourth birthday and an additional three years' unpaid leave until the child reaches the age of 18 if the child is disabled. Employees entitled to take childcare leave may, instead of taking childcare leave, request part-time working, however the requested part-time hours cannot, however, be less than half the employee's full-time hours.

Employees are entitled to additional leave in a number of other circumstances, for instance, employees raising a child under the age of 14 are entitled to two days of paid leave in a calendar year, and employees gaining professional qualifications, with the employer's consent, are entitled to paid study leave (in particular up to 21 days' paid leave during the last year of study).

## 10. Health and Safety

### 10.1 Accidents

Employers are under a duty to have regard for the health and safety of their employees while at work (and travelling to or from work), and are obliged by statute

to take out insurance against liability for occupational injuries and diseases.

Generally, employers are obliged to prevent accidents at work. In the case of an accident at work, an employer is obliged to provide first aid and eliminate the source of danger. Employers must maintain an accident register.

In the case of serious, lethal or group accidents, the employer should inform the Labour Inspectorate and the Labour Inspectorate's prosecutor.

### 10.2 Health and Safety Consultation

The employer should provide the employees with healthy and safe work conditions and should inform the employees about the health and safety work place rules.

Before an employee commences work, the employer must give him training in relation to health and safety rules, and the employee has to undergo preliminary medical examinations.

An employer is obliged to provide employees with free personal equipment to protect them against factors in the work place that are hazardous and harmful to health and to instruct the employees in the use of such equipment. In certain situations, it is also obligatory to provide employees with free working clothes and shoes and the employer should not permit the employees to work without personal protective equipment, work clothes and shoes.

An employer with more than 100 employees is obliged to set up an advisory and supervisory board body on work and safety issues. If the employer employs fewer than 100 employees, it may assign the performance of work and safety service tasks to an employee carrying out other work.

An employer with more than 250 employees is obliged to set up a

work and safety committee as an advisory and opinion-giving body.

## 11. Industrial Relations

### 11.1 Trade Unions

Under Polish law, workers are free to set up a trade union which can be established by a minimum of 10 founders. Trade unions have various rights as far as employment relationships are concerned. Employers are obliged to consult with them, for example on redundancies, transfer of business, or termination of the employment contract of an employee represented by trade unions. Employers cannot dismiss employees who are members of the managing body of a trade union.

### 11.2 Collective Agreements

Collective agreements between employers and trade unions are most usually executed in the industrial sector and often regulate matters such as pay, working hours, holidays, dispute procedures and redundancy procedures.

Collective agreements are one of the sources of labour law, which means that they bind employers. They regulate work conditions, rights and obligations of the employer and the employees. Typically, work conditions provided for in collective agreements are more beneficial to the employees than those stipulated in employment legislation.

One type of collective agreement is the so-called Social Package, which may be concluded between a trade union and an employer, or an investor planning to buy the employer. Most often they are concluded in the companies privatised by the State where the position of the trade unions is stronger (in particular in the energy and mining sectors). The Social Package provides for additional employee rights, and guarantees that the employer will fulfil these rights.

Most commonly, the Social Package stipulates additional benefits, a guarantee

of employment, and additional severance payments for the employees in the case of redundancies. The Social Package is concluded for a fixed period of time, mostly for a few years.

### 11.3 Trade Disputes

Trade disputes may relate to work and remuneration conditions. The first step to resolving a trade dispute is a negotiation exercise between the trade unions and the employer. If the parties do not come to an agreement, the next step is mediation conducted by the representatives chosen by trade unions and the employer. If the parties do not reach an agreement as a result of mediation, trade unions have the right to go on strike. The right to strike is guaranteed by the Polish Constitution.

### 11.4 Information, Consultation and Participation

The Workers Information and Consultation Directive has been implemented by means of the Act on Informing and Consulting Employees of 7 April 2006. This Act introduces a new employee representative body called the "Works Council". The Act applies to employers with at least 50 employees. The employer is obliged to inform the employees about their right to establish the Works Council but is only obliged to create a Works Council when a request is made by the employees.

A Works Council only has a consultative remit. In particular, Councils are not entitled to enter into collective disputes with the employer or call any strikes.

Employers must keep the Works Council informed about the following:

- (a) the activities and economic situation of the employer and any planned changes in this field;
- (b) the situation, structure and probable development of employment within the undertaking; and any activities which are aimed at maintaining employment levels; and

- (c) those activities which may cause any material change in the organisation of work or basis of employment.

The employer is also obliged to consult with the Works Council on the matters outlined at (b) and (c) above.

The Works Council is entitled to issue an opinion about the matters on which it has been informed. However, the employer is not required to take any action in response to this opinion. The consultation should be carried out in good faith and with due regard to the other party's interests. However, this is very general wording, which does not oblige the employer to share the Works Council's view or to reach any agreement.

An employer may have additional information and consultation obligations in the context of mergers and acquisitions and redundancy exercises (see sections 12.2 and 13.1 below).

## 12. Acquisitions and Mergers

### 12.1 General

The acquisition of a company through a share purchase does not in itself trigger any specific employment law obligations on the part of the employer (except for the general obligation to inform the Works Council, if one has been established), as the employing entity does not change as a result of the transaction.

On the other hand, where an acquisition is in the form of the sale of a business (assets), various information and consultation obligations will be triggered. The transfer of a business (i.e. employment establishment) or part thereof, irrespective of the number of employees affected by the transfer, results in the automatic transfer (i.e. by operation of law) of employment contracts related to the business (or part of the business) to the buyer proposing to operate the business. The same generally applies to mergers, where the employees of the entity which is

taken over are transferred, by operation of law, to the surviving entity.

The general legal framework for the transfer of an employment establishment is based on the EU Acquired Rights Directive, which has been implemented in Poland.

Transferred employees have no right to object to the transfer, but they may terminate their employment contracts on seven days' notice at any time in the two months following the transfer.

Termination of employment on the basis of the transfer of an employment establishment is prohibited. However, the new employer (the transferee) may terminate employment on the grounds of restructuring or staff rationalization following the transfer.

In principle, unless the terms of the transferee's internal remuneration regulations are more favourable for the transferred employees, the transferee is obliged to apply the collective bargaining agreement applicable to the previous employer (transferor) in respect of the employees affected by the transfer for at least one year following the date of transfer. After a one year period, the former working conditions of transferred employees apply to them until they are changed by the transferee.

### 12.2 Information and Consultation Requirements

If the trade unions are recognised, the seller and the buyer must inform them of the transfer 30 days in advance. If there are no recognised trade unions, the seller and the buyer have to inform the individual employees of the transfer 30 days in advance. Additionally, an employer is obliged to conduct an information and consultation process with the works council, if any. These obligations exist regardless of the number of employees involved in the transfer of an employment establishment.

If, as result of a transfer of an employment establishment, employment conditions are to be changed, the employers should conduct negotiations with the trade unions in order to conclude an agreement regarding the transfer.

Failure to complete the information and consultation process prior to the transfer does not prevent a transfer from being completed before the end of the consultation process.

### 12.3 Notification of authorities

There is no obligation to notify the authorities of a transfer, unless the transfer triggers the collective dismissal procedure (e.g. in relation to change of working conditions with respect to the place of work) (see section 13.5 below).

### 12.4 Liabilities

The transferor and the transferee are jointly and severally liable for liabilities towards employees related to the period prior to the transfer.

If the information and consultation process with trade unions or work council is not completed before the transfer of an employment establishment due to the employer's fault, there may be penalties (e.g. a fine or restriction of freedom) imposed on the employer for failing to comply with these obligations.

## 13. Termination

### 13.1 Individual Termination

The employer must comply with the rules of termination provided in the Code. Non-compliance with the provisions of law may cause re-instatement or compensation obligations. The employment contract may be terminated with or without notice or by mutual agreement.

### 13.2 Notice

An employer may only terminate an employment contract without notice if

one or more particular events, precisely described in the Code, occur. These are:

- (a) an employee seriously violates his basic duties (i.e. through gross negligence of wilful misconduct);
- (b) an employee commits a criminal offence during the employment period that renders his further employment in his position impossible, if the offence is obvious or has been confirmed by a court judgement;
- (c) an employee ceases through his own fault to have the necessary qualifications for the performance of work at his post;
- (d) an employee is incapacitated for work on account of sickness and such incapacity lasts (i) longer than three months, in cases where an employee has been employed by the same employer for less than six months; (ii) longer than the sickness-allowance period, in cases where an employee has been employed at the same employer for at least six months, or where the incapacity was caused by an accident at work or an occupational disease; and
- (e) an employee is absent from work for more than one month for a justified reason other than those covered by the previous points.

Each party to an employment contract may terminate the employment contract by a termination notice. The notice period varies according to the type of employment contract (fixed term period, indefinite period or for a probationary period) and the length of employment with a given employer. The termination notice must be in writing and must be delivered to the other party of the employment contract.

If the employer terminates an employment contract concluded for an indefinite period

of time and the employee is a member of trade union or is represented by the trade union, the employer should inform the relevant trade union in writing of any intention to terminate the employment contract, and it should state the reasons for the dismissal.

If a trade union decides that such a notice is unjustified, it may present the employer with written substantiated objections within five days of receiving the information. The employer, however, is not bound by the objections of the trade union and may proceed with termination.

The minimum guaranteed notice period for an employment contract for a probationary period is as follows:

- (a) three working days if the probationary period does not exceed two weeks;
- (b) one week if the probationary period is longer than two weeks; or
- (c) two weeks if the probationary period is three months.

A fixed-term contract can be terminated by the parties with two weeks' notice if the term of the contract is longer than six months and the parties agreed in the contract on the possibility of termination by notice.

The minimum guaranteed notice period for an employment contract of indefinite period is:

- (a) two weeks if the employee has been employed for no more than six months;
- (b) one month if the employee has been employed for at least six months; or
- (c) three months if the employee has been employed for at least three years.

The employee receives remuneration during the entire notice period.

### 13.3 Reasons for Dismissal

The employer may generally terminate an employment contract at any time. However, if the contract is for an indefinite period, the employer has to state the reasons for the dismissal. Under Polish law, the reasons have to be justified and specific. This means that they have to be related to the employee's work (e.g. low standard of work) or to the employer (e.g. restructuring). If an employee proves that the reasons for dismissal are not justified, he has the right to claim compensation, or, if the employment contract has been terminated in the meantime, the employee can also claim reinstatement to his previous position. The maximum amount of compensation that can be awarded is generally three months' remuneration.

### 13.4 Special Protection

There are special rules regarding dismissal as far as e.g. pregnant women, trade union representatives or employees nearing retirement age are concerned. Generally, employers cannot terminate the employment contracts of such protected employees. There are, however, exceptions to these protection rules. If an employer is declared bankrupt or is in the process of liquidation, such employees will not be protected from dismissal.

### 13.5 Closures and Collective Dismissals

There are special rules in relation to collective redundancies. The rules will apply if the employer employs at least 20 employees and within the period of 30 days he makes redundant:

- (a) 10 employees where the total workforce is less than 100 employees;
- (b) 10% of employees if the total workforce is between 100 and 300 employees; or
- (c) 30 employees if the total workforce exceeds 300 employees.

An employer is obliged to consult recognised trade unions about any proposed redundancies. The employer and trade union should execute an agreement regarding the terms of the redundancy exercise. An employer is also obliged to notify the poviát (i.e. the relevant administrative region) employment office (*powiatowy urząd pracy*) of the redundancy terms (in particular of the number of employees who will be made redundant and the reasons for the redundancy).

Generally, in the case of redundancy employment protection rules do not apply.

An employee who is made redundant is entitled to a redundancy payment of:

- (a) one month's remuneration if he has been employed for less than two years;
- (b) two months' remuneration if he has been employed for more than two years and less than eight years; or
- (c) three months' remuneration if he has been employed for more than eight years.

The total amount of a redundancy payment may not exceed 15 times the minimum wage, i.e. PLN 24,000 gross in 2013.

A redundancy payment is paid to employees whose employment contracts were terminated even if the number of employees made redundant is less than that indicated above. The only requirement for the payment of the redundancy payment is that the employment contract be terminated due to reasons not attributable to the employee.

If the employer subsequently recruits staff into the same positions that were previously made redundant, it is obliged to re-hire employees made redundant from any such position if they apply for those positions within a year of the date of their respective redundancies.

## 14. Data Protection

### 14.1 Employment Records

The employer's data protection obligations are specified in the Code and in the Personal Data Protection Act. Under the Personal Data Protection Act, personal data means any information relating to a natural person on the basis of which it is possible to identify that person.

Under the Code the employer may demand from an employee only the following data:

- (a) name and surname;
- (b) date of birth;
- (c) residential address and address for correspondence;
- (d) education level;
- (e) certificates of previous employment; and
- (f) other personal data and data pertaining to the employee's children if required for the purposes of exercising employee's rights.

An employer, as a data controller, is permitted to process employee data for the purposes of the employee's employment. This covers processing for the purposes of the fulfilment of statutory and contractual obligations towards employees, as well as to a certain extent, for the purposes of justified business objectives.

The Personal Data Protection Act provides other detailed rules with respect to personal data processing, such as the rules on transferring personal data outside the European Economic Area (EEA). The Personal Data Protection Act also specifies what security measures an employer, as a data controller, is obliged to take to prevent unauthorised access to the personal data of its employees.

### 14.2 Employee Access to Data

Under the Personal Data Protection Act an employee, as a data subject, has a

number of rights allowing him/her to control the processing of his/her personal data by the employer. In particular an employee has the right:

- (a) to be informed about the scope and manner of the processing of his/her personal data;
- (b) to be informed about the manner in which data are made available to third parties, and in particular about the recipients or categories of recipients of personal data; and
- (c) to demand that his/her personal data be supplemented, updated, amended as well as temporarily or permanently withheld from being processed or deleted, if data is incomplete, out of date, inaccurate or was collected in breach of the Personal Data Protection Act, or is no longer necessary for the purpose, for which it was originally collected.

The Personal Data Protection Act does not specify the method by which an employee must be provided with information

concerning his personal data. This is left to the employer to decide provided that the employee has an effective means of acquainting himself with the information and the information is given in writing if the employee so requests.

#### **14.3 Monitoring**

The monitoring of employee emails is not expressly regulated by law. Generally, the employer has the right to supervise how an employee is fulfilling his duties at work. Monitoring employee email, Internet and telephone usage is permitted as long as such usage is related to the employee's work. The employee's consent is not required, however, employees should be notified about monitoring.

#### **14.4 Transmission of Data to third parties**

An employer who wishes to provide employee data to third parties must do so in accordance with the Personal Data Protection Act principles and processing conditions. In many cases it may be necessary to obtain express consent to such disclosure in the absence of a

legitimate business purpose for the disclosure or express legal grounds for such disclosure. Personal data can be transferred within the EU subject to general compliance with the Personal Data Protection Act.

Where the third party is based outside the EEA, personal data may be transferred if the country ensures an adequate level of protection of personal data. If the country does not ensure an adequate level of protection, the transfer of personal data may occur only if: (i) one of the specific conditions of transfer set out in the Personal Data Protection Act is fulfilled; or (ii) if the Polish data protection authority (the General Inspector for Protection of Personal Data) consents to such transfer.

*Contributed by Clifford Chance, Warsaw*

# Portugal

## 1. Introduction

The primary source of employee rights is the Constitution which enshrines rights such as the employee's right to strike.

Employment relationships in Portugal are highly regulated and in the past there has been criticism that the extent of regulation has led to a certain amount of inflexibility in the labour market.

An amendment to the Labour Code came into force on 1 August 2012. This third amendment to the Labour Code implemented significant changes in the following areas:

- (a) overtime work payments;
- (b) compensation for termination of employment contracts;
- (c) flexible working hours;
- (d) reduction of administrative communications to the Labour Authority.

These alterations to the Labour Code are in line with the Memorandum of Understanding – Agreement between Portugal, the International Monetary fund and the European Central Bank of 3 May 2011.

Collective bargaining is well established with some 80% of Portuguese employees being covered by some form of collective agreement. Collective agreements are legally binding and it should be noted that there is a high degree of government intervention in the conduct of collective negotiations.

Disputes are resolved by a highly developed system of Labour Courts (*Tribunais de Trabalho*) but the system is extremely cumbersome and it can take one to two years between an aggrieved individual making an application and a final decision being given at first instance and four to five years if the case goes on appeal.

## 2. Categories of Employees

### 2.1 General

There are three categories of employees: general, rural and domestic. In this publication, attention is focused exclusively on “general” employees covering non-domestic and non-agricultural employees including senior staff and directors.

### 2.2 Directors

There are specific provisions relating to “special confidence” employment relationships, namely those with directors, managers and their personal secretaries.

### 2.3 Other

There are specific provisions relating to part-time employment. The salary of part-time employees must be calculated pro-rata to the salary of full-time employees carrying out similar work.

## 3. Hiring

### 3.1 Recruitment

Employers are encouraged to recruit young employees up to the age of 30 who have never had regular employment. Employers who employ such employees are exempt from making 50 to 100% of the social security contributions they might otherwise have to make for a period of three years.

Women must be allowed access to all jobs, professions and posts. As a basic rule, job offers and advertisements must not specify any restrictions or qualifications based on sex.

Although there is a recommendation in the law on contracts of employment that employment shall be made available to individuals notwithstanding age, illness or disability, undertakings are not legally obliged to hire any minimum percentage of disabled workers. However, employers benefit from reduced social security contributions in respect of disabled employees.

### 3.2 Work Permits

A “temporary stay visa” is required in respect of non-EEA nationals of countries which do not apply a principle of equal treatment to foreign nationals intending to work for a short period. However, such nationals intending to work for more than six months must obtain a residence permit. All contracts of employment of this type must be registered by the employer with the Ministry of Labour. The contract will be considered for registration if the employer provides evidence of the reasons for wishing to employ a foreign national, evidence that the employee has a clean police record and a copy of the signed employment contract.

Foreign employees may not be offered pay and other benefits differing from those offered to Portuguese nationals doing equivalent work.

There are no restrictions regarding the number of foreign employees that a Portuguese employer is allowed to hire. However, an annual government report establishes the total maximum number of foreign employees that may be admitted for each sector of activity.

## 4. Discrimination

The Portuguese Constitution enshrines the basic right to be treated equally regardless of sex, race or nationality. The Labour Code guarantees equal pay, equal opportunities, equal conditions at work and equal treatment for both men and women and outlaws discrimination on the grounds of parentage, age, sex, sexual orientation, marital status, genetic heritage, disability, chronic illness, nationality, ethnic origin, religion, political or ideological convictions and trade unions membership.

## 5. Contracts of Employment

### 5.1 Freedom of Contract

Although the principle of freedom of contract is recognised, in practice such

freedom is limited in the employment field by the requirements of legislative provisions and collective agreements. A collective agreement will take precedence over an individual contract where the provisions of the former are more favourable to the employee.

## 5.2 Form

There is no requirement for contracts of employment to be evidenced in writing. However, home-based work contracts, term contracts (where permissible), part-time contracts, intermittent work contracts, contracts with non-EEA nationals of countries who do not apply a principle of equal treatment to foreign nationals (see above) and non-competition provisions must be in writing. In addition, as Portugal has implemented the EU Directive dealing with the information to be given about the contract of employment, it is necessary to have the “essential aspects” of the contract, as defined in the EU Directive, communicated to the employee in writing.

Contracts may be for fixed or indefinite periods and, if not specified to be for a fixed period, will be deemed to be for an indefinite one. Term contracts may be entered into for periods up to three years, and can be renewed three times provided that it does not in aggregate exceed three years, except in specific circumstances provided for by law. If a term contract “overruns”, then it will be deemed to have become a contract for an indefinite period. Term contracts may also be entered into for non defined periods of time in certain legally defined situations (e.g. for the duration of a specific project, as a temporary replacement of an absent employee). In these situations the contract’s duration is limited to the duration of the “event” giving rise to the contract and may not, in any event, exceed six years.

Under special legislation in force, fixed term contracts whose duration does not extend beyond 13 June 2013 can be subject to two special renewals that cannot exceed 18 months. The duration

of each special renewal cannot be less than one sixth of the legally established maximum duration of the contract or of its effective duration, whichever is the shorter. In any case, no contract subject to a special renewal may be extended beyond 31 December 2014.

In specific situations defined by law, the following special types of employment contract may be executed:

- (a) Term contracts of a very short duration: these may be for periods not exceeding 70 days for specific seasonal activities such as tourism. This type of term contract need not be in writing.
- (b) Intermittent work: for employers with a variable and discontinuous activity. These contracts will allow pre-defined periods of employee activity and inactivity. This type of employment contract must be entered into in writing.

## 5.3 Trial Periods

The maximum trial period for an indefinite contract is 90 days. Longer periods apply for senior management contracts (240 days) and contracts which require special skills or experience (180 days). During the trial period the contract may be terminated by either party without notice or compensation.

In the case of fixed-term contracts, the maximum trial period is 30 days for contracts of six months or more and 15 days for contracts of less than six months.

These periods can be reduced by collective agreement or by written agreement between the parties.

The duration of any previous professional relations between employer and employee (term employment contract, temporary work or independent work) will be considered for the purposes of determining the duration or excluding the existence of a trial period.

## 5.4 Confidentiality and Non-Competition

Employees are under a general duty to protect confidential information and not to reveal information concerning production methods or other business secrets to third parties. Unlawful competition by an employee is a reason which may justify dismissal.

To be effective, non-competition provisions must be contained in a written contract of employment and cover only activities which may reasonably be said to damage the employer’s business. They can be for a maximum period of two years and the employee is entitled to compensation for the period during which alternative employment is restricted. However, in situations where the employee’s role involves a significant degree of confidentiality or access to sensitive information, the non-competition period may be extended to three years.

## 5.5 Intellectual Property

If an invention is made by an employee during the course of his or her employment, it belongs to the employer, provided the activity giving rise to the invention is required by the contract and the employee is remunerated for the invention. If such remuneration is not provided for, the employee is, nevertheless, entitled to be remunerated according to the value of the invention. If the invention, however, is connected with the employer’s activity but is not related to a task defined in the contract, the employer has a preferential right over the acquisition and exploitation of the invention; appropriate compensation must however be paid to the employee.

## 6. Pay and Benefits

### 6.1 Basic Pay

A statutory minimum national wage is normally fixed each year (€485 per month for 2012).

The employer cannot reduce the contractual wage, unless expressly

permitted to do so by law, or where such a reduction has been accepted in a collective agreement.

An extra one month's basic wage must be paid to all employees as holiday allowance and at Christmas by law.

There is no obligation to index-link pay.

## **6.2 Pensions**

In some areas there are supplemental private pension plans. These tend to be more common in the case of larger and multi-national companies. All private pension schemes established on or after 1 January 1987 must be funded and managed on a segregated basis, either through an insurance company or a management society approved under the law.

Most private pension schemes have been collectively bargained and offered benefits related to final pay, targeting a final pension (inclusive of the state pension) of between 80 and 100% of final pay. Recently there has been a tendency to alter pension schemes into defined contribution plans rather than defined benefits/schemes.

## **6.3 Incentive Schemes**

There is no legislative requirement for employers to operate share options or profit-related pay schemes, and in practice such schemes are not widely used.

## **6.4 Fringe Benefits**

Common fringe benefits include subsidised meals for employees, cars for directors, mobile telephones and health insurance.

## **6.5 Deductions**

Employers are obliged to deduct tax and social security contributions at source.

# **7. Social Security**

## **7.1 Coverage**

Benefits provided under the Social Security regime include retirement

pensions, unemployment payments, family allowances, sickness and maternity pay. Extensive medical care is provided under a national health system funded by the social security system.

Old age retirement and disability pensions are covered and supported by Social Security.

## **7.2 Contributions**

Under the legislation currently in force contribution rates are of 34.75%: comprised of the employer's contributions at 23.75% of salary and the employee's contribution at 11% of salary. In addition, all employees must be provided with a minimum level of industrial injury benefits; employers may provide these benefits by way of insurance.

# **8. Hours of Work**

The legal limit on the maximum hours of work is eight hours a day (up to a maximum of 40 hours per week). However, collective agreements may establish different maximum hours of work provided that they do not exceed the legal maximum hours of work provided for by general law. Special flexible working hours regimes may also be established in certain circumstances.

The Labour Authority must be informed once a year of the number of hours worked in excess of the legal maximum.

The alterations to the Labour Code in 2012 reduced overtime work payments by 50%. According to the new rules, overtime must be paid at a premium of 25% for the first hour and at 37.5% of normal rates for subsequent hours or fractions. The premium is 50% if overtime is performed on a day off. Any provision in employment contracts or collective agreements providing for overtime work payments superior to those established by law are currently suspended for a period of two years until August 2014.

# **9. Holidays and Time Off**

## **9.1 Holidays**

With effect from 1 January 2013, public holidays are reduced to nine national public holidays and an additional municipal holiday. Permanent employees are entitled by law to 22 working days holiday per annum and, unless the contrary is agreed with an employee, the employer is obliged to permit an annual vacation in the period between May and October.

## **9.2 Family Leave**

The initial parental leave is 120 days and may be increased by 30 days if the parents so desire and by an additional 30 day period if the leave is shared by the parents. In the event of multiple births the 120 days of maternity leave will be increased by an additional 30 days leave for each additional child.

The mother is entitled to an exclusive parental leave of a minimum of six weeks (that must be taken after birth) and the father is entitled to an exclusive parental leave of a minimum of 10 to 20 business days. The balance of the initial parental leave may be taken either by the mother or by the father.

The initial parental leave allowance is 100% of the employee's average wage for 120 days or 80% for 150 days (if the maternity leave is increased by 25%) and the cost is met by the social security system. Where both parents share the parental leave giving rise to leave of 180 days the employee will be entitled to receive a monthly allowance corresponding to 83% of her/his average salary. All rights regarding job security and seniority are protected during the parental leave.

Either the mother or the father may take unpaid leave of up to three months, extendible to up to two years, after the birth of a child to look after that child until the child is six years old. Employees have the right to return to their previous job on expiry of parental leave.

In the case of the birth of a third child or more, leave may be extended for up to three years.

Either the mother or the father will also be entitled to take unpaid leave of up to four years to take care of their children in cases where they are handicapped or have a chronic disease until the child is 12 years old.

### 9.3 Illness

During the first three days of absence due to illness or injury, the employee does not receive his or her full wage. After this period, the employee is entitled to receive pay for up to 1095 days. These costs are met by the social security system as follows:

- (a) 55% of full wage for periods of illness of 30 days or less;
- (b) 60% of full wage for periods of illness of more than 30 days and up to 90 days;
- (c) 70% of full wage for periods of illness of more than 90 days and up to 365 days; or
- (d) 75% of full wage for periods of illness of more than 365 days.

The employment contract will be considered suspended if an employee is unable to work for longer than 30 days.

Sickness and disability payments are made under the social security system, although in some industries, collective agreements may provide for a supplemental payment. Employers are liable for the payment of salary if the employee is not covered by the social security system.

### 9.4 Other time off

Several situations such as marriage and death of relatives are qualified as justified absences by the labour Code and entitle the employee to be absent from work without loss of remuneration in most situations.

Employees attending any level of schooling, including postgraduate courses may be covered by the special Student employees' regime that provides for special rules in what concerns working hours and study related leaves.

Flexible working hours and part time regimes as well as unpaid leaves are also available to employees but will in most situations require the agreement of the employer.

## 10. Health and Safety

### 10.1 Accidents

All employees must be covered for a minimum level of industrial injury benefit in addition to benefits payable under the social security system, this cover is provided by way of mandatory insurance.

### 10.2 Health and Safety Consultation

The law gives employees the right to have health and safety representatives and health and safety committees may have to be set up under the terms of collective agreements. Special rules govern the running of employers' health and safety departments. Employees and Works Councils have rights to information and consultation in respect of health and safety matters.

## 11. Industrial Relations

### 11.1 Trade Unions

Trade unions are given extensive rights under the law to organise themselves which, together with the relatively few legal restrictions on the formation of trade unions in Portugal, has led to a large number of trade unions. However, it is difficult to accurately assess the percentage of the Portuguese workforce involved in unions, but estimates suggest that it is about 18%.

Although unions are protected from political interference by law, they are

themselves highly political. The majority of Portuguese unions belong to one of two national organisations:

- (a) the CGTP – Intersindical (Confederação Geral dos Trabalhadores Portugueses); or
- (b) the UGT (União Geral dos Trabalhadores).

There are regional or sectoral employers' associations, for example, the Confederation of Portuguese Industries (CIP), which negotiate collective agreements.

### 11.2 Collective Agreements

There are three different types of collective agreements recognised under Portuguese law:

- (a) *contrato colectivo*, which is the collective contract negotiated between employers' associations and unions;
- (b) *acordo colectivo*, an agreement negotiated between unions and more than one employer (although not an employers' association); and
- (c) *acordo de empresa*, an agreement between unions and an individual employer.

The first two are more commonly found in small and medium businesses, whilst large employers tend to negotiate an *acordo de empresa*.

Collective agreements are governed by a special section of the Labour Code and most private sector employees are covered by one of these agreements.

Provided that a collective agreement does not attempt to impose upon employees worse economic and social conditions than those provided by law or attempt to regulate the economic activities of the undertaking, the parties are free to include any matters which they feel are appropriate. In practice, collective

agreements tend to cover matters such as working hours, career development, health and safety and minimum wages.

The procedure by which collective agreements are negotiated is governed in some detail by law, and the final form of any agreement must be lodged with the Ministry of Labour.

The Labour Code contains provisions on the duration and renewal of collective agreements. Generally speaking, under this regime a collective agreement may not remain in force for longer than two years without being renegotiated. The underlying purpose of these provisions is to promote the periodical renegotiation of the collective agreements (which, in the past, had remained unaltered for long periods of time). The Labour Code introduced specific rules on the duration of the currently typical (termination) clauses in collective agreements that stipulate that the agreement will only be terminated in the event it is replaced by a new collective agreement. The new rules provide that these termination clauses will fall away after a five or six and a half year period if not renegotiated by the parties during that period.

The government has powers to intervene in the collective bargaining process, and may by order (*regulamento de extensão*) extend a collective agreement to bind parties other than the original signatories.

The Labour Code makes it possible for an individual employee to adhere to a collective agreement in force at the company even though he is not a member of the relevant unions.

### 11.3 Trade Disputes

The right to strike is enshrined in the Portuguese Constitution. The procedures laid down in the Labour Code must be followed.

It is also worth noting that lock-out action by an employer is a criminal

offence punishable by up to two years' imprisonment.

### 11.4 Information, Consultation and Participation

There is a constitutionally guaranteed right to form a Works Council (the size of which will depend on the number of employees) in any undertaking whatever its size. Its members are elected on an annual or twice yearly basis by the workforce frequently, although not always, from lists put forward by the dominant union. The role of a Works Council is advisory, aiming to safeguard employees' interests by becoming involved in consultation on matters such as changes in location, plant closure and production changes.

In addition to Works Council delegates, time off must be given to elected union delegates, whose role is to ensure that collective agreements are adhered to and to defend employees' rights.

## 12. Acquisitions and Mergers

### 12.1 General

The Labour Code implements the revised Acquired Rights Directive that regulates employees' acquired rights in the event of a transfer of a business. As a general rule, a transferee will take over the contracts of employment on the transfer of a business and assume the position of the transferor, unless the employee was transferred elsewhere (e.g. to a different location or department) before the transfer of the business occurred.

### 12.2 Information and Consultation Requirements

Before the transfer takes place, the transferor and transferee must provide written information to the employees, or their representatives, stating the date and reasons of the transfer, its legal, economic and social consequences as well as any specific employment measures to be implemented as a result of the transfer. This obligation arises regardless of the number of employees involved.

Ten days after compliance with the information obligation, the transferor and transferee must consult the employees, or their representatives, in order to obtain their agreement on specific measures to be implemented as a result of the transfer. The information and consultation obligations must be complied with before completion.

### 12.3 Notification of Authorities

There are no specific obligations to notify authorities in the event of a transfer of business. However, general rules in relation to the notification of the labour authorities or social security services concerning the admission of new employees or the termination of the company's activity will apply.

### 12.4 Liabilities

Failure to comply with the information and consultation obligations is classified as a light labour law infraction punishable with fines of up to €1,440, though such failure will not invalidate a transaction.

For a period of one year after the transfer, the transferee is jointly liable with the transferor for any obligations vis-à-vis the employees that arose prior to the date of the transfer.

Any dismissals or redundancies prior to or after the transfer that are made in connection with the transfer itself are unlawful. Failure to comply with the obligation in relation to the automatic transfer of employees is classified as a very serious labour law infraction. This is punishable with fines and will entitle the employees to bring proceedings to be reinstated or to receive compensation for unlawful dismissal.

## 13. Termination

### 13.1 Individual Termination

Fixed-term contracts may terminate with the expiry of the term if notice is given in writing by the employer or by the employee, respectively, 15 or eight days before the end of the term. Any contract

may terminate by mutual agreement (which must be recorded in writing) or by the employee's unilateral decision. Otherwise (except during a trial period or when there are collective dismissals), an individual's contract of employment may only be terminated if there is gross misconduct (*justa causa*). In particular, it should be noted that although the retirement age is legally fixed at 65, the employee may not be forced to retire and any enforced retirement will be construed as an unjust dismissal. However, once an employee reaches 70, the employment contract will be deemed to become a fixed-term contract for six months, terminable at the end of this period.

Where an employer terminates an employment contract in breach of the applicable rules a labour court can classify it as an unlawful dismissal. This will entitle the employee to choose between being reinstated or receiving compensation of between 15 and 45 days' base salary and seniority award ("*diuturnidades*") per year of service (in any event the compensation cannot be less than three months salary). The employee will also be entitled to all unpaid salary from the date of dismissal until the date of the court decision.

### 13.2 Notice

An employee may terminate an employment contract on 30 or 60 days' notice depending on the duration of the employment contract.

An employer cannot terminate an indefinite employment contract by giving notice except in cases of redundancy, but in such cases, there are other complex procedural requirements.

### 13.3 Reasons for Dismissal

There are three reasons for which an individual's contract may be terminated:

- (a) misconduct;

- (b) redundancy; or
- (c) the employee's lack of adaptability to new working conditions.

In connection with dismissals for misconduct, the law lays down a non-exhaustive list of reasons, each of which would be sufficient justification.

Termination due to elimination of an individual's post (which is equivalent to individual redundancy) must be distinguished from collective redundancy (see below).

Finally, an employer may terminate the contract of employment if an employee is unable to adapt to changing circumstances. There are certain specific circumstances which must exist before dismissal on such grounds can occur (including the introduction of new technology in the preceding six months).

The procedure applicable to dismissals arising for each of the reasons set out above is laid down in considerable detail by law. In connection with dismissals for misconduct, the Works Council must be informed and the employer must await the opinion of the Works Council before implementing the dismissal (failure to do so will lead to the dismissal being considered void). Where a dismissal is due to the disappearance of the job or the employee's lack of adaptability, the employer must notify the Works Council which may call upon the Labour Authority to examine the grounds of the dismissal. There are detailed consultation requirements.

### 13.4 Special Protection

Prior to dismissing an employee who is benefiting from specific parental protection rights (pregnant, breast-feeding on maternity or paternity leave), a prior favourable opinion must be issued by the Employment Department. Dismissal of

employees who benefit from such protection is always rebuttably presumed to have been without just cause.

### 13.5 Closures and Collective Dismissals

There will be a collective dismissal if two or more employees are dismissed from a micro company (i.e. a company with a less than ten employees) or a small company (i.e. a company with between 10 and 50 employees), or if five or more employees are dismissed from a medium or larger undertaking. The employer must demonstrate that the reasons for making collective dismissals are sufficiently grave to justify priority being given to the undertaking's interests over the constitutionally protected rights of the employees. The employer must notify the Works Council and the Labour Authority, giving details of each employee involved and the reasons for the proposed dismissals. The employer and employees' representatives are obliged to negotiate ways of minimising the numbers of employees affected. The services of the Ministry of Labour will intervene in negotiations to ensure that the appropriate formalities are complied with and to act as mediator. Once the negotiations are completed, the employer must give all affected employees at least 15 to 75 days' notice (depending on the employee's seniority) before the dismissals can take effect and inform them, in writing, of the reason for the dismissal, the date on which it takes effect and the amount of compensation payable. The applicable notice periods are:

- (a) 15 days if the employee has less than one year's service;
- (b) 30 days if the employee has between one and five years' service;
- (c) 60 days if the employee has between five and 10 years' service; or

- (d) 75 days if the employee has 10 or more years' service.

Under the new rules, employees have the right to receive compensation for termination as follows:

data protection rules based on the principle of preservation of the right to privacy/private life.

Employers, as data controllers, are under an obligation to ensure that they process

In the absence of the application of any of the exemptions specified by the Data Protection National Commission (CNPD) employers must notify the CNPD of their processing of their employees' personal data. This notification is made on a standard form setting out details of the processing, the data controller's identity, the purposes of the processing, the categories of data to be processed, security measures adopted to protect the data, details relating to the transfers of data to third parties and international data flows.

In some specific cases identified by the PDPL (including cases where sensitive data and criminal records are processed and images are recorded by an internal television circuit), an employer must obtain the prior authorisation of the CNPD in order to initiate the processing of their employees' personal data.

In addition, in the absence of a relevant exception, personal data may only be processed if employees have unambiguously given their consent. In some cases express consent is required, for example in order to process sensitive data where no relevant exceptions apply.

#### 14.2 Employee Access to Data

Employees, as data subjects, have the right to access their personal data. The right of access entitles them, subject to certain limited exceptions, to be told, among others, what data are held about them, the purposes of the processing, to whom it is disclosed and to be provided with a copy of their personal data. Data subjects may also request the rectification, deletion or blocking of their personal data, where the processing of their data does not comply with the provisions of the PDPL, and that any such rectification, deletion or blocking should be notified to any third party to whom their personal data had been communicated except where the employer demonstrates that it is impossible to do so. The exercise of these rights of access is subject to certain conditions in particular case of data processing, as provided by the PDPL.

Employment commenced before 1 November 2011	
Service up to 31 October 2012	Service after 31 October 2012
<ul style="list-style-type: none"> <li>■ One month basic salary (MBS + Seniority allowance (SA)) X no. of years of service</li> <li>■ Compensation cannot be less than three MBS and SA</li> <li>■ Prorated payments will be made in respect of fractions of a year</li> </ul>	<ul style="list-style-type: none"> <li>■ Will only be considered if the employee has less than 12 years' service and/or the compensation for the previous period of service does not exceed 240 times the minimum national wage (i.e. €116,400 for 2012)</li> <li>■ 20 days of MBS and SA per year of service</li> <li>■ A prorated payment is made in respect of fractions of a year</li> <li>■ 1 day of MBS = (1 MBS + SA) /30</li> <li>■ The MBS ceiling is 20 times the minimum national wages (i.e. €9,700 for 2012)</li> </ul>
Employment commenced on or after 1 November 2011	
<p>20 days of MBS and SA per year of service</p> <p>Prorated payments for fractions of a year</p> <p>1 day = (1 MBS + SA) /30</p> <p>MBS ceiling of 20 times minimum national wage (i.e. €9,700 for 2012)</p>	

## 14. Data Protection

### 14.1 Employment Records

The collection, storage and use of personal data held by employers about their employees is regulated by the Personal Data Protection Law, approved by Decree-Law 67/98, dated 26 October (PDPL), which implements the EU Data Protection Directive. Violation of the PDPL can lead to criminal convictions, fines, compensation claims from affected employees or regulatory action. The Labour Code also establishes specific

personal data about their employees (whether held on manual files or computer) in accordance with specified principals including the following: ensuring that data is accurate, up to date, and is not kept longer than is necessary and that it is stored securely to avoid unlawful access or accidental destruction or damage.

Employers, and all persons that have access to personal data in the scope of their job function are obliged to keep such data confidential.

Employees also have the right to object to the processing of their data in the circumstances specified by the PDPL, namely in the case of processing for direct marketing purposes or for any other form of advertising.

### 14.3 Monitoring

The monitoring of employee email, internet and telephone usage and closed circuit TV monitoring is regulated by the Labour Code. Monitoring is permissible provided that it is carried out in accordance with the principles and processing conditions prescribed by the Labour Code. All files and systems used by the employer to process employees' data must satisfy the PDPL's provisions. Express employee consent to monitoring is not usually required, however, employees shall be made aware that monitoring is being carried out, the purpose for which it is being conducted and to whom the data will be supplied.

The recording of communications is expressly prohibited, except if made for the exclusive purpose of proving a

commercial transaction or if made in the context of a contractual relationship, as established by the Law related to Personal Data Processing and Privacy Protection in Electronic Communications. In the case of legally authorised recordings, employees involved in such communications must be made aware of the recording and they must give their express consent to the recording in addition to any other data subject involved in the communication. The CNPD must grant prior authorisation for the recordings.

The employer is entitled to establish rules for the use of the company's communication systems (e.g. email). These rules must be made clear to the employees.

### 14.4 Transmission of Data to Third Parties

An employer who wishes to provide employee data to third parties must do so in accordance with the PDPL principles and processing conditions. In many cases it may be necessary to obtain express consent to such

disclosure in the absence of a legitimate business purpose for the disclosure and depending on the nature of the information in question and the location of the third party. Personal data can be transferred within the EU subject to general compliance with the PDPL.

Where the third party is based outside the EEA it should be noted that the PDPL prohibits the transfer of data to a country outside the EEA, unless that country ensures an adequate level of protection for personal data or one of a series of limited exceptions apply.

*Contributed by Cuatrecasas  
Gonçalves Pereira*

# Romania

## 1. Introduction

Romanian employment relationships are governed principally by the Labour Code (Codul Muncii), collective bargaining agreements, the employer's internal regulations and employment contracts.

The Labour Code is the main enactment governing individual employment relations and sets out the minimum rights to be afforded to employees. It came into force in 2003 and has been significantly amended several times. The latest amendments came into force on 30 April 2011. The Labour Code largely complies with the European Union legislation.

In addition, the Law of Social Dialogue, in force since May 2011, constitutes a unitary legal framework for, *inter alia*, trade unions, employers' organisations, collective negotiations and the settlement of labour conflicts.

Collective bargaining agreements may be concluded at sector, group company or company level. Collective bargaining agreements, irrespective of the level at which they were concluded, must not breach the requirements of the Labour Code nor establish rights for employees that are inferior to those established by the collective bargaining agreements concluded at higher levels.

As a general remark, there is a certain degree of uncertainty and lack of consistency in the practice and the approach of different Romanian authorities and courts of justice dealing with labour law issues. This is especially so regarding the most recent labour legislation changes.

## 2. Categories of Employees

### 2.1 General

Romanian legislation distinguishes between employees with indefinite contracts and fixed-term contracts, full-time employees and part-time employees, temporary agency employees

and employees working at home. Each of these categories of employees has the right to be treated no less favourably than a comparable full-time employee with an indefinite contract.

### 2.2 Directors

Under Romanian corporate legislation, directors are appointed under mandate contracts and not employment contracts. As an exception, a director in a limited liability company can conclude an employment contract for the position of director if he is also the sole shareholder of that company.

In addition, directors and managers in joint stock companies cannot be engaged under an employment contract in the company for the duration of their mandate. If a director is engaged as an employee of a company, his employment contract with the company is automatically suspended during his mandate as director.

### 2.3 Other

Public officers are subject to a special law establishing their status, rights and obligations, in accordance with the relevant EU legislation.

## 3. Hiring

### 3.1 Recruitment

There are a number of sources of recruitment, such as the state agencies for employment and private recruitment agencies. Also, in order to recruit, employers usually advertise in local or national newspapers or journals. The services of private recruitment agencies are often used by employers for all categories of employees.

Romanian legislation provides for incentives to be granted by the state to employers which hire unemployed and newly graduated persons.

### 3.2 Work Permits

Work permits are required for most foreign citizens to work in Romania.

There are various types of work permit. The most important is the type A work permit which allows a foreign person to enter into a Romanian employment contract and grants the foreign person the same rights as a Romanian employee would have. The type B work permit allows a foreign employee to be seconded in Romania for a maximum duration of one year.

Certain categories of foreigners are, however, exempt from obtaining a work permit, such as: (i) EU/EEA nationals; (ii) non-EU/EEA citizens appointed as heads of representative offices, subsidiaries or branches in Romania; and (iii) non-EU/EEA foreigners employed by companies having the registered offices in EU/EEA countries and who are seconded to Romania, provided they present the residence permit issued by the respective EU/EEA country.

The family of a work permit holder may enter Romania provided that they do not need a visa or have obtained a visa for a family reunion.

## 4. Discrimination

The Labour Code recognises the principle of equality in work relationships between all employees and all employers. In this respect, the Labour Code prohibits any form of direct or indirect discrimination against employees on grounds such as gender, sexual orientation, genetic parameters, age, nationality, race, colour, ethnic origin, religion, political views, social origin, disability, marital status, family responsibility, union membership or union activities. The Labour Code requires employers to address discrimination issues in their internal regulations and breach of an employer's discrimination rules will trigger the liability of the employer.

Specific rules on discrimination are also contained in special enactments, such as the Governmental Ordinance no. 137/2000 on preventing and sanctioning all forms of discrimination which

transposes Council Directive 2000/43/CE implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and Council Directive 2000/78/CE which establishes a general framework for equal treatment in employment and occupation. Also, Law No. 202/2002 regulates the principle of equal opportunities between women and men and imposes specific obligations on employers in order to ensure this is achieved. This legislation provides that employees claiming discrimination at work on grounds of gender may commence civil claims against employers in special employment courts. Both pieces of legislation provide for the principle of equal pay for equal work.

Sexual harassment is a criminal offence under Romanian law and may be punished by a term of imprisonment of between three months and two years or by a fine.

## 5. Contracts of Employment

### 5.1 Freedom of Contract

As a general principle, employers and employees are free to negotiate and enter into an employment contract, though certain mandatory provisions need to be taken into consideration. For instance, although contracts may be for a fixed or indefinite term, fixed-term contracts may only be used in very limited situations as provided by law. No more than three successive fixed-term contracts may be concluded for the same job, and, generally, their total duration cannot exceed 60 months.

Before entering into any kind of employment contract, the employer is legally required to inform the employee about the most important clauses.

Irrespective of the term of the contract, the employees receive the benefit of the same mandatory rights as provided by law and the applicable collective bargaining agreements.

### 5.2 Form

The employment contract must be concluded in the written, Romanian-language standard form provided by law. In addition to the mandatory clauses, the employment contract may include additional clauses, as negotiated by the parties, provided that such additional clauses are not in breach of the law or the collective bargaining agreements. The employment contract may also be concluded in a foreign language, for the parties' use; nevertheless, the Romanian version will prevail and will be the enforceable one.

One day before commencement of activity, the main elements of the employment contract must be recorded in the employees' register kept by the employer in electronic form; also, an electronic copy of the employees' register must be filed with the appropriate labour inspectorate by the employer on the same day.

As a rule, any amendment to the employment contract must be agreed to by the employer and the employee and must be recorded in the employees' register and notified as above to the appropriate labour inspectorate within 19 days of the amendment.

### 5.3 Trial Periods

Trial periods may be included in employment contracts. During such a period, either of the parties may terminate the employment contract with immediate effect.

The following maximum terms are prescribed for the trial period in employment contracts concluded for an indefinite term:

- (a) 120 calendar days for management positions;
- (b) 90 calendar days for non-management positions; and
- (c) 30 calendar days for persons with disabilities.

The first six months after the professional debut of graduates from universities are deemed a period of traineeship, except for those professions where the period of traineeship is regulated by specific legislation.

For employment contracts concluded for a fixed term, the trial periods vary between five business days for employment contracts concluded for less than three months and 45 business days for employment contracts concluded for more than six months for a management position.

### 5.4 Confidentiality and Non-Competition

The employment contract may contain a confidentiality clause whereby the parties agree that throughout the duration of the employment contract and after its termination they will not disclose data or information they have acquired during the contract. Failure by either of the parties to comply with such a clause obliges the party at fault to pay damages.

A non-competition clause may also be included in the employment contract. This clause may be effective only after termination of the employment contract and for a period not exceeding two years. Under the non-competition clause, the employee undertakes not to perform, for their own interests or that of a third party, any activity which competes with the activity performed for their former employer, in exchange for a monthly non-competition indemnity which the former employer undertakes to pay during the entire non-competition period.

The non-competition clause is valid only if it clearly stipulates:

- (a) the activities the employee is prohibited from performing;
- (b) the amount of the monthly non-competition indemnity;
- (c) the time period for which the non-competition clause is effective;

- (d) the third parties on behalf of whom the performance of activity is being prohibited; and
- (e) the geographical area in which the employee might be in actual competition with their former employer.

The monthly non-competition indemnity is not part of the employee's salary and must be paid after termination of the employment contract. The amount of the monthly non-compete indemnity is at least 50% of the employee's average gross salary paid for the six months prior to the date of termination.

The non-competition clause may not have the effect of absolutely prohibiting the employee from exercising their profession or specialisation.

If the employee wilfully breaches the non-competition clause, they may be obliged to return the non-competition indemnity and, if applicable, to pay damages to the employer.

### 5.5 Intellectual Property

As regards inventions, under Romanian law there are two main rules on inventions created by an employee during employment: (i) if the employee was assigned a creative mission, the invention belongs to the Company however, the contract must provide for additional consideration to be paid to the employee in respect of any such invention, unless otherwise agreed; or (ii) if the employee was not assigned a creative mission and the invention was created during employment through knowledge or use of technology or by means specific to the employer or information available on the premises of the employer or with the material assistance of the employer, the invention belongs to the employee unless otherwise agreed. As regards industrial drawings and designs: (i) if the employee was assigned a creative mission or acted in accordance with his job description, the right to the industrial drawing/design

belongs to the company; or (ii) if the employee created the industrial drawings or designs independently, i.e. other than in pursuit of a specific creative mission or in accordance with the job description, the related right belongs to the employee.

As regards copyright: (i) works created in accordance with the job description belong to the employee unless otherwise agreed; the copyright related to such works may only be transferred to third parties with the employer's consent and with due compensation of the employer for its contribution to the cost of creation of such work; or (ii) computer programs belong to the employer if created in accordance with the job description or upon the employer's instructions, unless otherwise agreed.

## 6. Pay and Benefits

### 6.1 Basic Pay

According to the Labour Code, the salary includes the base salary, bonuses, compensation, and other benefits as provided by law and the relevant employment related documents.

The minimum base salary is established at national level by government decision and in 2012 it amounts to RON 700 per month (approximately €155) for 170 working hours per month.

Salaries in Romania may be linked to a certain currency exchange ratio, most frequently € or US dollars.

According to the Labour Code, the salary must be paid at least once a month. No retentions may be performed out of the salary, except for the cases and in the conditions provided by law.

The Labour Code provides for minimum bonuses to be granted to all employees in addition to the base salary, such as overtime bonus or night-work bonus. The relevant collective bargaining agreement, the internal regulation or the employment contract may provide for other bonuses, compensation and additions to the salary.

### 6.2 Pensions

The Private Pensions System in Romania has been operational since May 2007 and is mandatory for employees under the age of 35 and optional for employees between 35 and 45 years old.

### 6.3 Incentive Schemes

There is no legal requirement for employers to grant share options or profit-related pay schemes, and these are also not commonly used by Romanian employers. The granting of these incentives may be negotiated by the parties in the relevant collective bargaining agreements or employment contracts or may be given *ex gratia* by the employer.

### 6.4 Fringe Benefits

A very common fringe benefit in Romania is meal tickets. These are tickets that can only be exchanged for food products. The value of the meal tickets is partially deductible from the employers' taxable incomes and is subject to income on the part of the employee.

Private medical insurance, the use of the employers' vehicles or telephones for personal purposes are also common fringe benefits. They may be contractual or given *ex gratia* by the employers.

### 6.5 Deductions

Deductions from pay by the employer are prohibited unless they are expressly regulated by law. Deductions by way of damages may be withheld provided the employee's debt is due, liquid and payable and has been established by way of a definitive and irrevocable court decision. By way of exception, the employer and the employee can agree as a matter of contract that the employee will be liable in damages to the employer up to an amount of approximately €780.

In addition, deductions cannot, in any circumstances, exceed 50% of the net salary.

## 7. Social Security

### 7.1 Coverage

Romanian law establishes a mandatory social security system provided by the state. The public system covers, *inter alia*, retirement as a result of age, early retirement, disability and survivors' pensions, temporary incapacity to work due to sickness, maternity and child care allowances. This system is funded by contributions from both employees and employers. In addition, a mandatory private pension scheme and a voluntary pension scheme have also been implemented in Romania.

### 7.2 Contributions

The rates, dependent on work conditions, of social security contributions are established by law annually, and are distributed between the employee and the employer. Employers must calculate and pay monthly into the relevant public fund both the employer's contributions and individual employee's contributions.

The employer must deduct a total of 16.5% of the gross monthly salary of each employee, representing an individual employee's contributions for unemployment, pensions and health funds.

Employers' contributions may vary between 27.75% and 38.45% of the gross monthly salaries depending mainly on the working conditions (i.e. normal, particular or special conditions) and the business object of the employer.

In addition to withholding and paying the employee's income tax and the various social contributions, the employer has a number of related reporting obligations with the state authorities.

## 8. Hours of Work

The legal working time for full-time employees is eight hours per day, 40 hours per week and cannot exceed 48 hours per week (including overtime).

As an exception, working time may exceed 48 hours per week provided that the average working hours calculated over a reference period of four months do not exceed 48 hours per week. In addition, longer reference periods, up to 12 months, can be negotiated in collective bargaining agreements if certain conditions are met.

Every 12 hours worked must be followed by 24 consecutive hours of rest.

The working time for part-time employees, calculated weekly or as a monthly average, is shorter than the working program of comparable full-time employees.

Overtime may not be performed without the employee's consent, except in case of force majeure or absolute necessity.

In general, overtime entitles the employee to be afforded time off in lieu, within the following 60 days. If time off in lieu cannot be afforded, the employee must be paid an overtime bonus of 75% of the base salary or a higher amount as provided for in the applicable collective bargaining agreement, internal regulation or employment contract.

## 9. Holidays and Time Off

### 9.1 Holidays

Full-time employees are entitled to a minimum of 20 business days of holiday per year. In addition, there are 11 days of public holiday in Romania. It is not permitted for money to be paid in lieu of untaken holiday, except upon termination of employment. In addition, untaken holiday entitlement may not be taken in the following year except if provided by law or the relevant collective bargaining agreement. Collective bargaining agreements or employment contracts may grant additional holiday rights.

### 9.2 Family Leave

Women are entitled to maternity leave of 126 calendar days. Normally, leave of 63 days before the child's birth and

63 days after the child's birth is granted. In any case, the new mother may not return to work earlier than 42 days after the child's birth. During maternity leave, the employee is entitled to 85% of the average income over the six months preceding the birth which is paid out of the social security fund, without exceeding 12 monthly gross minimum salaries i.e. RON 8,400 (approximately €1,860).

Collective bargaining agreements often provide that male and female employees are entitled to additional paid holidays for special family events, such as for the birth of a child, for the marriage of the employee and for the marriage of a child.

Employees are entitled to childcare leave until the child is one or two years old, as they so choose (or three years old in the case of a disabled child). During this leave, employees are entitled to social benefits amounting to 75% of the average income over the 12 months preceding the birth but no less than a monthly statutory pay of RON 600 (approximately €133) and no more than RON 3,400 (approximately €755) for childcare leaves until the child turns one, and not more than RON 1,200 (approximately €270) for childcare leave until the child turns two. During childcare leave, the employer may not terminate the employment.

### 9.3 Illness

Illness has the effect of suspending the employment contract. Employees absent from work by reason of illness are entitled to between 75% and 100% of their average income in the preceding six months depending on the type of illness without exceeding 12 monthly gross minimum salaries, i.e. RON 8,400 (approximately €1,860). This is paid by the employer during the first five days and by Social Security for the rest of the period, up to a total of 183 days per year.

## 10. Health and Safety

### 10.1 Accidents

Under Romanian law, employers must ensure the health and safety of their employees and to maintain insurance against liability for accidents of employees at work. They are also required to maintain insurance for occupational disease. The cost of the insurance varies according to generic classes of risk which are established by law based on specific formulae for each area of activity. Romanian legislation also contains specific regulations and norms governing certain types of workplace and activities in terms of health and safety.

### 10.2 Health and Safety Consultation

Employers have the legal obligation to consult with their employees on health and safety matters and the employees, through their representatives, have the right to make suggestions on such matters. For this purpose, a health and safety committee must be established for companies with more than 50 employees. Also, for employees working under difficult, harmful or dangerous conditions, the labour inspector may require such committees to be established even for companies with fewer than 50 employees. For companies not required by law to establish a health and safety committee, consultation with employers on health and safety matters is carried out by an employee representative designated by the employer.

## 11. Industrial Relations

### 11.1 Trade Unions

Employees have the freedom of association according to law. A trade union may be set up by at least 15 members working at the same employer. An employee may only be a member of one trade union in respect of a single employer.

The union members must pay subscriptions. They have the right to elect the union's representatives and to organise their activity. Unions function in

accordance with statutes that have been adopted by their members.

A trade union is representative if it meets certain criteria, such as its members representing at least 50% plus one of the total number of employees in the relevant company (e.g. if there are 30 employees there must be at least 16 members). Being representative gives a trade union additional powers (e.g. to negotiate collective bargaining agreements).

In companies with more than 20 employees and where no representative union has been established, the employees may elect and empower representatives to promote and defend their interests. Such representatives must be elected at a general meeting of employees, by at least half of the total number of existing employees. The employer and the employees must agree on the number of employees' representatives to be elected, which varies according to the total number of employees. The term of office of such representatives may not exceed two years.

According to the Labour Code, employees' representatives may not act on matters that are reserved by law for unions. However, they have certain rights which can be exercised by them as well as by unions. Such rights include the right to consult on all matters that may affect the employment relationship, and the right of collective negotiation.

Employees' representatives may participate in collective negotiations and as the case may be, enter into a collective bargaining agreement at the level of the company for which they work.

However, unions may participate in collective negotiations and enter into a collective bargaining agreement at the level of the company where they are present only if they are representative within that company. According to the Law of Social Dialogue, a legally established union qualifies as representative at a company level if at

least half plus one of the total number of employees of the relevant company are members.

Union leaders benefit from special rights including the right: (i) not to be dismissed for the duration of their term, except on disciplinary grounds; (ii) to negotiate with the company a number of days off per month in order to perform union related activities (employers are not required to pay their salaries for the time spent during the performance of union related activities); and (iii) to receive copies of the decisions of the board of directors or equivalent management body dealing with matters of a professional, economic and social nature within two working days of the relevant meeting date. In addition, the employer may invite the leaders of the representative trade union to attend the board of directors meetings where discussions relate to matters of professional, economic and social nature.

### 11.2 Collective Agreements

Collective bargaining agreements may be concluded at sector, group company or company level.

Under the law, these agreements apply to all of the employees from:

- (a) the company if the collective bargaining agreement is at company level;
- (b) the group of companies if the collective bargaining agreement is concluded at group company level; and
- (c) all the companies in the employers' organizations that concluded the collective agreement at sector level.

An employer with at least 21 employees must initiate collective negotiations. Collective negotiations may not necessarily culminate in the conclusion of a collective bargaining agreement. If the employer fails to observe this obligation, the employees can request that the employer initiates collective negotiations.

### 11.3 Trade Disputes

According to Romanian law labour conflicts may arise with respect to rights provided by employment contracts, collective bargaining agreements or the law or in relation to the negotiation of collective bargaining agreements .

Strikes may be organised only in the case of conflicts of interests and only after prior settlement procedures have been exhausted. During strikes, employment contracts may not be terminated by the employer; however employment contracts are suspended and employees do not receive their salaries for the period of the strike.

### 11.4 Information, Consultation and Participation

The Information and Consultation Law no. 467/2006 (which transposed Directive 2002/14/EC) requires employers of at least 20 employees to inform and consult with the employees' or union representatives in respect of:

- (a) the recent and probable development of the employer's activities and economic situation;
- (b) the situation, structure and probable development of employment within the employer and on any anticipatory measures envisaged, in particular where there is a threat to employment; and
- (c) decisions likely to lead to substantial changes in work organisation or in contractual relations, including collective redundancies and the transfer of undertakings, businesses or parts of undertakings or businesses.

Information must be given at such time, in such manner and with such content as are appropriate to enable, in particular, employees' or union representatives to conduct an adequate study and, where necessary, prepare for consultation.

Consultation shall take place:

- (a) while ensuring that the timing, method and content thereof are appropriate;
- (b) with the relevant level of management and representation, depending on the subject under discussion;
- (c) on the basis of information supplied by the employer and of the opinion which the employees' or union representatives are entitled to formulate;
- (d) in such a way as to enable employees' or union representatives to meet the employer and obtain a response to any opinion they might formulate, and the reasons for that response; and
- (e) with a view to reaching an agreement on decisions likely to lead to substantial changes in work organisation or in contractual relations.

More details on the information and consultation procedure could be provided in the applicable industry and/or company collective bargaining agreements.

Failure to inform and/or consult the employees or the provision of false or inaccurate information is considered a minor offence and may be sanctioned with fines between RON 1,000 and 50,000 (approximately €220 to €11,110).

In addition, according to the Labour Code employers have information and consultation obligations with the union or the employees' representative in certain circumstances, such as:

- (a) on the introduction of internal regulations of the employer;
- (b) on the introduction of health and safety rules and procedures within the employer;
- (c) on the introduction of a professional training plan within the company;

- (d) on scheduling the annual leave of employees; and
- (e) on any matters that might substantially affect the working conditions, the contractual relations, labour relations and generally the employees' rights and interests.

The European Works Council Law (implementing the European Works Council Directive 94/45/EC) came into force on 1 January 2007 and applies to the following:

- (a) a Community-scale undertaking whose central management is located in Romania or in another Member State of the European Union or of the European Economic Area ("Member State");
- (b) a Community-scale undertaking whose central management is not located in a Member State, but where the central management has appointed a representative in Romania for the purpose of initiating the establishment of a European Works Council or a procedure for informing and consulting with employees; and
- (c) a Community-scale undertaking whose central management is not located in a Member State, and it did not appoint a representative in a Member State, and the subsidiary, branch or any other secondary office of such undertaking or, as the case may be, the undertaking member of a group, which employs the largest number of employees in a Member State is located in Romania.

A Community-scale undertaking must have at least 1,000 employees within the Member States and at least 150 employees in each of at least two Member States in order to be subject to the legal obligation to establish a European Works Council or a procedure for informing and consulting with employees.

## 12. Acquisitions and Mergers

### 12.1 General

There is no general obligation of information or consultation of the employees in case of change of control in Romanian companies. However, employees are protected in the case of transfers of undertakings, businesses or parts of undertakings or businesses, pursuant to Law no. 67/2006 which implemented the Acquired Rights Directive 2001/23/EC, as amended. In such circumstances, employees retain all their rights as provided in their employment contracts and collective bargaining agreements at the date of transfer. Employment contracts may not be terminated by the employer.

### 12.2 Information and Consultation Requirements

Thirty days before the transfer is scheduled to take place both transferor and transferee must inform their respective employees in writing of the following:

- (a) the date of the transfer;
- (b) the grounds for the transfer;
- (c) the legal, economical and social consequences of the transfer;
- (d) the measures to be taken in relation to the employees; and
- (e) the working conditions.

Also, both the transferor and the transferee must consult with their respective employees 30 days before the transfer is scheduled to take place if certain measures are planned, in order to reach an agreement with the employees.

In addition, employers have a general obligation to inform and consult with employees on every occasion on which decisions are made which have a significant impact on working conditions, contractual relations with employees or labour relations.

### 12.3 Notification of Authorities

There is no obligation to notify authorities in the case of a transfer of undertaking. This obligation exists only when collective redundancies are involved.

### 12.4 Liabilities

Failure to observe the information and consultation obligations by the transferor or the transferee in the case of a transfer of an undertaking is deemed a minor offence and is sanctioned with a fine of between RON 1,500 and 3,000 (approximately €332 and €665). Moreover, employees affected by the transfer may make a complaint to a court.

If it is not within a transfer of undertaking situation, the failure to inform and consult with employees about major decisions affecting their interests and rights is deemed a minor offence and is sanctioned with a fine of between RON 1,000 and 20,000 (approximately €220 and €4,442).

## 13. Termination

### 13.1 Individual Termination

The employment contract may cease pursuant to the parties' mutual consent or at one party's initiative, under the terms and conditions expressly provided for by the law.

The employment contract may also cease automatically in cases expressly provided for by the law.

### 13.2 Notice

As a principle, employees are entitled to a termination notice of 20 business days if termination occurs in one of the following circumstances:

- (a) physical and/or mental incapacity preventing the employee from carrying out their duties;
- (b) the employee is not professionally fit for their current position; or
- (c) individual or collective redundancies.

If, during the notice period, the employment contract is suspended, the notice term is also suspended.

The Labour Code provides for specific procedures to be observed by employers in the case of dismissal in specific circumstances.

Employees may terminate the employment contract by resignation, in which case they must provide notice of a maximum of 20 business days for employees in junior positions, or 45 business days for employees in management positions. Throughout the notice period, the employment contract continues to have full effect. If, during the notice period, the employment contract is suspended, the notice term is also suspended accordingly.

Employees may resign without notice if the employer has not met its obligations under the employment contract, such as paying their salary.

### 13.3 Reasons for Dismissal

The permitted reasons for dismissing an employee are as follows:

- (a) serious misconduct or repeated acts of misconduct;
- (b) if the employee has been placed in police custody for a period exceeding 30 days, under the terms of the Criminal Procedure Code;
- (c) physical and/or mental incapacity preventing the employee from carrying out their duties; or
- (d) if the employee is not professionally fit for their current position.

Dismissal for reasons not related to the employee is a redundancy termination. The redundancy of a position must be genuine and must have a genuine cause.

Redundancies may be individual or collective.

### 13.4 Special Protection

There are certain situations regulated by law when employees benefit from special protection and their employment contract may not be terminated:

- (a) during sick leave;
- (b) during quarantine;
- (c) during pregnancy, provided that the employer has been informed about the pregnancy before the dismissal decision;
- (d) during maternity leave;
- (e) during child care leave (which may last until the child turns two, or, in the case of a disabled child, turns three years old);
- (f) during the leave for looking after a sick child aged up to seven years, or, in the case of a disabled child until they turn 18 years of age;
- (g) during the exercise of an elective position in a trade union body, except when the dismissal is for serious disciplinary misconduct or for repeated acts of disciplinary misconduct; and
- (h) during annual leave.

### 13.5 Closures and Collective Dismissals

Collective dismissal involves dismissing, for reasons not related to employees, within a 30-day period, at least ten employees (for companies with 21 to 99 employees), 10% of employees (for companies with 100 to 299 employees), or 30 employees (for companies with at least 300 employees).

Collective dismissal requires 30 days' prior notice to the trade unions/employees' representatives, the territorial labour inspectorate and the territorial agency for professional occupation and training. The notice must state the intent to engage in collective dismissal and detail the social protection measures taken. If the problems relating to the collective dismissal cannot be

solved within 30 days, the territorial labour inspectorate may, at the request of a party, extend the period by a maximum of 10 days. The dismissal decision is individual and the serving of termination notices is mandatory.

If the employer resumes the activity, the employees made redundant by way of collective redundancies must be given priority in relation to vacancies for the same jobs in the 45 day period following their dismissal. The employer may only recruit other candidates if the redundant employees refuse the jobs.

Employees hired for indefinite periods who are laid off through collective dismissals during company restructuring or reorganisation processes, during partial or total cessation of the activity or during privatisation or liquidation may benefit from social protection measures such as compensatory payments, collective pre-dismissal services (e.g. outplacement counselling) and active measures intended to limit unemployment.

## 14. Data Protection

### 14.1 Employment Records

Under the Labour Code, an employer has a general obligation to ensure the confidentiality of its employees' personal data.

The Data Protection Law implemented the Data Protection Directive 95/46/EC.

As a general principle, the processing of personal data must be notified to the Romanian Personal Data Processing Supervisory Authority (the "Authority"). However, the processing by the employer of the personal data of its employees in order to fulfil its legal obligations related to employment is not required to be notified to the Authority.

An employer need not obtain the express consent of the employee with respect to the processing of personal data when entering into the employment contract.

Any further registration, organisation, storage, amendment, use, disclosure to third parties or transfer overseas of an employee's personal data must be made with the employee's express consent, except where the employer acts in order to fulfil its legal obligations related to employment.

In accordance with the principles set out in the Directive, the employer must ensure that the data is:

- (a) processed fairly and lawfully;
- (b) collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes;
- (c) adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed;
- (d) accurate and, where necessary, kept up to date; and
- (e) kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed.

### 14.2 Employee Access to Data

The employee has the following rights:

- (a) the right to access the data: the right to obtain from the controller upon request and at no expense for one application a year, confirmation as to whether their personal data are or have been processed by the employer;
- (b) the right of intervention: the right to amend, update, block, delete and anonymise data whose processing does not comply with the law, especially incomplete or inaccurate data;
- (c) the right to object: the right to object, for serious and legitimate reasons related to their personal situation, to the processing of their

- personal data, except as otherwise provided for by the law;
- (d) the right not to be subject to automated decision-making: the right not to be subject to a decision which produces legal effects concerning them or significantly affects them and which is based solely on automated processing of data intended to evaluate certain personal aspects relating to them, such as his performance at work, creditworthiness, reliability, conduct, etc; and
- (e) the right of access to justice: the right to make a complaint to a court of law for any breach of the rights provided for by the Data Protection Law.

#### **14.3 Monitoring**

The monitoring of employee email, internet and telephone usage is not expressly contemplated by the labour legislation. Nevertheless, employers may have internal rules or policies that regulate these aspects.

As a general principle, employers have the right to supervise the way the employees fulfil their duties at work.

#### **14.4 Transmission of Data to Third Parties**

Unless it is performed in relation to the legal obligations of the employer, the transfer of data to third parties may be performed only with the employee's express consent. Furthermore, the employer must authorise such transfer

with the Authority. However, if the transfer is to an EEA state or a non-EEA state but where there is an adequate level of protection of personal data, the employer need not obtain authorisation from the Authority, but only notify such transfer to the Authority.

*Contributed by Badea Clifford Chance*

# Slovakia

## 1. Introduction

The principles of Slovak labour and employment law are based upon labour regulations applicable prior to 1989. In 2002 the new Labour Code, Act No. 311/2001 Coll. as amended (the “Labour Code”) replaced the previous Labour Code, Act. No. 65/1965 Coll. that had been in force since 1965. The new Labour Code still follows some of the traditional principles implemented in the past such as equal protection of blue-collar workers, white-collar workers and managers, limited rights of the employer to terminate employment and limited contractual freedom of the parties in certain labour law areas. The court practice concerning employment relations is also affected by the previous regime and it tends to protect employees’ rights over those of employers in court disputes.

## 2. Categories of Employees

### 2.1 General

The Labour Code does not distinguish between blue-collar workers, white-collar workers, managers and directors. All employees, regardless of their position, benefit from the same level of protection and they are all subject to conditions negotiated with trade unions and agreed in collective agreements. The Labour Code only recognises managers as a specific category of employees in respect of some working conditions, such as additional working duties. In other respects, including termination of employment, the position of managers is the same as the position of regular employees.

## 3. Hiring

### 3.1 Recruitment

The recruitment process known as “pre-contractual relations” is specifically governed by the Labour Code. The employer is obliged to inform the recruit of the rights and obligations under their labour contract, the salary and other working conditions. If there are any

specific requirements for the employee such as a health requirement or special legal requirements the employer may only enter into a labour relationship with a person who meets such requirements. The employer may require references and a previous job description with the exception of school graduates seeking first time employment. It is unlawful to request information about pregnancy, family status, trade union allegiance, political party membership, religion or trustworthiness (existence of a criminal record) from potential employees. A review of criminal records is only allowed when this is essential in respect of the particular employment position. Anti-discrimination laws and the obligation to treat employees equally also apply to the recruitment process. The prospective employee may claim financial compensation from the employer if obligations relating to the recruitment process are breached. The prospective employee is obliged to inform the prospective employer about all circumstances that could prevent him from performing the role or that could cause any harm to the employer.

### 3.2 Work Permits

EU citizens are in an equal position to Slovak citizens in respect of employment in the Slovak Republic. Non-EU citizens need a work permit to be employed in the Slovak Republic, except in cases determined by Act No. 5/2004 Coll., on Employment Services (as amended) (foreign Slovaks, refugees or persons under asylum laws, humanitarian organisation members, accredited journalists, etc.)

Slovak employers can be fined if they employ foreigners without valid work permits. A work permit is issued by the regional labour office upon the application of the future employee following a review of the labour market in the relevant region. In some cases the work permit is issued automatically. Work permits may be issued for a maximum period of two years and may be renewed. In addition to

a work permit, a non-EU citizen who intends to be employed in the Slovak Republic needs to obtain permission from the regional police office for temporary residence in the Slovak Republic.

## 4. Discrimination

The prohibition of discrimination and the obligation to treat employees equally is one of the basic principles of the Labour Code. Section 13 of the Labour Code expressly prohibits discrimination against employees and imposes an obligation on the employer to treat all employees equally. Act No. 365/2004 Coll., on Anti-discrimination (as amended) came into effect on 1 July 2004 and expressly prohibits discrimination in employment relations, based on gender, religion, race, nationality, health, disability, age or sexual orientation, marital or family status, colour of skin, language, political affiliation or other conviction, national or social origin, property, descent or any other status. The obligation to treat employees equally applies to access to employment, working conditions, remuneration etc. Different treatment is only permitted if there are reasonable grounds due to the nature of the work and only if the extent of this different treatment is necessary for such activities or the circumstances in which they are performed.

Any person who claims discrimination may apply to court and seek financial compensation, amongst other remedies.

## 5. Contracts of Employment

### 5.1 Freedom of Contract

Although the new Labour Code increased the level of contractual freedom in labour relationships, some provisions of the Labour Code are still mandatory and it is not possible to contract out of their application. The state governed Labour Inspection Office may impose a penalty of up to €100,000 on the employer for each breach of the Labour Code. Working conditions may only differ from the

provisions of the Labour Code if they are more beneficial for the employee than those provided for by the Labour Code.

## 5.2 Form

Labour relations in the Slovak Republic are very formal. Labour contracts must be agreed and amended in writing. Termination of employment is only valid if it is performed in a prescribed manner. The Labour Code recognises four types of labour contract (regular labour contracts, part time labour contracts (for working time not exceeding 10 hours per week), agreements on the performance of work for limited working tasks (not exceeding 350 hours per year) and agreements on the working activity of students), and sets out the essential requirements in respect of each of them. There are four unavoidable essentials that have to be included in labour contracts: (i) a job description; (ii) place of work; (iii) start date; and (iv) salary details. The formal requirements are particularly important in respect of termination documents, particularly with regard to notice from the employer. Summary termination and non-compliance with the formal notice requirements often cause the termination of employment to be declared void by the courts.

## 5.3 Trial Periods

A trial period may only be agreed before the start date, in writing, for a maximum period of three months. A trial period may not be repeated. During the trial period either party may terminate employment in writing, without providing an explanation. The termination notice during the trial period should generally be delivered to the other party at least three days before the end of the employment.

## 5.4 Confidentiality and Non-Competition

The employee has a duty of confidentiality under the Labour Code. This applies during employment but may be extended under the contract for an unlimited period after the termination of employment. The remedy for a breach of

confidentiality after termination of employment is, however, only theoretical as the Labour Code does not specify any fines or sanctions applicable after termination of employment, therefore the remedy must be sought under other legislation (such as the Commercial Code in respect of the protection of business secrecy and fair competition).

The Labour Code contains an explicit non-competition clause applicable during employment according to which the employee may only perform other gainful activities of a competitive nature to the business of the employer with the prior written consent of the employer that may be revoked at any time for serious reasons, except for scientific, pedagogical, publishing, lecturing or artistic activities. A non-competition clause may be applied for a period of up to one year after the termination of employment for a consideration of at least 50% of the employee's average monthly pay, if agreed in the labour contract.

## 5.5 Intellectual Property

According to Act No. 618/2003 Coll., the Copyright Act (as amended), the right to exercise the proprietary rights (copyright) of an author of literature, sound recordings, movies, pictures, computer software and similar works belongs to the employer if the particular work was created by the employee as part of the author's work duties. The personal rights attached to the work remain with the author.

# 6. Pay and Benefits

## 6.1 Basic Pay

The minimum salary in the Slovak Republic is set by a new Governmental Decree No. 326/2012 Coll., which approved new minimum rates with effect from 1 January 2013: €337.70 per month for employees compensated monthly or €1.941 per hour for employees compensated by the hour. The Labour Code sets out six levels of work (from untrained workers to work in scientific professions) stipulating for each level a

coefficient by which the minimum salary must be multiplied. For professions on the sixth level the minimum salary is double the minimum wage determined by law.

Higher rates of pay are commonly agreed in collective agreements. Extra pay for overtime, work during holidays, work during days of rest (usually Saturday and Sunday), night shifts and work on call is obligatory.

The law does not provide for the linking of salaries to an index. Such provisions are usually contained in collective agreements.

## 6.2 Pensions

The pension system in Slovakia has been based on three pillars since January 2005. The first one represents pension insurance provided by the Social Insurance Company. The second one represents old-age pension savings provided by pension fund management companies (the "PFMC"). The third one is supplementary pension insurance provided by supplementary pension companies.

The first and second pillars are the basic system of pension insurance to which citizens pay insurance premiums or contributions stipulated by law. Those who are only connected to the first pillar pay an insurance premium to the Social Insurance Company for old age insurance (which is part of the pension insurance) amounting to 18% of the assessment basis (if they are employees, the employer deducts 4% from their wage and the employer pays 14% from his or her own resources). Those who are also connected to the second pillar pay 14% to the Social Insurance Company for old-age insurance and 4% to the PFMC chosen for employees (if employed, the employer pays 10% to the Social Insurance Company and 4% to the PFMC). The third pillar is optional.

## 6.3 Incentive Schemes

It is not common for Slovak employers to operate share option schemes. Bonuses and profit-sharing arrangements are

usually agreed either in the labour contract or in collective agreements.

#### 6.4 Fringe Benefits

Slovak tax laws consider the private use by an employee of a company car to be a taxable benefit. Therefore it is more common to provide a company car to an employee exclusively for work purposes. Use of a company car, mobile phone or personal computer are generally regarded as the provision of equipment necessary for the performance of the work by the employee rather than as a benefit and are therefore provided on this basis.

#### 6.5 Deductions

The employer is obliged by law to deduct income tax (19% in general; 25% from earnings over €3,311 per month) and social contributions from the salary of the employee. Employers are also obliged to deduct part of the salaries from employees where an order of an executor or court applies.

### 7. Social Security

#### 7.1 Coverage

The public social security system includes: (i) retirement pension insurance; (ii) sickness insurance; (iii) work injury insurance; (iv) unemployment insurance; and (v) guarantee insurance.

#### 7.2 Contributions

Both employees and employer contribute to the social security system. The rates are broadly as follows:

### 8. Hours of Work

The maximum number of working hours according to the Labour Code is 40 hours per week excluding breaks. For employees working in shift operations it is 38.75 hours per week and for employees in three shift operations it is 37.5 hours per week. For employees up to 16 years of age the maximum working hours are 30 hours per week, for employees between 16 and 18 years of age the maximum working hours are 37.5 hours per week including overtime.

Collective agreements may provide for shorter but not longer working hours. In addition, the employer may introduce a working hours account in the collective agreement or in an agreement with the employees' representative. A working hours account allows the employer to allocate different working hours each week while paying the same salary to the employee. The salary has to be matched to the hours worked within a specified time period not exceeding 30 months.

A break of at least half an hour has to be provided to employees working shifts of six hours or more. The break between two shifts, except for certain professions and situations, cannot be less than 12 hours or 14 hours for young employees, within any 24-hour period. Each week, the employee shall have two subsequent resting days that should be a Saturday and a Sunday or a Sunday and a Monday.

Work performed in excess of the usual working hours, upon the instruction of the

employer or with the employer's consent, constitutes overtime. The number of overtime hours is limited. Generally, overtime work prescribed by the employer must not exceed eight hours per week and 150 hours per calendar year. In addition, the average number of overtime hours must not be more than eight hours per week during a reference period of four consecutive months, without prior agreement with the employees representative. In any event the average number of overtime hours must not exceed eight hours per week in a 12 month period.

The employee is entitled to receive extra payment for overtime amounting to at least a 25% increase over the average salary, unless it has been agreed in a collective agreement that overtime is included in the employee's basic salary (such agreement is only permitted for a maximum of 150 hours of overtime per year). The employee and the employer may agree that instead of extra payment for overtime, the employee will be entitled to additional time off.

### 9. Holidays and Time Off

#### 9.1 Holidays

Employees are entitled to salary compensation for public holidays when they are absent from work if the holiday falls on a day that would otherwise be a regular working day for the employee. Such compensation is calculated based on average earnings during the previous calendar quarter.

	Sickness Insurance	Pension Insurance		Guarantee Insurance	Unemployment Insurance	Health Insurance	Work Injury Insurance	Solidarity Fund
		Retirement Insurance	Disability Insurance					
Employee	1.4%	4%	3%	–	1%	4%	-	-
Employer	1.4%	14%	3%	0.25%	1%	10%	0.8%	4.75%
Total	2.8%	18%	6%	0.25%	2%	14%	0.8%	4.75%

All employees are entitled to four weeks of regular holiday a year. An employee who reaches the age of 33 years is entitled to five weeks per year. A week for this purpose means seven consecutive days.

## 9.2 Family Leave

Pregnant women are entitled to paid maternity leave for a period of 34 weeks. If a woman is a single parent, the maternity leave is extended to 37 weeks and if she gives birth to two or more children, to 43 weeks. If the father takes paternity leave to care for the child he is also entitled to the same leave, but only one parent can take such leave. Maternity payments are provided by the Social Insurance Company from the funds for sickness insurance. Maternity leave usually starts six weeks before the expected date of birth.

The employer is also obliged to provide to the employee, upon her/his request, parental leave until their child is three years old. If the health of the child requires additional care, parental leave should be provided until the child is six years old. If agreed between the employer and the employee, the parental leave may be extended until the child is five years old or, if the child requires additional care for health reasons, until the child is eight years old. During parental leave the employee is only entitled to the parental contribution paid by the state.

## 9.3 Illness

Employers pay a sickness contribution to employees for the first ten calendar days of absence (including Sundays and Saturdays) the amount of which is set out by social insurance regulations. After the initial ten days a sickness allowance is paid by the state Social Insurance Company.

## 10. Health and Safety

### 10.1 Accidents

The Labour Code and specific laws impose obligations on the employer to

provide safe working conditions and health protection, and to protect employees from accidents at work. State governed Labour Inspection Offices regularly check compliance with these conditions.

### 10.2 Health and Safety Consultation

Employers appoint a "safety commission" made up of employees, which takes part in internal reviews of working safety. This reaches joint decisions with the employer in relation to safe working conditions.

## 11. Industrial Relations

### 11.1 Trade Unions

Trade unions in the Slovak Republic are classified as civic associations registered with the Ministry of Interior Affairs. There is no nationwide trade union and the employees in each workplace may create their own association. There are trade union associations for specific industries and trades (e.g. a trade union association of foodstuff workers, trade unions for the metal processing industry) that communicate with employers associations with the intention of negotiating higher level collective agreements. Such trade unions usually succeed in establishing their presence in the workplaces of major employers.

In addition to trade unions, or if there is no trade union unit in the workplace, employees may elect a works council (if there are more than 50 employees) or a works representative (if there are more than three but fewer than 50 employees). The employer is obliged to allow the election of a works council upon the written request of at least 10% of the employees.

### 11.2 Collective Agreements

According to Act No. 2/1991 Coll., on Collective Bargaining (the "Act on Collective Bargaining"), each trade union unit has the authority to negotiate, with the employer, an individual collective agreement applicable to all employees including employees not belonging to the trade union. Individual collective agreements

may only provide for more beneficial working conditions for employees than those provided by the Labour Code. The provisions of the collective agreement are binding on the employer and they take precedence over the provisions of individual labour contracts. To the extent that the labour contract provides a lower level of benefits than the collective agreement, the provision of the labour contract is null and void. A higher level collective agreement is agreed between trade union associations and employers associations and takes precedence over any applicable individual collective agreements to the extent that such higher level collective agreement provide for a higher level of employee benefits. Higher level collective agreements are stored by the Ministry of Labour and Social Affairs and are publicly accessible.

### 11.3 Trade Disputes

The Act on Collective Bargaining governs the resolution of trade disputes. Trade disputes arising in connection with the fulfilment of obligations under collective agreements can be resolved by a mediator and an arbitrator, whose resolution can be contested by appealing to a court. Trade disputes arising in connection with entering into collective agreements can be resolved by a mediator and, if not submitted to an arbitrator, by declaring a strike.

### 11.4 Information, Consultation and Participation

The role of trade unions and other employee representatives is governed by the Labour Code, which imposes an obligation on the employer to inform trade unions and other employee representatives, consult with them and jointly decide particular issues. Joint decision-making with employee representatives is required in respect of the approval of internal working rules. Consultations are required in respect of the termination of employment by notice or immediate cancellation of employment by the employer or in respect of collective

dismissals. In addition, the employer is obliged to inform trade unions and other employee representatives about its economic and financial situation and about the employer's development. The employer is obliged to consult trade unions and other employee representatives about, among other things, social policy and organisational changes of the employer. Trade unions are entitled to examine measures implemented for safety and health protection at work. Furthermore, employee representatives are entitled to inspect the employer's compliance with labour laws, including compensation regulations and obligations arising under collective agreements.

## 12. Acquisitions and Mergers

### 12.1 General

Slovak law provides that a merger may occur by way of the merger of two companies to form a new entity or when one company absorbs another.

The term "acquisition" can mean either the acquisition of the shares of a company or the acquisition of a company's assets. A share acquisition will have no impact on employment relationships as there is no change in the identity of the employer. In the event of an asset acquisition the acquirer of the assets acquires all the rights and liabilities attached to the assets including those related to employment relationships.

### 12.2 Information and Consultation Requirements

In general, the employer is obliged to consult employee representatives about material issues relating to the employer's existence and profit (regardless of the number of employees involved). In particular, the employer must inform employee representatives or employees directly (if there is no representative) in writing of the:

- (a) date or intended date of transfer;
- (b) reasons for transfer;

- (c) working, economic and social impact for employees; and
- (d) measures related to the transfer affecting employees.

This information must be provided one month, at the latest, prior to the transfer, whether that occurs due to merger, takeover or sale and purchase.

In addition, no later than one month before the transfer the employer has to consult with employee representatives.

Should the transfer of the employees include redundancy terminations, the provisions on collective dismissal would apply (see section 13.5 below).

### 12.3 Notification of Authorities

There are no specific obligations to notify and/or to seek the approval of the authorities in relation to employment relations and/or the transfer of employees in the context of mergers and acquisitions.

### 12.4 Liabilities

The Labour Inspection Office may impose a penalty of up to €100,000 on an employer that has breached its information or consultation duties. However, the validity of a particular merger or acquisition and related transfer of employees will not be affected by such a breach or by the sanction.

In addition, if the working conditions of an employee are to be substantially changed by the transfer and the employee does not consent to such change, his employment is deemed terminated as of the date of the transfer and the employee is entitled to a severance payment as if his employment was terminated by agreement (see section 13.1 below).

## 13. Termination

### 13.1 Individual Termination

An employer wishing to terminate an employment relationship may only do so

in accordance with the provisions of the Labour Code.

In the event of the termination of employment by notice or agreement due to organisational reasons or due to the employee's incapacity to perform the work on health grounds, the employer is obliged to provide a severance payment to the employee ranging from at least the employee's average monthly earnings to at least (i) four times the average monthly earnings of the employee in the case of termination by notice; or (ii) five times the average monthly earnings of the employee in the case of termination by agreement, in each case depending on the length of the employment.

If the reason for terminating the employment is due to a work accident or occupational disease, or the threat thereof, or because the employee exceeded the maximum permitted level of exposure to a dangerous environment, the proposed severance payment should be at least ten times the average monthly earnings of the employee.

### 13.2 Notice

The Labour Code provides for a one-month general notice period. However, there are several exceptions.

Should the employment be terminated due to organisational reasons or due to the employee's incapacity to perform the work on health grounds, the employer has an obligation to provide: (i) two months' notice if the employee has been working for the employer for at least one year and less than five years; and (ii) three months' notice if the employee has been working for the employer for at least five years. In the case of termination for other reasons where the employee has been working for the employer for one year or more, the employer has an obligation to provide two months' notice.

The employee has an obligation to give two months' notice if he has been working for the employer for one year or more.

The notice period starts on the first day of the calendar month following the month in which the notice is delivered to the counter party.

### 13.3 Reasons for Dismissal

An employee may terminate his employment by notice at anytime without providing a reason. An employer may only terminate employment for one of the reasons set out in the Labour Code.

There are few such reasons, which include redundancy of the employee as a result of organisational changes, lack of capability due to the employee's health, failure by the employee to fulfil specific requirements of the law or employer for the performance of the work, breach of work discipline and also unsatisfactory performance by the employee provided that several conditions are met (e.g. prior written warnings are given). The termination of employment by the employer requires many preconditions to be met. The employer is considerably restricted in its ability to terminate the employment of its employees. In the past the "organisational changes" ground was often used by employers to justify the termination of employment. However, the law now restricts an employer who has made a position redundant from recruiting another employee for that position within the subsequent two months.

Notice of dismissal is only valid if employee representatives have been consulted in advance. Notice must be given in writing, state the cause of the notice by reference to the provisions of the Labour Code and also describe the circumstances or facts that are the grounds for such notice. Notice must be delivered to the employee personally at the workplace, at his home, or at any other place, or by registered mail. A notice that does not fulfil the formal requirements is likely to be found void by the courts. If notice is given on the grounds of a breach of discipline, the employer has to allow the employee to state his/her case regarding the alleged breach prior to giving notice to the

employee in question.

Immediate termination of employment is only possible where the employee or the employer has serious cause. The employer may summarily dismiss an employee who has been found guilty of a malicious crime or who is guilty of an extraordinary breach of work discipline. Although the Labour Code does not define such a breach, it is sufficiently defined by court practice. Determination of whether a particular breach was grounds for immediate termination is one of the most frequent subjects of labour law disputes in the Slovak Republic. The employee may immediately terminate employment if the employer is in default in paying all or part of his salary or if his health and safety is threatened.

An employee may bring court proceedings on the grounds that the act by which his employment was terminated was invalid. Such a claim must be brought within two months of the alleged termination of employment. If the claim succeeds the employee is entitled to salary compensation for the entire duration of the court proceedings up to 36 months. Such salary compensation may be reduced by the court at the sole discretion of the judge, upon the request of the employer, if the period for which the compensation is to be provided would exceed 12 months.

### 13.4 Special Protection

The Labour Code specifies certain protection periods during which employment may not be terminated by notice, such as pregnancy, illness or military service.

### 13.5 Closures and Collective Dismissals

Termination of employment by notice due to organisational reasons or termination due to other reasons not caused by the employee is classified as a collective dismissal if, within a period of 30 days, it affects at least:

- (a) 10 employees, if the employer employs from 20 to 100 employees;
- (b) 10% of all employees, if the employer employs 100 or more but less than 300 employees; or
- (c) 30 employees, if the employer employs 300 employees or more.

The Labour Code requires the employer to consult with employee representatives or affected employees directly (if there are no representatives) and regional labour offices in the event of collective dismissals. At least one month before the start of the collective dismissals the employer has to inform employee representatives of the collective dismissal and discuss with them potential options to minimise the negative effect of the collective dismissal. Information about such discussion must be delivered to the regional labour office, which also participates in the consultations.

The state governed Labour Inspection Office may impose a penalty of up to €100,000 for breaching this consultation obligation. In addition, the employee may be entitled to double the average salary as a compensation.

## 14. Data Protection

### 14.1 Employment Records

The collection, storage and use of personal data held by employers about their employees and workers (prospective, current and past) is regulated by Act No. 428/2002 Coll., on Personal Data Protection, as amended (the "Personal Data Protection Act"), which implemented the EU Data Protection Directive. As it does not contain any special provisions in respect of employment records, the general principles set down therein for data processing apply. The general rule applying to the processing of personal data is that unless the Personal Data Protection Act or a specific law provide otherwise, the prior consent of the data subject is required for the processing.

The data controller must be able to prove that the consent is valid. The consent may be revoked and such revocation is subject to conditions agreed upon when granting the consent.

Employers, as data controllers, are obliged to ensure that only personal data that corresponds to the purpose of processing in extent and content is processed. In addition, employers must process only accurate, complete and up-to-date personal data in relation to the purpose of processing; inaccurate and incomplete personal data must be blocked and corrected or updated without undue delay, otherwise the data controller must erase such data.

Employers are responsible for the security of personal data and must protect the data from accidental or illegal damage, destruction and loss, unauthorised access or modification as well as any other inadmissible form of processing by adopting appropriate technical, organisational, and personnel measures corresponding to the manner of processing.

Any person who has access to processed personal data is obliged to keep the data confidential.

The Labour Code restricts the processing of personal data by employers to such personal employee data that is necessary for the employment relationship, or that relates to the qualifications and working experience of the employee.

#### 14.2 Employee Access to Data

Employees, as data subjects, have the right to request from the data controller in writing: information about the status of

the processing of their personal data, detailed information about the source of the personal data, a copy of their personal data being processed, correction of inaccurate or out of date personal data, erasure of personal data if the purpose of processing has been completed or if the processing has involved a breach of the law.

Requests of the data subject must be complied with by the data controller and the applicant notified of the outcome in written form within 30 days of the receipt of the request. The data controller must provide the information without charge, apart from information about the source of the personal data and copies of the personal data being processed, in which case it is entitled to levy a fee not exceeding the costs of the copies, materials and posting of the information to the data subject, unless a specific law stipulates otherwise.

#### 14.3 Monitoring

The monitoring of employees' email, internet and telephone usage, and TV monitoring is governed by the Civil Code, according to which documents of a personal nature, video and audio records concerning an individual can only be made and used with the employees' consent.

The Data Protection Act only permits the audio or video monitoring of publicly accessible premises for the purposes of public order and security, and provided that clear warning is given that the monitoring is taking place (except if a specific law stipulates otherwise). If the record is not used for the purposes of prosecuting an offence or criminal act, it must be deleted within seven days of its creation.

The Labour Code allows the employer to monitor employees at the workplace and in common areas, record phone calls made from work devices and monitor emails received and sent from a work email address without notifying the employee in advance, provided that there are serious reasons based on the special nature of the employer's activities. In addition, the employer has to consult the employee representatives on the scope, methods and the duration of monitoring and on informing the employees prior to implementing any such measures.

An employee who claims that his privacy at the workplace or in common areas has been violated may refer to the court and seek legal protection.

#### 14.4 Transmission of Data to Third Parties

An employer who wishes to provide employees' data to third parties must do so in accordance with the principles and processing conditions set out in the Data Protection Act. Personal data may only be transmitted from an information system to a third person, including abroad, regardless of whether the third person is based within or outside the European Union, with the consent of the data subject, unless the Personal Data Protection Act or a specific law provides otherwise.

*Contributed by Clifford Chance, Prague*

# Slovenia

## 1. Introduction

The Employment Relationships Act (Zakon o delovnih razmerjih) is the principal law regulating labour issues in Slovenia. It took effect on 1 January 2003 and was amended in November 2007 (Official Gazette No. 103/07), and basically regulates all employment relationships in both the private and public sector. Collective agreements, individual employment contracts, the employer's general actions, works agreements and individual employment contracts also regulate the employment relationship.

Numerous trade unions are active in Slovenia. Due to obligatory bargaining conditions, most business sectors use collective agreements. Nevertheless, since membership of the Chamber of Commerce is no longer mandatory, a collective bargaining agreement is binding on an employer, only if it is a member of either the Chamber of Commerce or the Employers' Association. The only exception to this are collective bargaining agreements, which were declared by the Ministry of Labour to be generally applicable, e.g. for trade. Individual employment contracts may contain provisions that are more beneficial to the employee than those contained in the Employment Relationships Act or other collective agreements.

Employees' participation rights are governed by the Law on Worker Participation in Management, which provides for various forms of employee participation, and by the Law on Worker Participation in Profit (Zakon o udeležbi delavcev pri dobi ku), which was adopted in 2008 and provides for a voluntary agreement between the employer and employees on the distribution of profits to employees and consequential tax relief for the employer.

Labour disputes, whether individual or collective, are settled by special labour courts. An appeal from the labour court is

heard by the Higher Labour and Social Court (Višje delovno in socialno sodišče).

## 2. Categories of Employees

### 2.1 General

Slovenian law does not differentiate between blue-collar employees and white-collar employees. However, the law differentiates between "normal" employees and managerial staff, as well as between full-time employees and part-time employees.

## 3. Hiring

### 3.1 Recruitment

Generally, an employer has to advertise vacancies either in the public areas of the employment service office in newspapers or on its own webpage (if any). In addition, the advertisement has to set out the requirements of the job and may not specify a particular gender unless gender is an essential condition for carrying out the work. A deadline for the submission of applications must be established, although there are some exceptions to this obligation.

An employer who employs part-time employees or employees with a fixed-term employment contract has to inform such employees of any available full-time positions of a fixed term or indefinite nature.

Employers with more than 20 employees are obliged to employ a certain percentage of disabled people depending on the type of business. If the employer does not meet this obligation, it has to pay 70% of the minimum salary to the competent social security authorities for each disabled person it has not employed.

### 3.2 Work Permits

The Slovenian Act on Employment and Work of Aliens (Zakon o zaposlovanju in delu tujcev) refers to three types of work permits: (i) personal work permits;

(ii) permits for employment; and (iii) permits for work. Every work permit is subject to different requirements. Permits for employment and permits for work are issued by observing a quota determined by the Slovenian government. Whereas a personal work permit allows general access to the Slovenian labour market, a permit for employment and a permit for work are linked to a specific workplace and have to be applied for by the employer.

A foreigner or a person without Slovenian citizenship may only enter into an employment contract if he or she fulfils the conditions set out in the Slovenian Act on Employment and Work of Aliens.

In 2011 the EU Blue Card was introduced as a document comprising the work and residence permit. The EU Blue Card allows a foreigner who will perform highly qualified work to enter and reside in Slovenia. In such cases the individual need not obtain a work permit and a residence permit, instead he or his employer simply files an application for the EU Blue Card.

Citizens of the EU and the European Economic Area countries and the Swiss Confederation are exempt from the obligation to obtain a permit before commencing work; however, there is still a notification obligation for statistical purposes.

## 4. Discrimination

Discrimination by an employer on various grounds (e.g. sex, race, disability, sexual orientation, religion, age), direct or indirect, as well as sexual harassment and other harassment in the workplace (mobbing) is prohibited. The shifting of the burden of proof assists the employee in proving any discriminatory act complained of. Recently, it has become common for employees to bring claims of 'mobbing' as part of the claim before the courts in relation to their dismissal. At present damages that are awarded in relation to 'mobbing' are not very high.

## 5. Contracts of Employment

### 5.1 Freedom of contract

In general, an employment contract is subject to the general rules of civil law. However, the Employment Relationships Act imposes restrictions on the freedom to contract. Provisions in an employment contract may only depart from applicable legal requirements and collective agreements if doing so is beneficial to the employee. The employment agreement may be less beneficial for management positions (i.e. directors and procurators entered into the Business/Court Register as the legal representatives of a company).

The conclusion of a fixed-term employment contract is only permissible in the circumstances prescribed in the Employment Relationships Act. A fixed-term employment contract or subsequent, successive fixed-term employment contracts concluded with the same employee in relation to the same job may not exceed a period of two years (in aggregate). Exemptions apply to “smaller” employers, employing ten or fewer employees, if such exemptions are provided for in the relevant branch collective agreements, and if the employment agreement is concluded with a person in a managerial position or due to a substitution of an absent employee.

### 5.2 Form

Employment contracts have to be executed in writing. The employer has to forward to the employee a written draft of the employment contract three days before the anticipated execution. After the execution of the employment contract, the employer has to hand over to the employee a written executed copy of the employment contract. Violation of this formal requirement may result in a fine from €750 up to €2,000 for the employer and from €100 up to €800 for the responsible person at the employer, but does not lead to the nullification of the employment contract.

In addition, the Employment Relationships Act stipulates the minimum content for the employment contract. If the employment contract does not contain all required elements, the law provides for the automatic application of the relevant legal provisions and collective agreements, provided that the employer is a member of the association that is a party to the collective agreement or if the collective agreement is generally applicable.

### 5.3 Trial Periods

Generally, a trial period is permissible. A probationary period must be agreed upon in the employment contract. A trial period does not, however, provide the employer with the right to rescind the contract. Only the employee may terminate the employment contract for any reason by adhering to a notice period of seven days.

The employer may exceptionally terminate the employment relationship after the expiry of the trial period, if the employee performed his or her duties unsatisfactorily during the trial period.

### 5.4 Confidentiality and Non-Competition

The employee may not disclose business secrets to a third person or exploit such secrets for his or her private use. Generally, the employee is liable in damages for any violation of this obligation.

During the employment relationship, the employee may not render services or conclude a transaction on his own behalf in competition with the employer. In certain cases, the parties to the employment contract may agree to a post-termination non-compete provision for a specified period after the termination of the employment relationship. However, a non-competition clause may not exceed a term of two years after the termination of the employment relationship. It is only enforceable if the employment relationship has been terminated by the employee or as a result of his actions and if the amount of the monetary

compensation for complying with the non-competition clause is explicitly stipulated in the employment contract. The compensation may not be less than one-third of the average monthly salary of the employee in the three months immediately prior to the termination and has to be paid in certain circumstances, for example where the non-competition clause prevents the employee from earning a salary, comparable to the previous salary of the employee.

### 5.5 Intellectual Property

The mandatory provisions of the Law on Intellectual Property Rights in Connection with Employment differentiate between employment-related inventions and so-called free inventions. Employment inventions are further divided into direct and indirect inventions. Direct inventions are those generated within the contractually required employment tasks or as expressly required by the employer, while indirect inventions are those generated beyond the scope of one's employment, but the employment experience and employer's facilities contributed considerably to the invention. The employer is entitled to assume rights to inventions related to employment and may register the invention as a patent with the IP authority on the employer's behalf. Employment-related inventions may be taken over by the employer for certain consideration, either exclusively or non-exclusively.

## 6. Pay and benefits

### 6.1 Basic Pay

In Slovenia, the minimum basic wage amounts to a monthly salary of €763.06 (with effect from January 2012). The Slovenian wage has three principal components: (i) basic wage; (ii) wage for job performance; and (iii) extra payments.

Employees are entitled to extra payments related to extraordinary working times, e.g. night shifts, overtime work, and work on Sundays, holidays and work-free days. The amount of such extra

payments is regularly stipulated in collective agreements. The law also provides for an extra payment based on the employee's length of service, which amounts to an automatic pay increase based on length of service.

In addition, there are certain voluntary wage components that may be fixed in the employment contract: remuneration for business performance, profit-sharing and payments in kind.

There is no obligation to index-link pay.

## 6.2 Pensions

In Slovenia, employers are not obligated to include or pay for employees' private pensions.

In practice, a considerable number of well-established employers provide for their employee's participation in additional collective pension schemes. In addition, some employees enter into additional pension insurance plans on an individual basis. Altogether, about 60% of Slovenian employees have additional private pension insurance.

## 6.3 Incentive Schemes

Share schemes are not mandatory in Slovenia, however share schemes and profit sharing have been increasingly focused upon by trade unions and employers' representatives.

## 6.4 Fringe benefits

In practice, it is uncommon for employers to grant fringe benefits such as a company car or additional personal injury insurance to normal employees unless certain benefits are crucial to a specific type of job performance. Sales agents are often granted a company car and phone. Tax legislation does not encourage the granting of such benefits.

Apart from work-related needs, it is common for employers to grant certain benefits such as the use of a company car, phone, additional personal injury insurance and the like to managerial staff.

## 6.5 Deductions

Employers are obligated to deduct income tax advances and social security contributions from the salary of their employees.

# 7. Social security

## 7.1 Coverage

An employer has to register the employee for obligatory pension, disability, health, parental and unemployment insurance on the day the employee's work commences. The social security system provides benefits in the case of retirement, disability, death, sickness, injuries (regardless of whether employment-related or not), occupational disease, pregnancy, maternity leave and unemployment.

## 7.2 Contributions

Employees' social security contributions amount to 22.1% of an employee's salary, while employers' social security contributions amount to 16.1% of an employee's salary.

# 8. Hours of work

In Slovenia, the normal working week is 40 hours. The employer's general actions or a collective agreement may decrease the "normal" working time, although it may never amount to less than 36 hours, except in relation to employees who are exposed to a greater risk of injury or damage to health.

Working hours comprise an employee's effective working time plus breaks. Hence, a daily break of half an hour is counted as part of the working hours.

There are certain limits to the amount of overtime that may be worked: overtime may not exceed eight hours per week, 20 hours per month, and 170 hours per year. With the employee's consent this annual limit may be extended, but may not exceed 230 hours per year. A blanket consent cannot be included in the employment agreement, instead consent

must be obtained each time an employee is asked to work overtime. The Employment Relationships Act and some collective agreements stipulate certain cases in which employees may not be ordered to work overtime.

Overtime can be avoided or minimized where prior agreement is reached with the employee that the hours worked in a given period of six months, or longer if provided for by collective agreement, will be aggregated for the purpose of calculating full-time work (this is referred to as an 'uneven distribution of work'). In the case of an uneven distribution of working hours, an employee may work up to 13 hours per day and 56 hours per week. At the end of the calculation period, full-time work is calculated and the difference is regarded as overtime.

# 9. Holidays and Time Off

## 9.1 Holidays

An employee has the right to paid absence from work on public holidays recognised in the Republic of Slovenia and on other work-free days as specified by law.

An employee is entitled to at least four weeks of paid holiday per calendar year. Under the Employment Relationships Act, certain employees are entitled to a longer annual leave period.

## 9.2 Family Leave

A female employee is obligated to go on maternity leave for a period of 28 days before the expected due date. Female employees are entitled to paid maternity leave for a period of 105 days altogether i.e. including the leave before the child's birth. Payments during maternity leave are borne by social security.

In addition, the father is entitled to 15 days' paid additional leave to be taken during the first six months after childbirth and an additional 75 days leave to be taken before the child's third birthday. During this 75-day period the

state pays only social contributions based on the minimum salary in Slovenia for such father.

After the maternity leave has expired, either the mother or the father of the child is entitled to 260 days of paid parental leave, which may be used as full-time absence from work, or alternatively, as part-time absence from work, in which case the period of absence is longer. Payments during paternal leave are borne by social security.

Parental leave may be extended under certain circumstances.

### 9.3 Illness

In the case of temporary incapacity due to injury or disease, an employee is entitled to be absent from work. The employer has to pay wage compensation out of its own funds in the case of such absence from work due to health reasons for a period of up to 30 days for each individual absence. In relation to injury or disease not connected to work, there is a limit of 120 working days per calendar year. In the event of a longer absence from work, the employer will be refunded by health insurance. If the absence from work does not result from an occupational disease or an injury related to work, the wage compensation amounts to 70% of the employee's wage in respect of a non-work related injury and 80% of the employee's wage for the absence due to sickness. The current trend is towards reducing these compensation amounts.

## 10. Health and Safety

### 10.1 Accidents

The employer has to ensure that working conditions meet the regulations applicable to health and safety in the workplace. This is verified occasionally through a labour inspection.

The employer is also obliged to instruct a job candidate to have a medical check-up before concluding an employment agreement and commencing employment.

### 10.2 Health and Safety Consultation

According to the Act on Occupational Health and Safety, the employer may ensure health and safety by appointing an expert employee who fulfils certain tasks related to safety at work, as well as an authorised physician for the purpose of ensuring health at work.

The expert employee in charge of safety at work has to pass a special exam. However, the employer may also hire an external expert employee or external expert bodies to conduct such tasks. Certain restrictions apply.

## 11. Industrial Relations

### 11.1 Trade Unions

A trade union that has members working for a particular employer may appoint or elect a trade union representative to represent the trade union at the employer's place of business. The employer has to be informed of the appointment or election of such trade union representative. Furthermore, the trade union representative has the right to protect the rights and interests of the employees at the employer's place of business.

### 11.2 Collective Agreements

Slovenian law recognises general collective agreements, branch collective agreements and company collective agreements. Currently, there are several branch collective agreements that apply generally to the whole of Slovenia, e.g. the Collective Agreement for Trade. This means that this collective agreement applies to all employers that pursue an activity which falls within the scope of the collective agreement regardless of whether they are members of the Slovenian Chamber of Commerce or the Association of Employers of Slovenia.

The parties to collective bargaining agreements comprise: (i) the associations of employers using general and branch collective agreements, or the employer itself in the case of company collective agreements, and (ii) the associations of

trade unions or trade unions at the employer's place of business in the case of company collective agreements.

### 11.3 Trade Disputes

Employees have the right to strike, which is exercised collectively. The right to strike is enshrined both in the Constitution and in the Strike Act.

Generally, disputes between employers and trade unions should be resolved in compliance with applicable collective agreements.

### 11.4 Information, Consultation and Participation

Employees have the right to participate in the management of the employer. Such participation may either be performed by a workers' representative or a works council, depending on the size of the employer's company. There are three forms of participation: (i) the right to information; (ii) the right to consultation; and (iii) the right to participation in decision-making. If certain participation rights are neglected by the employer, the works council may stay a decision by the employer.

Moreover, employees may have certain participation rights in management bodies. Workers' participation in management bodies is implemented through representatives acting on a company supervisory board, the supervisory committee of a cooperative, or through an employee representative within the company's management.

Participation rights may also be extended or their exercise regulated in more detail by a works agreement.

## 12. Acquisitions and Mergers

### 12.1 General

If the employer changes due to the legal transfer of a business, in whole or in part, the contractual and other rights and obligations arising from the employment

relationship that the employees had on the day of the transfer are automatically transferred to the transferee. Any rights and obligations under the collective agreement that bound the transferor must be guaranteed by the transferee for at least one year, unless the collective agreement expires earlier or unless a new collective agreement is concluded during this period. In addition, certain information and consultation obligations of the transferor and the transferee apply in the event of the transfer of a business.

If the employee refuses to transfer, this gives the employer (i.e. the transferor) a reason to terminate the employment relationship without any severance pay or notice period.

## **12.2 Information and Consultation Requirements**

The transferor and the transferee must inform trade unions of the reasons for a transfer, the legal, social and economic implications of the transfer for the employees and the measures contemplated in respect of the employees at least 30 days prior to the transfer of the business. All obligations related to the transfer of an employer apply to all companies, regardless of the number of employees. In addition, the transferor and the transferee need to consult with these trade unions on the legal, social and economic implications of the transfer for the employees and the measures considered in relation to the employees at least 15 days before the transfer. The relevant date of the transfer of the employees is the date of transfer of the employer, e.g. the date of the transfer as stipulated by the sale agreement. The information with respect to the transfer must be provided at least 30 days prior to the expected date of transfer. The purpose of the consultation is to reach an agreement on these topics. Should it not be possible to reach an agreement, this does not affect the transfer. If a trade union has not been established at the employer, the transferor and the transferee have to

inform the employees directly. Additional consultation obligations may arise in the event of any organisational changes in the business operation.

## **12.3 Notification of authorities**

There is no obligation to notify the authorities in the event of a business transfer.

## **12.4 Liabilities**

If the information and consultation provisions of the Employment Relationship Act are not complied with, fines of between €3,000 and €20,000 can be imposed on the transferor and fines of between €450 and €2,000 can be imposed on the individual employees at the transferor who are responsible for the infringement.

# **13. Termination**

## **13.1 Individual Termination**

An employer wishing to terminate the employment relationship must be careful to comply with the statutory requirements as regards reasons and procedure.

Employees with service of more than one year and whose employment contract was terminated by the employer through ordinary termination due to business reasons or for reasons of incapacity are entitled to a severance payment. The amount of such severance payment is dependent on the employee's length of service (ranging from one-fifth of monthly salary to ten months' salary). There are currently initiatives that the law can be changed to reduce the amount of severance payable.

If an employee retires and the employment relationship is terminated, he or she is entitled to severance pay.

## **13.2 Notice**

The minimum notice entitlement is determined by the reason for termination and the duration of service.

If termination is based on business reasons, the minimum notice period

amounts to 30 days and increases with the length of service up to 150 days. If the reason for termination is related to the incapacity of the employee, the minimum notice period is also 30 days and increases with the length of service up to 120 days. If the employer terminates the employment relationship due to the employee's capability or conduct, the minimum notice period is always 30 days. Specific notice periods apply in some circumstances (e.g. bankruptcy or liquidation proceedings). The notice periods in the event of termination due to business reasons (reorganisation, technical, economic, or structural reasons) and incapacity have been changed by the amendments to the Employment Relationship Act in 2007, however they will not come into force until a new Unemployment Act is adopted and it is currently unclear when this will happen.

The parties to the employment contract may reach a written agreement providing for the payment of compensation in lieu of the observance of the notice period.

Prior to an ordinary termination of employment, the employer has to meet information obligations and is subject to the duty to warn the employee. Except in the case of termination due to business reasons, the employer has to provide the employee with an opportunity to defend himself.

Upon the request of the employee, the employer has to inform the trade union, if any, in writing about the intended termination. If the trade union opposes the termination, the employee may request that the termination not become effective until the commencement of arbitration and/or judicial protection has begun. The employee may also seek a temporary injunction within the course of the judicial proceedings, which has the effect of further postponing the termination date.

Any notice of termination has to be in writing. The employer has to cite the reasons for termination and has to inform the employee of the available legal remedies and the employee's rights to unemployment insurance.

Dismissal without notice is only permissible if the employer's reason for doing so is acceptable for the purposes of the Employment Relationship Act. The law sets a high standard. In addition to having a legitimate reason for the purposes of the Employment Relationships Act, the continuation of the employment relationship until the expiry of the notice period or a fixed term must also be unreasonable for the employer.

The employer has to inform the employee of the dismissal without notice within 15 days of becoming aware of its reason and no later than six months from the occurrence of the action that gave rise to such reason.

Also, the employee may terminate the employment relationship without notice, again for a reason stipulated by law (e.g. material breach of contract). Eight days before the employee may extraordinarily terminate his employment, the employee has to call on the employer to fulfil its obligations. Simultaneously, the employee has to inform the labour inspectorate of the employer's violations in writing. If the employee has adhered to this procedure, he may terminate the employment for the reasons stipulated by law.

Mutual termination of the employment contract requires a written contract between the employer and the employee. If the parties do not adhere to this formal requirement, the mutual termination is invalid.

### 13.3 Reasons for Dismissal

In Slovenia, the employer may never terminate the employment relationship without reason. Consequently, the employer may base the ordinary

termination on four different grounds: (i) business reasons; (ii) the incapacity of the employee; (iii) reasons of fault; and (iv) disability. In any event, the reason(s) for termination has to be substantiated and has to render continuation of the employment relationship impossible.

In the case of termination on the grounds of the incapacity of the employee or for business reasons, the employer is obligated to examine whether it is possible to employ the employee under different conditions or to transfer him to another post, and/or whether it is possible to retrain the worker.

Additionally, the Employment Relationships Act sets out certain reasons where termination is considered to be unfounded.

The employee does not need to cite a reason for his resignation upon providing notice.

The employee may assert the illegality of the termination within 30 days of a violation of his rights (i.e. from the notice of termination) before the competent labour court.

If the labour court finds that the employer's termination was illegal and that the employee does not intend to continue the employment relationship it shall, at the employee's request, rule that the employment relationship continued up to the date the judgment of the first instance court is issued. The court will also determine the employee's length of service and other rights arising from the employment relationship, as well as the employee's compensation arising from the illegal dismissal in light of the applicable civil law. The level of compensation will depend on the circumstances of the case.

### 13.4 Special Protection

Certain categories of employee enjoy special protection against termination: members of the works council, workers' representatives, females during pregnancy, breastfeeding mothers (there

is no upper limit on the duration of such protection), parents, disabled persons, and persons absent from work because of disease. Such employees may only be dismissed in certain circumstances.

### 13.5 Closures and Collective dismissals

A specific procedure has to be adhered to if the employer intends to dismiss a large number of employees due to business reasons. For example, the dismissal of at least 10 employees by an employer employing more than 20 but fewer than 100 employees qualifies as a collective dismissal.

In these circumstances, the employer is obliged to draft a dismissal program. The Employment Relationships Law stipulates the material content of the dismissal program. In addition, the employer has to inform the trade union and the employment service of its intention. The employer may not terminate any employment relationship for a period of 30 days from notification of the employment service ("blocking period"). The employment service may even extend this blocking period to 60 days. Should the employer dismiss during the blocking period, the dismissal is ineffective and the labour inspectorate can impose a fine of €3,000 to €20,000 on the employer and a fine of €450 to €2,000 on the individual responsible.

## 14. Data Protection

### 14.1 Employment Records

The employer is obliged to protect the personal data of employees. Hence, data on employees may only be collected, processed, used and provided to third parties if the Employment Relationships Act or another law so stipulates, or if this is required in order to exercise the rights and obligations arising as a result of the employment relationship.

### 14.2 Employee Access to Data

Employees' access to data is usually regulated in the employer's internal

documents, e.g. the employer's general act (pravilnik).

### **14.3 Monitoring**

The Employment Relationships Act and the Act on Data Protection do not include provisions regarding the monitoring of employee communications. However, provisions regarding monitoring are usually included in the employer's internal documents, e.g. the employer's general act (pravilnik).

According to the Act on Data Protection, the employer may use video monitoring on the business premises in extraordinary cases. Video monitoring can be carried out if necessary to

preserve the safety of people or assets or for the protection of secret information and business secrets, provided that there are no less intrusive means by which these aims can be achieved. Employees have to be notified in advance of the video monitoring. In any event, video monitoring is prohibited in locker rooms, elevators and sanitation areas.

### **14.4 Transmission of Data to Third Parties**

Data may only be transmitted to data managers, contractual employees or users of data who have a registered seat or are registered in non-EU countries or non-EEA countries, if the supervisory

body of the Republic of Slovenia issues a decision that the receiving state guarantees a sufficient level of data protection. Such decision is not required for transmission to a state contained on the list of countries recognised as having sufficient levels of data protection. If a sufficient level of protection in relation to the data transmitted and the purpose of the transmission is established, data may be transmitted to countries that only partially assure a sufficient level of protection without first obtaining a decision by the supervisory body of the Republic of Slovenia.

*Contributed by Wolf Thies, Rechtsanwälte Attorneys-at-law*

# Spain

## 1. Introduction

The Spanish Constitution recognises certain basic labour-related rights, such as the right to work, the right to strike and the right to join a trade union. More detailed regulation is contained in the Workers Statute, which establishes a number of mandatory and minimum terms and conditions of employment. The employment relationship may be further regulated at a number of levels, for example, Collective Bargaining Agreements (“CBAs”) or individual contracts agreed with a particular employee.

## 2. Categories of Employees

### 2.1 General

Spanish law draws a distinction between “Senior Executive” staff and ordinary or standard staff.

### 2.2 Directors

The employment relationship of Senior Executive employees is governed by the specific rules of Royal Decree 1382/1985. Their contracts of employment are subject to fewer constraints than standard employees whose employment relationship is largely governed by the Workers’ Statute.

The concept of “Senior Executive” is narrowly defined and includes only “those employees who genuinely exercise broad powers inherent to the company’s legal ownership and related to the company’s general objectives, limited only by the direct instructions issued by the company’s managing body”.

When determining whether an employment relationship should be classified as “standard” or that of a “Senior Executive” in the context of a multinational group of companies, if the individual does not receive direct instructions from the Board of the Spanish company but from a person who is responsible at an international level for

the group or board of directors within the group (without the employee having significant autonomy in the performance of his services), the employee may be classified as a standard employee rather than a Senior Executive.

In some cases, case law has stated that individuals who render their services as Senior Executives and are simultaneously active members of the company’s board have a mercantile and not an employment relationship with the company.

## 3. Hiring

### 3.1 Recruitment

In principle, the employer may recruit employees freely. For this purpose, the employer may resort to public employment services, recruitment agencies, placement agencies and temporary employment agencies. When an employer recruits via a temporary agency, the relationship is governed by specific rules contained in Law 14/1994 and Royal Decree 4/1995.

Generally speaking, employers are legally required to register the content of any employment contracts, and any amendments thereto or extensions, with the relevant Employment Office (“Servicio Público de Empleo”) within 10 working days of the execution date. In addition, employers must register employees with the social security system before their employment contracts can commence.

Companies with more than 50 employees must recruit 2% of their workforce from those persons registered as disabled. Employers may receive social security or tax benefits for recruiting disabled employees.

### 3.2 Work Permits

As a general rule, non-EEA nationals must obtain a work permit before commencing employment. Various types of work permits may be granted depending on the nature and duration of

the work involved. Whether or not a work permit will be issued may depend, among other things, on the current national employment situation.

Pursuant to Royal Decree 240/2007 citizens of the European Union or of EEA Member States, either employees or self-employed, may reside and work in Spain without a residence or work permit, as may the members of their family as a general rule. In order to carry out activities as employees or in a self-employed capacity, the interested parties are subject to the same regulations as Spanish citizens.

## 4. Discrimination

The Workers’ Statute prohibits discrimination on the grounds of sex, marital status, age, race, social status, religious/political ideology, sexual orientation, trade union membership, kinship with other employees or language, in relation to recruitment and employment conditions. It also prohibits discrimination on the grounds of physical or mental handicap and provides special protection in maternity cases.

In addition, Organic Law 3/2007 of Equality between Men and Women requires every company to adopt measures in order to avoid discrimination between men and women. Furthermore, an “Equality Plan” including: (i) specific equality objectives; (ii) specific strategies and policies to achieve these objectives; and (iii) evaluation and monitoring systems must be developed in certain circumstances (i.e. in companies with more than 250 employees, when stipulated by the applicable collective bargaining agreement, etc.).

## 5. Contracts of Employment

### 5.1 Freedom of Contract

The parties are free to agree on any terms to the extent permitted by law.

## 5.2 Form

Certain types of employment contracts must be executed in writing in a prescribed format (e.g. internship contracts, fixed-term contracts with a term of over four weeks, part-time contracts etc). The main classifications of contracts are set out below:

Indefinite employment contracts, which may generally be agreed either verbally or in writing.

Fixed-term employment contracts, which can be:

- (a) Contingent contracts - based on production needs or market demands, these contracts must set out in detail the circumstances in which they operate. They must be agreed in writing if the term exceeds four weeks.
- (b) Interim contracts - to provide temporary cover for another employee. These contracts must be agreed in writing.
- (c) Contracts for a specific work or service - these must be agreed in writing.
- (d) Internship contracts - these must be agreed in writing.

There are other specific categories of employment contracts such as part-time contracts (either of fixed or indefinite duration), relief contracts (an employee substitutes another employee who has partially retired), or temporary contracts for disabled persons (from one to three years' duration). These must all be agreed in writing.

The employment of Senior Executive staff is governed by Royal Decree 1382/1985; this contains more flexible provisions than general labour law, particularly in relation to termination and severance arrangements. Senior Executives are not generally governed by CBAs unless express agreement is reached with the employer.

Accordingly, as regards Senior Executives, the parties are free to agree specific severance terms. If no prior agreement on severance terms has been reached, dismissal packages of 20 days' salary per year of service (up to a maximum of twelve months' salary) are payable. An employer can also terminate the contract "at will" and waive the contract on the grounds of "loss of trust" upon giving notice of three to six months (or making a payment in lieu), and compensation of seven days' salary per year of service (up to a maximum of six months' salary) is payable, unless a different amount is agreed by the parties. In practice, contracts for Senior Executives often include "golden parachute clauses" which provide detailed and substantial severance packages, as well as other related terms.

## 5.3 Trial Periods

If a trial period is agreed, it must be recorded in writing before the employment starts. During the trial period, either party may unilaterally terminate the contract without having to justify the grounds. In these circumstances, the employee is not entitled to receive a notice or a severance payment upon the termination of the employment relationship.

Trial periods may not exceed the term established in the applicable CBA. In the event that the trial period is not regulated by a CBA, the Workers' Statute provides for a general term of six months for qualified technicians or two months for other employees. In any event, trial periods may not exceed three months (except qualified technicians) in companies with fewer than 25 workers.

One exception is in relation to the indefinite employment contract to support "entrepreneurs", established for companies with less than 50 employees that meet some requirements where the trial period is one year.

Employment contracts for Senior Executives may incorporate a trial period not exceeding nine months.

## 5.4 Confidentiality and Non-Competition

Any information related to the employer's business must be kept confidential, both during and after employment. This duty of confidentiality is inherent to the legal nature of the employment relationship for both standard employees and Senior Executives, and there is no need for the employer to provide any compensation for it.

An employee may not provide services to several employers during the term of the contract if this would give rise to unfair competition, or if an exclusivity covenant has been given by the employee. The exclusivity covenant must be in writing and the employee is entitled to be specifically remunerated for the covenant, except in the case of Senior Executives. The exclusivity covenant may be terminated at any time at the employee's discretion, by serving the employer with 30 days' written notice, thereby disentitling the employee to any further compensation for exclusivity.

Post-termination non-competition covenants may also be agreed at any given time, provided that:

- (a) the employer has an effective industrial or commercial interest in relation to its enforcement; and
- (b) the employee is paid adequate economic compensation.

In any event, such post-termination non-competition covenants may not exceed two years for technicians and six months for other employees.

When the employee has attended professional specialisation courses or received training at the employer's expense, a "retention" covenant may be agreed in writing, by virtue of which the

employee shall remain with the company for a specific term not exceeding two years. If the employee leaves the company before the end of the term, the employer will be entitled to claim damages. The damages are normally at a level equal to the value of the courses taken in order to acquire the specialisation in question.

### 5.5 Intellectual Property

The transfer to the employer of intellectual property rights in works created by virtue of an employment relationship is governed by the contract. In the absence of any express provision, it is assumed that the intellectual property rights have been exclusively assigned to the extent required by the employer to carry out its usual activities.

## 6. Pay and Benefits

### 6.1 Basic Pay

The structure of the salary is usually established by the CBA or detailed in the employment contract, with a distinction being drawn between the base salary and any additional allowances. Additional supplements are payable in certain circumstances specified by the relevant CBA or in the employment contract (for example hazardous work, night shifts etc).

Employees are also entitled to at least two extraordinary payments per year; one payment to be made at Christmas and the other generally paid before the summer holidays. The CBA may, however, provide that the extraordinary payments be paid on a *pro rata* basis over 12 months.

The government annually adjusts the minimum wage, taking into account, amongst other criteria, the Consumer Price Index. The amounts established are a minimum wage and may be increased by CBAs or in individual employment contracts between the worker and the employer.

The CBAs establish the minimum salary reviews to be made on an annual basis and which are usually linked to the increase in the Official Consumer Price Index, although the employer may apply higher increases.

### 6.2 Pensions

The promoter of an “employment system” pension plan will be any entity, company or business whose employees are participants in the pension plan. These plans are financed by contributions from the promoters and, where applicable, by contributions from the participants. These pension schemes are funded through a vehicle which is separate from the promoter.

### 6.3 Incentive Schemes

Many companies have incentives schemes. Usually these incentives schemes comprise variable remuneration linked to performance or sales.

Stock option plans may be used as an incentive for productivity and the retention of employees or Senior Executives within the company. As a general rule, the benefits provided to employees under a stock option plan will be classified as remuneration in kind for tax and Social Security purposes (there may, however, be tax exemptions in certain circumstances and subject to specific limits).

Case law has established that the benefits provided to employees under a stock option plan will be classified as salary for the purposes of calculating severance payments.

### 6.4 Fringe Benefits

Fringe benefits can be voluntarily granted by companies or stipulated in the applicable CBA.

Each company has a different policy as regards fringe benefits (i.e. some companies have no fringe benefits or have them only for managers and other

companies have a series of different fringe benefits offered to all of their employees). Generally fringe benefits are provided to managers. However, under some CBAs fringe benefits (i.e. insurance policies, meal/transportation allowances, etc.) are provided to all the employees.

### 6.5 Deductions

Employers are obliged to deduct employees’ social security contributions from their pay.

## 7. Social Security

### 7.1 Coverage

Provided that specific requirements are met, the Spanish Social Security System offers a wide range of benefits, including medical care, benefits for dependent children, death and survivors, unemployment allowances, retirement pensions, temporary or permanent disability grants and maternity/paternity benefits.

The Spanish Social Security System is made up of a General Regime, a Regime for employees “assimilated to the General Regime” (applicable to directors that also perform management tasks while paid by the Company) and several special regimes applicable to, for example, self-employed workers.

### 7.2 Contributions

Under the General Regime, both the employer and employee are required to make contributions.

The standard contribution rates are 28.3% for employees with an indefinite contract, plus the contribution for occupational accidents and illnesses (which ranges from 1% to 8.5% depending on the type of activity carried out) of which 23.6% is the employer’s contribution rate and 4.7% is the employee’s contribution rate. The unemployment contribution rate is 7.05% for employees with an indefinite contract of which 5.5% is the employer’s contribution rate and 1.55% the

employee's contribution. The Wage Guarantee Fund contribution rate is 0.2% for the employer. The Career Training contribution rate is 0.7% of which 0.6% is the employer's contribution and 0.1% is the employee's contribution. The contribution rates are applied over the corresponding contribution base. The contribution base for 2012 has been set at a maximum monthly amount of €3,262.50 that serves as a cap. The employee's Social Security must be deducted directly by the employer from the employee's salary. In addition, the employer must make monthly payments to the Social Security Treasury for the corresponding employees' and employer's contributions.

## 8. Hours of Work

The duration of the annual working time is agreed in the CBA or employment contracts. The maximum duration of the ordinary annual working time will be an average of 40 hours per week over the course of a year. In addition, companies may adjust 10% of their annual working schedule to meet production needs (i.e. some weeks the hours may be extended and during other weeks the hours reduced but in aggregate the annual hours are the same). Through a CBA or an agreement between the company and the employee's legal representatives, the percentage of the working schedule that can be adjusted can be increased, provided that the legal minimum rest periods are still complied with.

In this respect, there must be a minimum of 12 hours between the end of a working day and the following one. In addition, employees are entitled to enjoy a minimum weekly uninterrupted rest period of one and a half days, which can be accumulated over 14 days, so it is possible for an employee to work for 11 days and then rest for three days.

Hours worked in excess of the ordinary annual working time are classified as overtime, which may not exceed

80 hours per year. Overtime shall be remunerated according to the rates agreed in the applicable CBA or the employment contract (and this may not be lower than the established hourly rate) or offset with equivalent rest periods within the four months following the performance of overtime.

## 9. Holidays and Time Off

### 9.1 Holidays

The annual holiday period is agreed in the applicable CBA or employment agreement and may not be less than 30 calendar days. It is not permissible to pay employees in lieu of their holiday entitlement, except on the termination of the contract. Unused holiday may not be carried forward to the next year. In addition, employees are entitled to 14 public holidays annually.

### 9.2 Family Leave

Paid leave must be allowed in certain family-related circumstances (e.g. 15 days for marriage or two days for the death of a close relative). The parents or legal guardians of children under eight or handicapped/dependant relatives have the right to a reduction of up to half of the working day, with a pro-rata salary reduction. Workers are entitled to a one hour absence in their daily working time (without loss of salary) for nursing a child of under nine months (or this may be accumulated and taken as rest days after the end of the maternity leave).

During maternity leave, the contract is suspended for 16 weeks (plus two extra weeks per each child if more than one child is born). This right to maternity leave may be enjoyed by the child's mother or father, although during the six weeks following the birth leave may only be taken by the child's mother and, thereafter, both parents may take maternity leave either simultaneously or successively, provided that no more than 16 weeks' leave is taken in total between the parents.

During paternity leave, the contract is suspended for 13 days (plus two extra days per each child if more than one child is born).

Social Security benefits are not indexed to an employee's actual salary but to specified contribution bases (subject to minimum and maximum amounts). The Social Security System pays 100% of the employee's Social Security reference contribution base while the employee is enjoying parental leave.

### 9.3 Illness

General legislation states that in the case of temporary incapacity caused by common illness or non-occupational accidents, employees are not entitled to receive their salary for the first three days following the temporary incapacity. Between days four and 20, employees are entitled to receive 60% of the reference contribution base (from the 4th to the 15th day sick pay is paid by the employer and from the 16th to the 20th day by the Social Security System). Finally, from day 21 onwards, they are entitled to receive 75% of their reference contribution base (paid by the Social Security System).

In the event of occupational illness and accidents, employees are entitled to receive 75% of the reference contribution base from the date on which the temporary incapacity begins (paid by the Social Security System).

CBAs often improve these percentages, for example by requiring the employer to pay the difference between the Social Security allowance and the real salary or imposing an obligation on the employer to assume payment during the first three days of incapacity.

Social Security benefits resulting from temporary incapacity are paid for a maximum of 18 months.

## 10. Health and Safety

### 10.1 Accidents

Regulations on the prevention of occupational hazards are extremely detailed in Spain, requiring multiple measures to be taken and obligations to be implemented by the companies.

In the event of a breach of health and safety duties, employers are subject to different administrative sanctions depending on the seriousness of the breach. In addition, infringing employers bear a surcharge of between 30%-50% of the corresponding Social Security allowance granted to the employee that has suffered an occupational illness or accident at work, depending on the nature and the extent of the breach. This surcharge cannot be insured against, and any agreement or contract which is executed in order to cover, compensate or transfer this surcharge is legally null and void.

### 10.2 Health and Safety Consultation

The monitoring of health and safety regulations is carried out both externally and internally. Externally, the Labour Inspection and other public bodies are in charge of these matters. Internally, employers, Prevention Services, the Health and Safety service provider or the Health and Safety Committees are involved with the prevention of occupational risks (notwithstanding the employing company's ultimate responsibility).

The Health and Safety Committees are joint membership bodies in charge of regularly and periodically advising the company on matters related to risk prevention. They are set up in companies or workplaces which have at least 50 employees and consist of an equal number of employee and employer representatives.

## 11. Industrial Relations

### 11.1 Trade Unions

Law 11/1985 on Trade Union Freedom governs the right of all workers to freely

join a trade union and gives broad powers to trade unions to exercise their rights. Indeed, large trade unions in Spain such as the Workers' Commission ("Comisiones Obreras" or "CCOO") and the General Workers' Union ("Unión General de Trabajadores" or "UGT") have considerable political power. There are also employer associations, which seek to develop labour relations in conjunction with the trade unions and the labour authorities by means of collective agreements, lobbying and so on.

### 11.2 Collective Agreements

CBAs mandatorily regulate specific employment terms and conditions of those employees that come within the scope of each specific CBA. CBAs may be drawn up at different levels by means of collective negotiation (by sector; such as metal, offices, chemicals etc, or by company) and with different territorial scopes of application (national, Autonomous Community, provincial). CBAs are temporary agreements, the duration of which is agreed between the parties. In addition, individual contracts may contain specific terms and conditions agreed with a particular employee.

### 11.3 Trade Disputes

The right to strike is protected by the Spanish Constitution. Any strike action must be expressly adopted by a majority of employees in each company and must be notified to the employer and to the Labour Authorities by the employees' legal representatives. This notice must be given at least five working days prior to the commencement of the strike, or 10 working days if the strike affects public service companies.

While an employee is exercising the right to strike, the employment contract is suspended. This relieves both employer and employee of their obligation to provide remuneration and services respectively. The dismissal of an individual whose employment contract is suspended as a result of exercising the right to strike will be void, unless the

strike is declared illegal or the employee does not comply with the minimum service requirements provided in the law or relevant CBA.

### 11.4 Information, Consultation and Participation

As well as participation through union recognition, information, consultation and participation of employees at a company level is provided through the employees' legal representatives (staff delegates in workplaces with fewer than 50 employees or Works Councils in workplaces with at least 50 employees). The number of employees on a Works Council will depend on the size of the workplace. Work Councils and staff representatives are entitled to receive information (e.g. details of serious disciplinary actions against employees etc) to publish leaflets in relation to employment or social matters and may collectively negotiate in certain circumstances.

Employers must consult the Work Council before adopting certain important decisions, such as those relating to the reorganisation of the workforce, the closure of a plant or training programmes.

A Spanish company must establish a European Works Council, or a similar vehicle which provides information and consultation to/with employees, if:

- (a) it employs a total of more than 1,000 people in all European Member States, of whom 150 work in one particular Member State and another 150 in a different Member State; and
- (b) this is requested by at least 100 workers or their representatives, belonging to two workplaces or companies located in different Member States.

Prior to the establishment of a European Company in Spain, specific procedures must be followed and rights to information, consultation and/or participation agreed between the

company representatives and the employees' legal representatives.

## **12. Acquisition and Mergers**

### **12.1 General**

Article 44 of the Workers' Statute implements the "Acquired Rights Directive" in Spain. In the event of a transfer of an undertaking, the affected employees are entitled and obliged to transfer, under their existing employment terms and conditions, to the transferee who automatically becomes their new employer.

The transferor and transferee are jointly and severally liable for a three-year period for any employment obligations outstanding at the time of the transfer and for a four-year period in relation to social security obligations arising prior to the transfer.

If there are no labour or social security obligations outstanding at the time of the transfer, any future obligations are assumed exclusively by the new employer (unless the transfer is classified as a fraud, in which case the former employer would also be liable).

### **12.2 Information and Consultation Requirements**

The transferor and transferee should serve notice of the transfer to the legal representatives of the affected employees. In the absence of any legal representatives, each affected employee should be individually informed. The information to be provided is: (i) the proposed date of the transfer; (ii) the reasons for the transfer; (iii) the legal, economic and employment consequences of the transfer for the employees; and (iv) details of the proposed measures in relation to the employees.

The information must be provided in advance of the transfer and before the employees' employment conditions are affected by the transfer.

In the event of company mergers and demergers, the information must be provided no later than the date that the notice convening the general meeting of the company to adopt the relevant resolutions is served.

Where specific employment measures are contemplated as a consequence of a transfer, the employer(s) of the affected employees must commence a consultation process with the employees' legal representatives in relation to the proposed measures and their consequences for the employees. This consultation must take place sufficiently in advance of the implementation of the measures for a genuine consultation to take place.

Where any measures relate to a substantial modification of terms and conditions of employment, relocation or collective dismissals, detailed information and consultation rights and procedures will apply.

In the event of a merger or change in the employer's legal status that may affect the level of employment, the legal representatives of the employees are entitled to issue a report, prior to the merger provided they do so within 15 days of being informed of the merger/change in status.

### **12.3 Notification of Authorities**

There is no obligation from an employment law perspective to notify the authorities in the event of the transfer of an undertaking. However the social security authorities must be notified of the transfer and the affected employees.

### **12.4 Liabilities**

In strict legal terms, in relation to the transfer of an undertaking, if the employer does not comply with its information and consultation obligations, it will not affect the validity of the transfer, however, it could give rise to a fine of up to €6,250 from the Labour Authorities.

## **13. Termination**

### **13.1 Individual Termination**

Employment contracts may only be lawfully terminated on a number of grounds expressly stipulated by law and in accordance with the appropriate procedures for each case.

Contracts may be terminated at the request of the employee or employer by mutual consent, upon the expiry of an agreed term or the conclusion of the job or service covered by a temporary contract, or due to the retirement of the employee.

Upon the termination of a temporary contract, employees are entitled to compensation equivalent to eight days' salary per year of service (except for interim and internship contracts). This compensation will be progressively increased over the next few years. Accordingly, temporary employment contracts entered into after 1 January 2012 will have a compensation equivalent to nine days' salary per year of service; 10 days' salary per year of service if the temporary employment contract is concluded on/after 1 January 2013; 11 days' salary per year of service if the temporary employment contract is concluded on/after 1 January 2014 and 12 days' salary per year of service if the temporary employment contract is concluded on/after 1 January 2015.

### **13.2 Notice**

The employee must be served with written notice of the dismissal, indicating the events on which it is based and the date it is to take effect.

### **13.3 Reasons for Dismissal**

The employment contract may be terminated by the employer by means of a disciplinary dismissal based on a serious and wrongful breach of the contract by the employee, without the latter having any right to compensation. Legislation and CBAs list the contractual breaches which may be considered for

such purposes (lack of discipline or disobedience, offences, breach of contractual good faith etc).

The employee is entitled to oppose the dismissal by means of filing a claim within 20 working days of the dismissal date before a special administrative body where a preliminary conciliation meeting is required. A conciliation meeting will be held in an attempt to reach an agreement regarding the dismissal (e.g. the company may offer compensation in order to reach an agreement with the employee and avoid judicial proceedings).

If such an agreement is reached, then the company will have to pay the employee the agreed amount as severance pay for his/her termination.

If the parties fail to reach an agreement at the conciliation meeting, then it is highly likely that the employee will file a claim before the Labour Courts, which he/she must do within the remaining term of the 20 business day period granted for filing the conciliation claim. The Labour Courts would resolve the dispute by classifying the dismissal as fair, unfair or void. The relevant legal procedures can take around three to four months and an appeal to a higher court is possible.

If the dismissal is considered unfair the employer may, in most cases, choose either to reinstate the employee or to terminate the contract with a severance payment of 45 days of salary per year of service subject to a maximum of 42 monthly payments for the period of service between the commencement date and 11 February 2012 and 33 days of salary per year of service capped at 24 monthly payments for the period of service from 12 February 2012 onwards.

In addition, an employment contract may be terminated on "objective grounds" such as the employee's ineptitude, employee absenteeism (when it reaches certain levels as established by law), or when there are economic, technological,

organisational or production-related grounds affecting a number of jobs below the "collective dismissal" threshold number. The objective dismissal is subject to a number of legal requirements; first, written notice must be served to the employee explaining in detail the grounds for the decision; secondly, the employer must make a simultaneous offer to pay the minimum severance compensation equal to 20 days' pay per year of service (up to a maximum of 12 months' pay); and thirdly, the employee is entitled to 15 days' notice or a payment in lieu of notice.

The employee may appeal the decision to dismiss as if it were a disciplinary dismissal and, likewise, the decision may be classified by the Judge as fair, unfair or void with similar consequences.

#### 13.4 Special Protection

The dismissal will be considered void if it was discriminatory or if it violated the employee's fundamental rights or public freedom. In such circumstances, the employer must reinstate the employee and pay all salary accrued during the dismissal period.

#### 13.5 Closures and Collective Dismissals

The Collective Dismissal procedure is a procedure that should be followed when a company expects to terminate a minimum number of contracts in a 90-day period in accordance with the following thresholds:

- (a) 10 employees in a company which has fewer than 100 employees;
- (b) 10% of the total workforce in a company with between 100 and 300 employees; and
- (c) 30 employees in a company with 300 or more employees.

Dismissals which affect the entire staff are classified as collective dismissals if the headcount is more than five employees.

A Collective Dismissal procedure implies that the company must carry out a consultation period with the employees' legal representatives for a maximum term of 30 days, or 15 days in companies with less than 50 employees, in order to discuss the possibilities of avoiding or reducing the number of dismissals and mitigating their consequences with ancillary social measures.

After the consultation period, the company should notify the dismissal to each affected employee, and is obliged to pay the legal severance (i.e. 20 days of salary per year of service capped at 12 monthly payments).

In addition, if the Collective Dismissal procedure affects more than 50 employees, the company should offer an outplacement plan to the employees for a minimum term of six months. In the case of companies with over 100 employees (even in group terms) which have made profits over the last two years, and where the Collective Dismissal affects employees over the age of 50, the companies must make a contribution to the Public Treasury. This contribution consists of applying a percentage (between 60% and 100%) of the amounts representing unemployment benefits or subsidies and social contributions in relation to any such employees.

Both collective and individual claims may be filed in relation to dismissals carried out under a Collective Dismissal:

- (a) Collective claim

The employees' legal representatives or the trade union representatives who are "sufficiently established" in the collective dismissal situation may file a claim against a company's decision to adopt a Collective Dismissal, based on the non-existence of legal cause, the non-observance of the consultation period or the failure to provide the

necessary documentation, fraud, willful intent, duress, abuse of the law, or the infringement of fundamental rights and public liberties.

The claim must be filed within a 20-day statute of limitations following notification of the decision at the end of the consultation period.

The judgment (which can be appealed, will declare that the decision to terminate: (i) “conforms to law”, if the legal causes alleged for the collective dismissal are proven and the formal requirements are met; (ii) “does not conform to law”, if the causes alleged are not proven, in which case the company must pay unfair dismissal severance; or (iii) is null and void, if no consultation period was provided, if the necessary documentation was not provided or if the decision infringes fundamental human rights or was adopted in a fraudulent manner, with willful intent, duress or abuse of the law. In this scenario, the judgment will declare that the employees are entitled to be reinstated to their former posts.

(b) Individual claims

The dismissal will be declared null and void and, therefore, reinstatement will be mandatory if no consultation period was completed, if the necessary documentation was not provided or if the permanence priorities were not upheld, as provided by law, collective bargaining agreement or an agreement reached during the consultation period.

If the existence of an “objective cause” for dismissal is not proven, the dismissal will be declared unfair and the company will be obliged to pay unfair dismissal severance.

## 14. Data Protection

### 14.1 Employment Records

The processing of personal data in Spain, including the collection, storage and use

of information held by employers about their employees and workers (prospective, current and past) is governed mainly by the Organic Law 15/1999 dated 13 December 1999 (the “LPDCP”), which implements the EU Data Protection Directive and the Royal Decree 1720, of 21 December, which approves the regulation implementing organic law 15/1999, of 13 December, on the protection of personal data.

Employers, as data controllers, are under an obligation to ensure that they process personal data about their employees (whether held on manual files or on computer) in accordance with specified principals including the following: a requirement to ensure that data is accurate, up to date, and is not kept longer than is necessary; and a requirement that it is stored securely to avoid unlawful access or accidental destruction or damage to it.

Under the LPDCP, prior to the creation of a personal data file, employers (as data controllers) must notify the Data Protection Agency of the creation of every file, by filing a standard form. The notification must contain details of the data controller’s (corporate) identity, the purpose of the file, its location, security measures taken, the data intended for inclusion in the file, and details of foreseeable disclosures and international data flows.

In addition, personal data may only be processed if the employee has unambiguously given his or her consent, unless there is an applicable legal exception. Finally, employers must comply with certain duties to provide the employees with specific information about the data processing. This information must be provided before the personal data are collected and before the consent of the employee has been granted.

Infringement of the data protection law can lead to fines of between €900 and €600,000.

### 14.2 Employee Access to Data

Data subjects have the right to access their personal data, to rectify such data when it is incorrect, to delete the personal data contained in a data file when it is excessive, and to object to the data processing of their personal data in certain cases.

Employees, as data subjects, are entitled to request and obtain information from a data controller about their personal data included in the Employer’s files. Within one month of such a request, the data controller must decide whether the data subject has a right of access, and if no response is provided within one month, the request is deemed to have been refused. If the request is granted, the data subject should exercise the right within 10 days. This may involve merely consulting the files by visual examination, or the provision of relevant data in writing, by fax or photocopy in a legible and understandable form. The data subject may select the means by which the right of access is exercised, subject only to the limitation that the means chosen must be in accordance with the data controller’s method of storage.

The information provided must include not only the data, but also the source of the data, third parties to whom the data have been disclosed, and a statement of the uses and purposes for which the data are being stored.

The only statutory grounds on which access may be refused are that the request for access was made by someone other than the data subject, or that the data subject has exercised the right of access within the previous 12 months and there are no reasonable grounds for exercising it again. In such cases, the data subject has the burden of proving the reasonableness of his request.

Data subjects are also entitled to request from the Data Protection Registry information relating to the existence of

personal data processing, its purposes, and the identity of the data controller. The Registry is available for public consultation, without charge.

### 14.3 Monitoring

No specific legislation has been enacted to regulate the monitoring of employee communications such as email, internet and telephone usage. However, the Labour Courts have considered the conflict between the employer's rights to effective management control and the right of employees to personal privacy and secrecy of communications.

From case law, it can be inferred that employers may monitor employee communications in the circumstances set out below. Note that these guidelines are a matter of interpretation of the relevant case law and have not been promulgated by any regulatory authority:

- (a) The monitoring must be justified, suitable to achieve the company's aim, necessary (i.e. a more moderate alternative of achieving the same objective does not exist) and balanced.
- (b) The company should communicate to its employees that access to email or the internet has been granted

exclusively for professional purposes, and that the company has in place a procedure for monitoring emails sent and records of internet access. Employees can be advised of such practices via internal codes setting out professional standards or internal guides to the company, to be signed by each employee, or by inclusion of a statement in the terms of the employment contract, or by drafting a specific document to be signed by every employee of the company in which they express their agreement with the policy and consent to the monitoring activity.

- (c) Employees should be required to advise third parties of the monitoring activity carried out by the employer in connection with emails received. A reference to such monitoring activity should also be automatically included in emails sent by employees.

### 14.4 Transmission of Data to Third Parties

An employer who wishes to provide employee data to third parties must do so in accordance with the LPDCP principles and processing conditions. In principle, it may be necessary to obtain express consent to such disclosure. Please note

that in the following circumstances the consent is not required:

- (a) Under the LPDCP, disclosures of employees' personal data for the purpose of requiring them to fulfil their legal obligations (tax, social security), or to allow employers to fulfil theirs.
- (b) Where the third party is based outside the EEA it should be noted that the LPDCP prohibits the transfer of data to a country outside the EEA unless that country is considered by the Spanish Data Agency as one that ensures an adequate level of protection for personal data.
- (c) When a service provider has access to employee data and such access is necessary for the provision of the services to the employer and the services agreement provides that:
  - (i) once the contractual service has been completed, the personal data must be destroyed or returned to the employer;
  - (ii) the service provider will not transfer the data to any third party;
  - (iii) the service provider will store the data securely in accordance with the employer's instructions.

*Contributed by Clifford Chance, Madrid*

# Sweden

## 1. Introduction

Whilst statutory regulation of the Swedish labour market has increased, labour law in Sweden has for some time been highly regulated under a system of collective bargaining. In practice, terms and conditions of employment as well as the nature of labour/management relations are to a large extent moulded by collective bargaining.

A high percentage of employees belong to trade unions. There are three central trade union confederations: the first represents blue-collar workers; the second represents white-collar workers; and the third represents professional (graduate) employees. In addition, membership in employers organisations is common. The Swedish Employers' Federation exercises considerable influence over its members. Collective bargaining is focused nationally with agreements being negotiated centrally by trade unions. Labour law in Sweden protects this bargaining process by providing certain "positive rights" including the right to strike, the right to be a member of a trade union and the right of a trade union to consultations.

Collective agreements are legally enforceable. An employee's relationship with his employer is regulated by a combination of statutory provisions, collective agreement (if any) and individual contract. Indeed, employers who are not represented by an employers' body still tend to follow the industry-standard agreements.

Disputes are handled by the District Courts and the Labour Court. Decisions of the District Courts can be appealed to the Labour Court. The Labour Court comprises representatives of the judiciary, employers' organisations and trade unions. Decisions of the Labour Court are final and binding. In some cases disputes are handled directly by the Labour Court, from which there is no right of appeal.

## 2. Categories of Employees

### 2.1 General

The Swedish system of collective bargaining recognises various categories of employees. Generally, the employees can be divided into two main categories; white-collar employees and blue-collar employees. As stated above, such categories are traditionally represented by different trade unions and are, thus, covered by different collective agreements.

### 2.2 Directors

Executives and employees with comparable positions comprise a separate specific category, as they are exempted from the application of the principal piece of employment legislation, the Employment Protection Act (*lagen om anställningsskydd*). As a general rule, the managing director of a limited liability company is covered by this exemption, as well as senior management in larger companies. However, the actual duties and terms of employment have to be considered in each specific case in order to determine the scope of this exception. The managing director and the senior management are normally also excluded from the scope of collective agreements. Instead, the employment of senior executives is normally regulated by contract and disputes between employer and senior executives are often resolved through arbitration. However, senior executives and directors can be represented by trade unions.

### 2.3 Other

Generally, there are no special rules applying to the employment of part-time employees. However, a part-time employee may, under certain circumstances, have a right to increase his or her working hours. Discrimination against part-time workers is also prohibited (see section 4 below).

## 3. Hiring

### 3.1 Recruitment

As a general principle, an employer is free to choose whomever to employ. There are, however, some limitations to this principle such as the prohibition on discriminating on the grounds of gender, transgender identity or expression (i.e. discrimination against transsexuals, transvestites, intersexuals and other persons who do not identify themselves as male or female), ethnic origin, religious faith, disability, sexual preference or age.

Employees previously made redundant enjoy a preferential right to re-employment in the business where they were employed if their length of service totals more than twelve months over the preceding three years. This preferential right applies from the time notice is given to the end of the ninth month after the employment has been terminated. This means that an employer may not engage new employees within this period without observing the redundant employees' preferential right. The preferential right to re-employment will only apply if the redundant employee requests re-employment and if he possesses the necessary skills for the vacancy.

It should also be noted that the authorities, as a labour market measure, can indirectly influence who is employed (normally elderly and disabled employees or an under-represented gender group) by making specific quotas a condition of the grant of regional aid or other subsidies.

An employer is also normally obliged to initiate consultations with the trade union(s) to which he is bound by collective agreement before employing an employee in a managing position.

### 3.2 Work Permits

Nordic and other EEA nationals are entitled to stay and work in Sweden without restriction. Should the stay exceed three months, however, such persons must register with the Migration Board.

Non-EEA nationals, before coming to Sweden to work, obtain a residence permit and a work permit. Permits are issued for specified periods and extensions can be applied for. The applications for such permits are made to the Migration Board. In addition, nationals in the majority of countries outside the EU need a visa to enter Sweden.

Swedish citizens, foreigners already living in Sweden and citizens of EU and EEA member states have a priority over others in obtaining work in Sweden. However, an employer may, after having advertised a vacant position within Sweden, the EU and Switzerland, offer the employment to a non-EU or EEA national.

Work permits are normally granted for a maximum of two years at a time, or, if the employment lasts for less than two years, for the period for which the employment is offered. The employee can apply for a permanent residence permit after four years. A work permit is, as a main rule, restricted to the trade or profession envisaged in the offer and to the employer who made the offer.

An employer employing someone without a permit or keeping in his service someone who has had his permit withdrawn or not extended can be fined.

## 4. Discrimination

Discrimination on grounds of gender, transgender identity or expression, (i.e. discrimination against transsexuals, transvestites, intersexuals and other persons who do not identify themselves as male or female), ethnic origin, religious faith, disability, sexual preferences, age, part-time and fixed-term employment, parental leave as well as trade union activities is generally prohibited. This protection (with the exception of trade union activities as well as part-time and fixed-term employment) also applies to applicants for work (see above).

If an employee is discriminated against by an employer, the employer may be held liable to pay compensation to the employee and acts of discrimination can be declared invalid at the request of the employee. The time limits for bringing claims vary depending upon the cause of action.

It should also be noted that it is a criminal offence under the Swedish Criminal Code to discriminate on grounds of race, colour, nationality, ethnic origin, religious faith or sexual orientation.

There is a special so called discrimination ombudsman whose function is to ensure compliance with the discrimination legislation.

## 5. Contracts of Employment

### 5.1 Freedom of Contract

The negotiation of contractual terms at a local level is relatively uncommon in Swedish labour practice, although it is increasing. Typically, the terms of employment are governed by collective agreements signed at industry level. The employment of senior executives and employees with specific functions is, however, normally governed by individually negotiated contracts. It should be noted that statutory intervention provides a set of mandatory requirements relating to, for example, employment protection, parental leave, educational leave, health and safety issues, working time and holidays.

### 5.2 Form

There is no legal requirement that employment contracts must be in writing. It is customary, however, for collective agreements to require the employment contract to be in writing and to contain particular terms. Furthermore, in compliance with Council Directive 91/533, an employer must inform a new employee in writing of the conditions applicable to the contract.

There are several collective agreements containing employment conditions which cannot be reduced or exceeded. The purpose, amongst others, is to ensure that the parties retain control of pay rates. For example, if an employer pays wages which are too high he may be liable to pay damages to the trade union for breach of the applicable collective agreement.

Contracts of employment in Sweden are regarded as being for an indefinite period unless otherwise agreed. In certain specifically defined circumstances, employment contracts may be limited in time. Currently, Swedish law recognises four different types of fixed-term employment contract. These include a general fixed-term agreement, a temporary substitute agreement and employment for a specific season. A general fixed-term agreement or a substitute agreement will automatically transform into an employment contract of indefinite duration, if the aggregate duration of the employee's service during a five-year-period exceeds 24 months. The Ministry of Employment is proposing the following changes to this rule with effect from 1 July 2013: A general fixed-term employment or a substitute employment will automatically transform into an employment contract of indefinite duration if the employee - during a period of successive probationary or fixed-term employments - has either had a general fixed-term contract or a substitute contract for more than two years.

### 5.3 Trial Periods

A new employee may be employed on probation, provided that this does not last more than six months. The employer must give notice to terminate the relationship before the end of the probationary/trial period. In default, the contract will become an indefinite-term employment. During the probationary employment, the relationship can be terminated at any time on two weeks' notification. Many collective agreements include adjustments and supplements to these rules.

#### **5.4 Confidentiality and Non-Competition**

Under Swedish law, employees are bound by a general duty of loyalty during the term of the employment (including the notice period). This duty of loyalty precludes an employee from taking any actions that may be detrimental to the employer. In particular, the duty of loyalty imposes a duty not to compete with the employer, as well as a duty of confidentiality in relation to information that could harm the employer, should it become known publicly or by a third party. These obligations apply even though no non-compete or confidentiality undertakings have been included in the individual employment contract. A clarification of the duty of loyalty during the term of the employment is often included in collective agreements. A breach of the duty of loyalty could, in serious cases, constitute grounds for dismissal and could give rise to an obligation for the employee to pay damages to the employer.

Upon termination of employment, the duty of loyalty ceases. Thus, the former employee may engage in a business that is competitive with the employer and make use of knowledge acquired during the employment, with the exception of company secrets which are protected under the Swedish Protection of Trade Secrets Act (*lagen om företagshemligheter*). In order to prevent an employee from competing or disclosing confidential information, express post-termination contractual restrictions are required. Such restrictions must, however, be carefully considered in the context of each individual case, as their validity is subject to significant restrictions.

Pursuant to Section 38 of the Swedish Contracts Act (*avtalslagen*), a non-compete clause is not enforceable to the extent it is more far-reaching than is reasonable in the circumstances. Accordingly, a court of law could modify the scope of the non-compete provision or declare such a clause completely unenforceable. In addition, if the

non-compete clause is sanctioned by penalty, such a sanction could be adjusted or declared invalid pursuant to Section 36 of the Swedish Contracts Act. It should be noted that any penalty imposed on the former employee for breach of the non-compete obligation must be proportionate to his former salary from the employer. Liquidated damages, in relation to a breach of a non-compete clause, may normally not to be in excess of a sum equivalent to six months' salary. However, this naturally pre-supposes that the non-compete clause in itself is valid.

In order to determine whether a non-compete clause is reasonable, a balance must be struck between the employer's need for protection and the employee's freedom to work. The validity of a non-compete clause is subject to further regulation by a collective agreement entered into in December 1969 between the principal players in the labour market. The principles of this collective agreement (the "Collective Agreement of 1969") still guide the general legal considerations relating to non-compete clauses even in relation to employment relationships which are not formally covered by the Collective Agreement of 1969.

Specific provisions concerning loyalty, unfair competition and confidentiality are often found in the contracts of senior executives or employees with specific functions. However, it should be noted that the Swedish courts apply a restrictive approach towards post-contractual non-competition clauses.

#### **5.5 Intellectual Property**

The starting point is that intellectual property created by an employee during the course of his or her employment belongs to the employee. However, as regards patentable inventions, the employer has under certain circumstances a statutory right to take over such inventions and the employee is entitled to "reasonable compensation".

Disputes are tried in the ordinary courts, with issues concerning compensation being tried by a special board.

With regard to intellectual property other than patentable inventions, the employer also often, by way of agreement (express or implied), has a right to intellectual property created by the employee. In addition, in compliance with Council Directive 91/250, where a computer program is created by an employee in the execution of his duties, the employer is exclusively entitled to exercise all rights in the program so created, unless otherwise provided for by contract.

## **6. Pay and Benefits**

### **6.1 Basic Pay**

There is no statutory minimum pay, but collective agreements usually lay down rates of pay for the groups of employees to which they apply. As already noted, collective agreements are legally enforceable against an employer. Typically, companies not bound by collective agreements nevertheless follow wage rates set by an appropriate collective agreement.

The prohibition against discrimination can in some circumstances lead to governmental control in respect of wages.

Further, under the Contracts Act, any term of an agreement, including a wage clause, may in certain circumstances be set aside or modified by the courts if deemed unreasonable.

The method by which wages and salaries are paid is not regulated by statute, but again, collective agreements usually provide for the timing and method of payment.

Pay is not usually index-linked.

### **6.2 Pensions**

Most contracts of employment make provision for a pension complementary to the state pension scheme either through a collective agreement or by individual

provision in the contract itself. Pensions are usually index-linked.

### 6.3 Incentive Schemes

Profit related pay schemes, profit sharing arrangements or bonus schemes exist, but usually only for senior executives within the private sector.

### 6.4 Fringe Benefits

Benefits such as a company car, bonus, life/accident insurance and subsidised canteen/luncheon vouchers may be provided to employees.

### 6.5 Deductions

Employers are obliged under Swedish tax law to make income tax deductions before wages or salaries are paid. In addition, they must provide certain details in an itemised pay statement setting out what deductions have been made. Other deductions can only be made in specified circumstances or with the consent of the employee.

During 2012 municipality taxes varied between 28% and 34% on incomes under SEK 401,100 (for 2013 the threshold is expected to be SEK 413,000) depending on the municipality the employee resides in. On incomes ranging from SEK 401,100 to SEK 574,300 (for 2013 the income range is expected to be between SEK 413,000 and SEK 591,600) a 20% state tax is added to the above rates. On incomes over SEK 574,300 (for 2013 the threshold is expected to be over SEK 591,600) state tax at a rate of 25% is added.

## 7. Social Security

### 7.1 Coverage

Social security provision is made for, *inter alia*, sickness benefit, childcare, unemployment insurance, pensions, disability and industrial injury.

### 7.2 Contributions

Employers are obliged by law to make contributions in respect of their employees to the social security fund.

Contributions at the rate of 31.42% (during 2012; and it is anticipated that this will also be the applicable rate in 2013) of an employee's gross wage or salary and taxable benefits are payable by the employer but are tax deductible. Employees are also required to make a minor contribution, which is tax deductible for the employee.

## 8. Hours of Work

The Working Time Act (*arbetstidslagen*) regulates the working hours of all employees. The working week is set at a maximum of 40 hours, but is flexible in respect of when those hours are worked. Therefore, the number of hours worked over a period of four weeks can be considered together and averaged. The Act does not lay down any right for the employee to overtime compensation. However, collective agreements and/or individual employment contracts often contain provisions in this respect. Moreover, the total compensation to the employee may not be unreasonably low.

The Act recognises two different categories of working hours regulated by law: "normal hours" and "on-call hours" (where the employee is required to stay at work to be able to work if the need arises). Working weeks of less than 40 hours are not unusual.

In addition, there are two categories of overtime work – general and special. Employees are permitted to work a maximum of 48 hours general overtime per four-week period or 50 hours per calendar month, with an annual limit of 200 hours general overtime per year. Overtime in excess of this (referred to as special overtime) can be worked up to a maximum of 150 hours per calendar year, provided that it arises in the context of an extraordinary situation and the situation could not be resolved in a different way. General and special overtime together may not exceed 48 hours per four-week period or 50 hours per calendar month. The Act further contains certain

exceptions in case of natural disasters and major accidents.

The Act also regulates overtime worked by part-time employees, the working hours of young people as well as rest and interval periods.

Finally, as a general limitation, the average working time for each seven day period may not exceed 48 hours during a period of four months.

## 9. Holidays and Time Off

### 9.1 Holidays

Employees are entitled by law to 25 working days holiday per year. Saturday is not counted as a working day. The statutory holiday year runs from 1 April to 31 March the following year. Employees are entitled to save holiday entitlement over and above 20 days per vacation year (i.e. if the annual entitlement is 30 days, 10 days can be saved). It is, however, possible to agree with the employee that a maximum of five days may be saved per vacation year. The saved holidays must then be used within a five year period.

### 9.2 Family Leave

Both parents are entitled to parental benefits paid by the social security system. A female employee can start drawing such benefits 60 days before the expected birth of her child. After the birth of the child, the parents can draw parental benefits for 480 days (the parental benefits period is reduced by the number of days benefits already drawn by the mother prior to the birth of the child). This right also applies to adoptive parents. The days for which parental benefits are payable are divided equally between the parents, and, with the exception of 60 days, may be transferred from one parent to the other. Sole custodians are entitled to all 480 days themselves. The benefits may be drawn at any time until the child reaches the age of eight or completes the first class of school. The parents can

choose to draw full, three-quarters, one-half, one-quarter or one-eighth of a day in parental benefit. Parental benefits are paid by the Social Insurance Office and amount to 80% of the salary, in 2012 capped at an annual salary of SEK 440,000 (in 2013 SEK 445,000).

Irrespective of whether parental benefits are paid or not, a parent always has the right to full leave of absence for custody of his/her child until the child is 18 months old. Thereafter, parental leave can only be taken together with parental benefits (see above).

In addition, parents are also generally entitled to take leave in order to care for a sick child under the age of 12, as well as children between 12 and 16 who are in special need of care and supervision. In such cases the parent is entitled to temporary parental benefits, paid by the Social Insurance Office, amounting to 80% of the salary, in 2012 capped at an annual salary of SEK 330,000 (in 2013 SEK 333,750).

The employer is not required to make any additional maternity or parental payments, and parents are, unless otherwise agreed, solely compensated through the social security system. To some extent, however, employees earn vacation pay during their parental leave. For each child, the employee is entitled to count up to 120 days of parental leave, or 180 days for single parents, as leave of absence that qualifies for paid vacation days. For each day of such absence the basis for calculating the vacation pay is increased by a sum corresponding to the employee's average daily salary in the employment over the remaining qualifying year of service. Pregnant employees who have a physically demanding job are entitled to be transferred to other duties. If, in such a case, the employer cannot offer the employee some other form of work, the employee is entitled to pregnancy benefits.

### 9.3 Illness

The employer must pay sick pay to its employees in respect of the first 14 days of sickness, with the exception of the very first day of sickness (qualifying day). Such compensation amounts to 80% of the salary, unless a higher amount is stipulated in a relevant collective agreement or agreed with the employee. Thereafter, sick employees must be registered with their local Social Insurance Office. The Social Insurance Office provides for sickness benefits consisting of daily compensation. Normally sick pay is paid by the Social Insurance Office for 364 days during a period of 450 days (approximately 15 months). It is possible to receive extended sick pay for a maximum period of 550 days (approximately one and a half years), in certain cases even longer or without limitation in time (e.g. after work accidents). Sickness benefits amount to 80% of the salary, in 2012 capped at an annual salary of SEK 330,000 (in 2013 SEK 333,750). Sick pay and sickness benefit are taxable.

### 9.4 Other Time Off

Employees are entitled to paid or unpaid leave for, amongst other things, trade union activities, public work, education, non-competing business activity, language classes (in the case of immigrants) and compulsory or voluntary military or civil defence service.

## 10. Health and Safety

### 10.1 Accidents

The Health and Safety at Work Regulations cover almost every type of employment, and there are also specific rules relating to particular forms of hazard. Generally, an employer is obliged to ensure that the work place is safe and that such safety arrangements that are necessary to ensure that proper care is taken of employees are implemented in the work place. Liability is also imposed upon manufacturers of equipment or dangerous materials, which are used by employees in the course of their employment.

If an employer does not take sufficient care or otherwise fails to comply with health and safety requirements, criminal liability may arise, as well as civil liability (i.e. damages) and a liability to pay a company fine (*företagsbot*) (a company fine (*särskild rättsverkan*) can be imposed by a court on a company or other legal entity for infringements committed in the conduct of business activities. The amount is subject to an upper limit of SEK 10,000,000). Furthermore, the employer has a general legal duty to rehabilitate injured or sick employees. Compensation for injuries at work is paid out of the work injury insurance scheme.

### 10.2 Health and Safety Consultation

There is no legal obligation to specifically consult with employee representatives on health and safety matters. An employer is in general obliged to consult with the trade union to which it is bound by a collective agreement before making any significant changes to the business or to the employment conditions of the employees belonging to such trade union. Consequently, only if a health and safety matter at work involves a significant change to the business, will the employer have an obligation to consult with the relevant trade union(s). The employer is also obliged to consult with the trade union, if the trade union so requests or if the matter is of specific interest for the trade union with which the employer has a collective agreement. An employer who is not bound by a collective agreement is under an obligation to consult with a trade union to which an employee belongs only if a health and safety matter specifically concerns the employment terms and conditions of the employee.

Under the Swedish Work Environment Act, at every worksite where five or more persons are regularly employed, one or more employees must be appointed as safety delegates. Safety delegates are appointed by the local trade union currently or customarily having a collective agreement with the

employer. In the absence of such an organisation, safety delegates must be appointed by the employees. The safety delegate represents the employees on work environment matters and his function is to promote a satisfactory working environment.

Where 50 or more persons are regularly employed, a safety committee consisting of representatives of the employer and of the employees must be established at every worksite. The committee's employee representatives are appointed in the same way as the safety delegates. The safety committee must, *inter alia*, participate in the planning of work environment measures at the worksite and observe their implementation.

## 11. Industrial Relations

### 11.1 Trade Unions

Under Swedish labour law, employers and employees have the right to belong to an organisation and to be active in it. In addition, employees' organisations have the right to ask for consultations in relation to all matters relating to the relationship between employer and employees.

Sweden does not have a formal system for recognising trade unions. However, trade unions which have entered into collective agreements have more extensive legal rights than other trade unions concerning, for example, information and consultation. There are collective provisions providing for the right to distribute information during work hours, but not to recruit new members during work hours. Apart from organisations such as the Swedish Federation of Trade Unions (LO), the Swedish Federation of White-Collar Workers (TCO) and the Swedish Federation of Professional Associations (SACO) and the Private Sector White-Collar Workers' Cartel (PTK, which is a bargaining cartel that unites a number of sectoral trade unions belonging to SACO or TCO), there are a large number of national trade unions for different

categories of employees. Private employers are affiliated to national organisations and national employers' federations. State and local government employers have their own organisations.

### 11.2 Collective Agreements

Collective agreements are an important feature of the Swedish labour system. They are usually entered into by the national federations of trade unions and employers' organisations. Significant parts of labour legislation can be changed or adjusted through collective agreements.

Collective agreements can be negotiated at a local or national level, although at present, the trend is towards local level agreements. All categories of employees can be covered.

Collective agreements must be in writing and are legally enforceable both in respect of the employer and the members of the relevant organisations after signing. They are typically for a fixed duration (e.g. two or three years) but can be terminated by either party by way of written notice.

There are no registration requirements for collective agreements.

### 11.3 Trade Disputes

Subject to what is stated below, trade unions are entitled to take industrial action, such as a strike. Employees cannot be dismissed for taking such action, unless the employee has participated in an extended illegal strike. However, an employee can be dismissed on account of the effects of a strike, for example, the liquidation of a company following a strike.

As a general rule, where a collective agreement governs the issues in question both employers and employees are required to refrain from industrial action during the term of the agreement. Only if a matter within applicable co-determination provisions is at issue and negotiations have failed, industrial action may follow.

Damages to the trade union(s) can be awarded for failure to comply with the co-determination rules.

### 11.4 Information, Consultation and Participation

The most important collective labour law principle in Sweden is co-determination at work. More detailed provisions in relation to co-determination at work are contained in collective agreements. In short, trade unions always have the right to consult an employer on matters which concern the relations between the employer and the members of the trade union. In certain circumstances, the employer must initiate consultations with trade union(s) prior to issuing or reaching a decision. Trade union rights to consultations are complemented by certain information rights.

## 12. Acquisitions and Mergers

### 12.1 General

Sweden implemented the Acquired Rights Directive. As a consequence, employees who work in a business which is transferred will themselves transfer with the business on unchanged terms and conditions of employment. However, accrued rights to old-age, invalidity and survivors benefits are not taken over by the new employer. The employee may object to the transfer, in which case he/she remains employed by the transferor.

The transfer will not, as such, constitute "an objective ground" for dismissal. Thus, the transferor may not dismiss employees due to a prospective purchaser's wish to acquire a business with a reduced workforce.

If the transferor of a business is bound by a collective agreement, the purchaser will automatically be bound by such agreement, provided that the purchaser is not already party to another collective agreement that may be applied to the transferred

employees. The transferor may, however, terminate the collective agreement prior to the transfer. If notice of termination is given less than 60 days before the transfer, the purchaser will, however, be bound by the collective agreement until 60 days' notice has expired.

Where the purchaser is bound to another collective agreement, it must still apply the terms of employment stipulated in the transferor's collective agreement in relation to the transferred personnel for one year or until the term of the transferor's collective agreement has expired (if shorter). As a result, a purchaser already bound by a collective agreement may have to apply different terms (e.g. salaries, working hours and the like) to incoming employees than it applies to its own employees falling within the same categories.

A share transaction does not normally raise any specific employment law related issues except for information and consultation requirements (see below).

## **12.2 Information and Consultation Requirements**

Under the Swedish Co-determination Act (*lagen om medbestämmande i arbetslivet*), an employer, bound by collective agreement(s), is obliged to initiate consultations with the local trade union(s) before a decision is made which involves a significant change in its business. A transfer of business always qualifies as a significant change. There is no threshold number of employees triggering this obligation. Further, the sale of a major subsidiary is also likely to trigger the obligation to consult.

If the employer is bound by one or several collective agreements, the consultations must take place with the trade union(s) party to the agreement(s). A trade union with a collective agreement is deemed to represent all the employees, not just the members of that trade union. As a consequence, it is

sufficient to perform the consultations with such trade union(s). If the employer is not bound by any collective agreement, it is nevertheless obliged to consult with all trade unions that have at least one member affected by the transfer of business.

There is no fixed minimum or maximum time period during which the consultations must take place. The consultations must be carried out and finalised before the employer makes a final decision. They should be initiated at a sufficiently early stage of the employer's decision-making process so that the consultations form a natural and effective part of the process. The rationale being that the trade union should have a realistic opportunity of influencing the decision.

If no agreement can be reached with the local trade union, the employer must – if so requested by the trade union – also consult that trade union at a national level. However, once the consultation process is completed, the employer is entitled to make its own decision regardless of whether the trade union approves or not.

The length of a consultation process with the trade union(s) will be dictated by the trade union's attitude towards the issues in question and whether or not they refer the consultation to a national level. Typically, the consultation process will be longer if redundancies are involved.

There is no other obligation to inform and consult any employee representatives, employees or works councils in connection with a transfer of business, unless there are supplementary provisions in any applicable collective agreement or applicable European Works Councils agreement.

## **12.3 Notification of Authorities**

Apart from notice to the Swedish Public Employment Service (*Arbetsförmedlingen*) in the event of termination due to redundancy of more than five employees

(see section 13.5 below), the employer has no obligation, from a labour law perspective, to inform any governmental body of a merger or transaction.

## **12.4 Liabilities**

Sanctions and remedies for breach of the Co-determination Act and/or collective agreements are mainly damages, both financial and punitive, to the affected trade union(s). A court injunction cannot be obtained to prevent or reverse a transaction, nor can any criminal sanctions be enforced due to a failure to consult.

# **13. Termination**

## **13.1 Individual Termination**

A dismissal must be served in writing on the employee. The employee must also be informed of the procedures by which he/she can appeal against a dismissal. The formal procedure is to notify the employee as well as his/her trade union of the proposed dismissal in order to give the opportunity to either the employee or the trade union to ask for consultation in relation to the matter. After the consultation procedure is finalised (an agreement does not have to be reached), the employee can be given notice. If the employer fails to follow the formal procedure, the dismissal will not be invalid but the employer may as a consequence be liable to pay damages of between SEK 10,000 – SEK 20,000 to the trade union.

## **13.2 Notice**

Different notice periods apply to employees employed prior to 1 January 1997 and those employed thereafter. For employees employed before 1997, the period of notice of termination to be given depends on the employee's period of service and age. The shortest possible notice period is one month. An employee who at the time when notice is given has been employed by the employer for the last six months or for a total of 12 months during the last two years is entitled to a notice period of:

- (a) two months if he/she has reached the age of 25;
- (b) three months if he/she has reached the age of 30;
- (c) four months if he/she has reached the age of 35;
- (d) five months if he/she has reached the age of 40; and
- (e) six months if he/she has reached the age of 45.

For employees employed since 1 January 1997 the period of notice of termination depends only on the employee's period of service with the employer. However, the shortest possible notice period is one month. Employees are then entitled to a period of notice of:

- (a) two months if the employee has between 2 to 4 years of service;
- (b) three months if the employee has between 4 to 6 years of service;
- (c) four months if the employee has between 6 to 8 years of service;
- (d) five months if the employee has between 8 to 10 years of service; and
- (e) six months if the employee has at least 10 years of service.

Collective agreements and individual employment contracts may contain longer notice periods which must then be applied instead. If agreed between the parties, an employee can be paid in lieu of notice.

### 13.3 Reasons for Dismissal

The employer has the burden of proof to show that the dismissal is justified on objective grounds. The grounds which can be relied upon are redundancy (e.g. lack of work) and personal grounds (e.g. severe incompetence, failure to co-operate and neglect of duty). The practice of the labour Court is to require strict proof from the employer. Swedish law distinguishes between dismissal with or without notice. In cases of gross

misconduct, dismissal without notice can be permissible. In the examples referred to above, notice will usually be required. Before notice of dismissal is given, the employer must ascertain whether it is possible to assign the employee to another vacant position at the company. Only if the employer is unable to find other duties for which the employee has the necessary skills, objective grounds for termination exist. In the event of termination due to redundancy, the employer has to apply the "last in-first out" principle.

A dismissal can be held to be invalid and an employee may be able to remain at work until any litigation concerning his/her employment is resolved. Any employer contravening the Employment Protection Act may be liable to pay damages for (i) salary and other benefits to which the employee is entitled; and (ii) for any loss/damage incurred by the employee. The damages may consist of compensation for the resulting loss as well as for suffering caused by the unlawful act. The level of compensation for loss occurring after termination is set by section 39 of the Employment Protection Act (a maximum of 32 months' salary may be awarded where the employee had at least 10 years' service).

### 13.4 Special Protection

Generally, there is no special protection against dismissal, but any dismissal must be objectively justified. Needless to say, disability is not an objective ground for termination.

Employees on parental leave can be dismissed like other employees, however the notice period will only commence once the employee has returned from his/her parental leave.

It should be noted that trade union representatives enjoy extensive protection under the Swedish Trade Union Representatives Act (*lagen om facklig förtroendemanns ställning på arbetsplatsen*). Such representatives are

protected against dismissal on the grounds of their trade union activities. Further, in the event of redundancies, trade union representatives are entitled to be given priority to continue in employment, provided continued employment is of particular importance for the purposes of the general trade union activity at the work place concerned (and not only in relation to the redundancy situation). The onus is on the trade union (and not the employer or the individual representative) to determine whether continued employment is of "particular importance". Such issues can, however, be settled by court. If the employer contravenes the trade union representative's right to priority of employment, the dismissal can be declared void by the court upon application by the representative.

### 13.5 Closures and Collective Dismissals

In the event of termination due to redundancy of more than five employees, the employer has to notify the Swedish Public Employment Service. In addition, the employer must also initiate co-determination consultations with the affected trade unions.

The employer may not decide at its own discretion which employees are to be made redundant. Instead, as a general rule, the principle "last in - first out" applies. This mandatory rule means that the employer must prepare a priority list for each production unit and for each collective agreement sector (if there are more than one). The employee's position on the priority list depends on his length of service with the employer or other group companies and, to some extent, age. Where two employees have equal length of service, the older will be given priority. An employee will, however, not have priority over other employees unless he has the necessary skills for the job. There are, however, certain exceptions to these rules with regard to smaller companies (ten employees or fewer). Finally, it should be noted that it is

possible to depart from the priority rules by collective agreement.

## 14. Data Protection

### 14.1 Employment Records

Processing of personal data is governed by the Swedish Personal Data Act (the "PDA"). The PDA implemented Council Directive 95/46. A new EU privacy regulation, which is expected to increase compliance obligations and raise penalties substantially, is, however, anticipated to come into force by 2015.

The PDA regulates the conditions regarding processing of personal data, whether this is done by automated data processing or manually. Collection, recording and storage are, among others, examples of operations that constitute processing of personal data.

The PDA applies to data controllers which are established in Sweden. A "Data Controller" is defined as a natural or legal person which alone or jointly with others determines the purpose and means of the processing of personal data. In addition, the PDA also applies to Data Controllers who are established in a country outside the EU/EEA but use equipment located in Sweden for the processing of personal data. In such cases the Data Controller must appoint a representative established in Sweden.

Processing of personal data that is wholly or partially automated is, as a general rule, subject to a notification requirement. Notification should be given to the supervisory authority, the Swedish Data Inspection Board. However, there are many exceptions to the notification requirement. Examples of such exceptions are: (i) if a personal data representative is appointed and reported to the Swedish Data Inspection Board; (ii) the personal data is processed with explicit consent; or (iii) it is necessary for the Data Controller to fulfil its obligations or exercise rights under employment law in order to protect vital interests of the data subject.

The Data Controller is obliged to take appropriate technical and organizational measures to protect the personal data that is processed.

Violation of the PDA may under normal circumstances lead to fines and compensation claims from affected employees.

Employers as Data Controllers must ensure that the processing of personal data is in accordance with the PDA's fundamental requirements. For example, the personal data must: (i) be processed only if it is lawful, in a correct manner and in accordance with good practice; (ii) be collected only for specific, explicitly stated and legitimate purposes; and (iii) not be processed for any purpose that is incompatible with that for which the data was collected.

Personal data may, as a general rule, only be processed if the person concerned (the "Data Subject") consents thereto. If consent is not obtained, personal data may nevertheless be processed if, and to the extent, the processing is necessary in order to, for example: (i) fulfil a contract between the Data Subject and the Data Controller; or (ii) protect a legitimate interest, except for where such interest is overridden by the interest of the Data Subject. Employee related personal data can generally be processed on grounds (i) and (ii) above. Ground (i) includes all personal data that is necessary for the performance of the employment contract, for example information necessary to administer salary payment such as information regarding the employees' names, bank account numbers, positions at the company, etc. Ground (ii) most likely allows the processing of "neutral" facts such as information on education, work life experience and assignments performed.

The PDA contains stricter requirements in relation to the processing of sensitive information, including but not limited to health and membership in trade unions.

When collecting data from the Data Subject, the Data Controller must provide the Data Subject with information about the processing, for example information concerning the purpose of the processing and the Data Controller's obligation, upon request by the Data Subject, to provide information about, for example, the data that is processed about the Data Subject (see section 14.2 below).

Employers are generally advised to ensure they have some sort of personal data policy in place and to ensure that the staff are aware of their data protection obligations.

### 14.2 Employee Access to Data

The Data Controller is obliged to provide information at the request of a Data Subject on whether personal data concerning the Data Subject is being processed or not. If personal data is processed, written information must be provided about what information is being processed, the source from which it was collected, why the processing is taking place (i.e. the purpose of the processing) and to which recipients or groups of recipients the data is disclosed. A signed, written request must be sent to the Data Controller by the Data Subject. The Data Controller must submit the information to the Data Subject free of charge and, as a general rule, within one month of the request. The duty to respond to a data information request is limited to one occasion per calendar year.

### 14.3 Monitoring

Checking an employee's use of the employer's computer equipment is generally permissible in order for the employer to protect a legitimate interest, except where such interest is overridden by the interest of the Data Subject. However, please note that there may be certain requirements on information that must be provided to the employee before such checks may be performed.

An employer is not entitled to read private emails and files of the employees, unless there is serious suspicion of disloyalty or criminal activity.

Camera surveillance, images and movies from digital cameras are generally considered to qualify as the processing of unstructured data. The processing of such data is permissible if it does not violate the Data Subject's integrity. In order to decide if the camera surveillance violates the Data Subject's integrity a proportionality assessment must be carried out.

Further, camera surveillance is regulated both by the law on public camera surveillance (the "PCSA") and the PDA. The PCSA governs camera surveillance over areas where the public enjoys access and the PDA governs camera surveillance in places where the public does not enjoy access. Camera surveillance over areas where the public enjoys access may be subject to permission or notification to the supervising authority, the county administrative board. However, it is anticipated that a new law regulating camera surveillance, the Camera Surveillance Act, will come into force during the next few years. The intention is that all matters regarding camera surveillance, except for private camera surveillance, will be addressed by the new Camera Surveillance Act. Under

this Act, it is proposed that a party conducting camera surveillance shall compensate a person under surveillance for any damages and violation of the person's integrity caused by unlawful processing of visual and audio materials.

It is anticipated that Swedish Data Inspection Board will be responsible for the supervision of the Camera Surveillance Act, including evaluating the law enforcement, giving advice and support to the county administrative boards and providing general advice.

#### 14.4 Transmission of Data to Third Parties

It is permitted to freely transfer personal data between countries that are members of the EU/EEA.

As a general rule, the transfer of personal data to a country outside the EU/EEA that does not have an adequate level of protection for personal data is prohibited, unless the Data Subject has expressly consented to the transfer.

As an exception to this general rule, a transfer of personal data to a country outside the EU/EEA is permitted if the transfer is necessary for: (i) the performance of a contract between the Data Controller and the Data Subject, or measures that the Data Subject has asked to be taken before a contract is entered into; (ii) the conclusion or

performance of a contract between the Data Controller and a third party which is in the interest of the Data Subject; (iii) the establishment, exercise or defence of legal claims; or (iv) the protection of vital interests of the Data Subject.

It should also be noted that the European Commission has issued decisions stating that the use of certain standard contractual clauses when transferring personal data from within the EU/EEA to countries outside the EU/EEA offers adequate protection of personal data as well as using so-called Binding Corporate Rules (which need to be approved by the Data Inspection Board) or the US Department of Commerce's Safe Harbor Privacy Principles.

If the employer, as Data Controller, engages a third party to conduct the processing of personal data on behalf of the Data Controller ("Processor"), there must be a written contract between the Data Controller and the Processor which stipulates that the Processor may only process personal data in accordance with instructions from the Data Controller and specifically addresses security aspects of the processing of personal data.

It is always the Data Controller who is responsible to the Data Subject even if the Data Controller has engaged a Processor.

*Contributed by Mannheimer Swartling*

# United Kingdom

## 1. Introduction

This section describes the provisions which are generally applicable throughout the United Kingdom, but with particular emphasis on England and Wales. Both Scotland and Northern Ireland have legal systems separate from that of England and Wales (although in the field of employment law, the law in all three jurisdictions is similar).

The most important source of law regulating the employment relationship is the common law but statute nevertheless intervenes to protect employees (most notably in the fields of discrimination and dismissal and to govern certain areas of collective labour law) and to impose duties on employers (for example, in relation to pensions and share schemes). In general, it is not possible to contract-out of statutory employee protection. Traditionally, collective agreements have not been accorded as much importance in the UK as in other parts of the EU and are not normally legally enforceable, however legislation does provide for compulsory trade union recognition by an employer where the majority of the workforce wishes it.

Many disputes between an employer and employee are settled in special labour courts (Employment Tribunals and the Employment Appeal Tribunal) with a view, in theory at least, to providing a specialised, quicker and more cost efficient approach to resolving disputes than is normally possible using the ordinary courts.

## 2. Categories of Employees

### 2.1 General

The common law and relevant employment legislation apply equally to employees at every level. Some of the more recent employment legislation covers “workers”, a term which covers employees, agency workers and contract staff.

### 2.2 Directors

The position of directors of private and public limited companies, who may or may not also be employees of the company, is further regulated by company law.

### 2.3 Other

Part-time employees have a statutory right which, broadly speaking, entitles the employee to be treated no less favourably in respect of their terms and conditions of employment than a comparable full-time employee. A similar protection exists for employees on fixed-term contracts who also have the right to be treated no less favourably in respect of terms and conditions of employment than a comparable permanent employee performing similar work. Generally speaking executive directors are engaged under service agreements and are regarded as employees as well as officers of the employing company.

After a 12-week qualifying period temporary agency workers have a right to equal treatment in relation to terms and conditions of employment in comparison to those that would have applied if they had been recruited directly by the company.

It is anticipated that with effect from April 2013 there will be a new category of employee, the employee-shareholder. Such employees will be given shares of not less than £2,000 in value in the employer and/or the parent company, they will be exempt from any capital gains tax on any gains on shares issued up to the value of £50,000 (although shares of a greater value may be issued). Such employee shareholders will, however, not be able to claim unfair dismissal (except where dismissal is for a reason that is automatically unfair (e.g. for discriminatory reasons or for ‘blowing the whistle’)) or statutory redundancy payments, their ability to make flexible working requests will also be limited.

## 3. Hiring

### 3.1 Recruitment

Employers recruit through a variety of sources, including via the internet and by advertising in newspapers or journals. Private, fee-charging recruitment agencies are commonly used for some types of employees, for example, secretarial staff and senior and professional staff. State-run “Job Centres” provide a free recruitment service which is used by employers to recruit less senior employees. There is, however, no obligation on employers to use the state Job Centres. Private recruitment agencies no longer require a licence before they can operate but are nevertheless subject to regulation.

### 3.2 Permission to work in the UK

The general rule is that anyone who is not a British citizen, a national of another member state of the European Economic Area (EEA, i.e. European Union member states, Iceland, Liechtenstein and Norway) or a Swiss national, is subject to immigration control and may not work in the UK unless they have a visa issued by the UK Border Agency (UKBA) entitling them to work in the UK. Some controls apply in respect of particular EU member states, however.

### Employer liability

Since 29 February 2008 it has been a legal requirement for employers to check the immigration status of their employees. Checks should be made of all employees, not only those who appear likely to require immigration clearance (as above), to avoid any potential discrimination issues. Checks should be carried out before a prospective employee starts work and then at least annually until an employee provides evidence (in a form specified by law) of an indefinite entitlement to remain and work in the UK. Existing employees should also be checked for good measure.

Employers may be liable for a criminal and/or civil penalty (respectively) if they knowingly or negligently employ a person who is in the UK illegally or in breach of his/her immigration controls. An officer (or partner) of the employer may be personally liable if he or she consents or connives in the employment or it results from his or her negligence. For employees employed from 29 February 2008, the sanctions may be a fine of up to £10,000 per illegal worker (civil) or an unlimited fine and/or up to two years' imprisonment (criminal). Employers may be excused from the civil penalty if they can show that they checked at least annually that the employee had the necessary documents entitling them to work in the UK (there is a statutory list of acceptable documents) and retained copies of the original documents seen.

#### Points-based system (PBS)

The UK PBS has five tiers or categories (which cover, respectively, highly skilled workers; skilled workers with job offers; low skilled workers to fill temporary labour shortages (this tier is not open); students; and temporary workers). Migrants must score points, based on attributes which predict their likely success in the labour market and compliance with their conditions of leave in the UK, in order to qualify to enter or remain in the UK under the appropriate tier. Tier 2 is the most relevant tier for UK employers.

#### Tier 2 (skilled workers with job offers)

Tier 2 is aimed at enabling UK employers to recruit employees from outside the UK and EEA to fill a particular job for which no British or EEA worker is available. There are two main categories: (i) Tier 2 (General) whereby either a 'resident labour market test' must be satisfied to show that no British or EEA worker is available (for roles that attract a salary of less than £150,000 per annum) or the role must be in a category identified by the UK as a 'shortage occupation'; and (ii) Tier 2 (Inter-Company Transfer (ICT)) under which workers who have been employed by an overseas group entity for specified periods

(depending on the type of position they will fill, but usually 12 months) may move to a UK group entity.

In order to employ a worker under Tier 2, the employer must first obtain a licence to sponsor migrants. To become a sponsor, the employer will need to make an electronic application to the UKBA and provide certain supporting documents. The supporting documents will vary depending on the type of organisation. If a licence is granted the employer's name and rating will be published on the UKBA's register of sponsors. The sponsor will be rated 'A' or 'B', depending on whether they pose a risk to immigration control and/or have appropriate systems in place to comply with the UKBA requirements for sponsoring Tier 2 migrants.

Licensed sponsors are required to fulfil certain duties. The relevant duties for Tier 2 sponsors include: record keeping, reporting, complying with the law, co-operating with the UKBA and issuing a certificate of sponsorship only if satisfied that a migrant intends to and is able to do the specific skilled job proposed. In order to apply for a sponsorship licence, the employer must allocate members of its staff based permanently in the UK as 'key personnel', to have responsibilities in relation to sponsorship and to be a point of contact for the UKBA.

Once licensed, a sponsor is entitled to issue 'certificates of sponsorship'. A certificate of sponsorship is a reference number generated following an online application in which the sponsor provides details of the role, the salary and the candidate they intend to employ.

Once a certificate of sponsorship has been issued, the prospective migrant worker will need to make an application for leave to enter or remain in the UK. In their application, the prospective employee will need to give the certificate of sponsorship reference number and provide details and supporting evidence

regarding their academic qualifications, prospective salary, English language ability (for Tier 2 (General) but not usually ICT) and having specified funds available to maintain themselves in the UK (an A-rated sponsor can guarantee this 'maintenance' requirement). The fact that a certificate of sponsorship has been issued does not guarantee that the migrant will be successful in obtaining entry clearance or leave to remain.

Following the change in government in May 2010, a temporary limit on the number of migrants entering and remaining in the UK under Tier 2 (General) was introduced in July 2010 for the period up to 31 March 2011. Annual limits were introduced in April 2011.

An annual limit of 20,700 applies to migrants entering the UK under Tier 2 (General). The limit does not apply to in-country applications (from those already in the UK), to dependents of Tier 2 migrants or to those seeking admission to fill a vacancy attracting a salary of £150,000 or more. Applications for restricted certificates of sponsorship are considered on a monthly basis. It is necessary for a sponsor to request a 'restricted' certificate of sponsorship from the UKBA by submitting an online application using the Sponsor Management System. In months when the limit for Tier 2 (General) is oversubscribed, shortage occupations are prioritised and other applications ranked according to the salary payable for the role. To date, the allocation has been undersubscribed each month. The government has confirmed that the annual limit of 20,700 certificates will remain in place until April 2014.

The Tier 2 (ICT) route is not included in the Tier 2 limit however ICT migrants are restricted to a certain length of time in the UK. The minimum salary requirement for a Long-Term Staff migrant to come to the UK for more than 12 months is £40,000 (and up to five years). A minimum salary threshold of £24,000 applies to the

Short-Term Staff and Graduate Trainee sub-categories with a maximum stay of up to 12 months. The ICT Skills Transfer visa also requires the employee be paid a minimum salary of £24,000 and would allow them to remain in the UK for up to six months. (Sponsors should be aware that an ICT migrant's salary must also meet the minimum level for the relevant Occupation/Code of Practice as specified by the UKBA, which may be higher than this amount).

The new 'Senior Staff' sub-category of ICT visa will allow senior members of staff (earning £150,000 or more) to transfer to the UK for up to nine years.

Following the introduction of the 12 month 'cooling-off' policy in April 2012, Tier 2 migrants are now restricted to a period of five or six years in the UK (for ICT Long-Term Staff and General migrants respectively) after which time they will be required to remain outside of the UK for 12 months before applying for another Tier 2 visa. This policy does not affect Tier 2 migrants who have held an ICT (Short Term, Graduate Trainee or Skills Transfer) visa and will be returning to the UK on an ICT Long Term visa with the same employer. It also does not apply to Tier 2 ICT migrants who were granted a visa prior to 6 April 2011.

It is envisaged that the 'cooling-off' period will also apply to the 'Senior Staff' ICT migrants after working in the UK for the maximum period of nine years.

### **Tier 1 (highly skilled workers)**

Tier 1 allows certain individuals to come to the UK and to work or undertake self employment opportunities. There is no requirement for sponsorship.

Tier 1 is not relevant to most UK businesses, as the previous Tier 1 (General) route for highly skilled workers has been closed to new applicants since April 2011. It is possible for Tier 1 General Migrants to extend their stay in the UK as long as they continue to meet

the points requirement under the immigration rules.

There are four other categories within Tier 1. Two of the categories, Exceptional Talent (intended for academics, scientists and artists in particular and requires applicants to be internationally recognised in their field) and Graduate Entrepreneur (to allow graduates who been identified by UK Higher Education Institutions as having developed world class innovative ideas or entrepreneurial skills to establish one or more businesses in the UK) are limited to 1000 migrants annually. There is also the Entrepreneur and Investor routes under Tier 1 for high net worth individuals running businesses and/or investing in the UK. These are not subject to a limit on numbers.

### **Settlement**

Generally, migrants are initially granted leave to enter or remain in the UK for three years under the above categories, which can then be extended if the relevant criteria for attributes for extension are satisfied. Employees may apply for indefinite leave to remain in the UK after being in the UK for 5 years under Tier 1 or Tier 2 (this qualifying period can be shorter for Tier 1 Entrepreneur and Investor routes). Tier 2 ICT migrants will only be eligible to apply for Indefinite Leave to Remain if they were granted leave under the ICT scheme before 6 April 2010. For those granted a visa after this date but up to and including 5 April 2011, they will be able to extend their visas indefinitely in the UK but will not qualify for settlement.

Should a Tier 2 General migrant not obtain settlement before the end of their six year stay they will be required to leave the UK at the end of that period and will be subject to the 12 month 'cooling-off' policy.

Settlement for Tier 1 or Tier 2 (General) migrants is subject to satisfying criteria in relation to English language and knowledge of life in the UK. Additional

criteria, including a minimum pay threshold of £35,000 will apply to Tier 2 migrants applying for settlement from April 2016.

### **Tier 5 Temporary Workers**

There are a number of schemes under Tier 5 which allow non-EEA nationals to undertake temporary work placements in the UK.

The Tier 5 Youth Mobility Scheme is open to nationals (aged between 18 and 30 years of age) from Australia, Canada, Monaco, New Zealand, Republic of Korea and Taiwan. Nationals from these countries and territories can live and work in the UK for up to 24 months. (Japan will also be joining the Youth Mobility Scheme in January 2013). There are restrictions on the type of employment/self employment the holder can undertake and as it is a temporary visa, employers should not hire individuals on a permanent contract whilst holding this visa. The number of places available on this scheme are allocated by the government each year. In 2012, 51,000 places were available and this figure will increase to 54,500 in 2013.

The other categories within Tier 5 are Creative and Sporting, Charity Workers, Religious Workers, Government Authorised Exchange Scheme and International Agreement. As it is necessary for a Sponsor to assign a Certificate of Sponsorship for these roles, there will be a restriction on the type of role individuals holding these visas can undertake.

### **EU nationals**

Bulgarian and Romanian nationals require UKBA permission to work in the UK. In general terms: (i) an accession worker card and a work permit (under the old pre-PBS work permit system) are required for skilled work, for the first 12 months; (ii) particularly highly skilled Bulgarian and Romanian workers may be admitted under the highly skilled migrant programme (which remains from the old

pre-PBS system, for Bulgarian and Romanian nationals only); and (iii) limited numbers of Bulgarian and Romanian workers may be employed for up to six months' low-skilled agricultural work or up to 12 months in certain low-skilled food manufacturing positions. The restrictions applied to Bulgarian and Romanian nationals will continue until the end of 2013. It is expected that similar restrictions will apply to Croatian nationals once Croatia joins the EU in July 2013.

## 4. Discrimination

Discrimination in the work place, whether it be in connection with recruitment, treatment during the course of employment, in respect of termination and in certain circumstances following the end of the employment relationship, is rendered unlawful under the Equality Act 2010. The Equality Act prohibits discrimination on the grounds of sex, gender reassignment, marital status and civil partner, colour, race, nationality and ethnic or national origins, disability, sexual orientation, religion or belief, pregnancy and maternity and age. In Northern Ireland, it is additionally unlawful to discriminate on political grounds.

It is also illegal to discriminate against an employee on grounds of his or her membership or otherwise of a trade union.

## 5. Contracts of Employment

### 5.1 Freedom of Contract

It is a basic principle that parties are free to contract on whatever terms they choose. However, certain provisions, for example those concerned with preventing competition by a former employee, are not enforced by the Courts if they are considered a restraint of trade. In addition, subject to certain exceptions, attempts to contract out of statutory employment protection are void. Contracts may be for a fixed or an indefinite period (i.e. terminable on notice), as the parties think most

appropriate. However, the use of successive fixed-term contracts is restricted.

An employee engaged under a fixed-term contract will be classified as a permanent employee if all of the following conditions are satisfied:

- (a) the employee is currently employed under a fixed-term contract; and
- (b) that fixed-term contract has previously been renewed or the employee was previously employed under another fixed-term contract before the start of the current contract; and
- (c) the employee has been continuously employed under fixed-term contracts for a period of four years or more; and
- (d) at the time the contract was renewed (or entered into) the employer could not objectively justify the use of a fixed-term contract (e.g. where funding is only available for a limited period).

For the purposes of statutory protection, there is little distinction between the position of employees on fixed-term and indefinite contracts, since the accrual of certain of the more significant rights depends on the period the employee has worked irrespective of whether this is under a fixed-term or indefinite contract. Broadly speaking, an employee will enjoy significant statutory rights after two years' continuous employment, although some rights, especially those associated with anti-discrimination legislation, are exercisable irrespective of length of service. In addition, employers are not able to treat employees on fixed-term contracts less favourably than similar permanent employees.

### 5.2 Form

There are no particular requirements as to the form of contracts of employment, which may be oral or written (except in Scotland where a contract for a term of more than 12 months should be in writing). In the case of senior employees

(for example, managing directors), the contract is more likely to be contained in a formal written service agreement.

However, there is a statutory requirement that all employees be provided with a single document containing written particulars of certain details of their contract of employment within two months of commencement of employment.

### 5.3 Trial Periods

It is not uncommon for parties to agree a trial period but there are no specific legal requirements governing such periods and, since (with certain exceptions) an employee does not qualify for statutory protection against unfair dismissal until employed for two years, this allows the employer a reasonable period to assess the employee's suitability.

### 5.4 Confidentiality and Non-Competition

Although there are no statutory rules governing confidential information, an employee is bound by a general duty of good faith and a duty not to disclose the employer's confidential information. The extent of these general duties is not in all cases well defined and a prudent employer may, depending on the nature of the business, consider including an express confidentiality provision in the contract of employment.

Although express provisions in a contract may be used to stop an employee from competing with his employer both during and after the employment, it should be noted that since provisions which purport to restrict competition after termination of the employment are generally regarded as contrary to public policy, they will only be enforceable if they are reasonable and the employer has a legitimate interest to protect (i.e. confidential information or trade connections).

### 5.5 Intellectual Property

Broadly speaking, if intellectual property is created by an employee during the course of employment, it will belong to

the employer and compensation is only payable to the employee in limited circumstances.

## 6. Pay and Benefits

### 6.1 Basic Pay

There is a national minimum wage of £6.19 per hour for employees age 21 and above. It is £4.98 per hour in the case of young people aged 18 to 20. For 16 to 17 year olds the rate is £3.68 an hour. These rates are generally increased annually in October of each year.

Lower-grade workers in the UK are generally paid a weekly wage, often determined by reference to an hourly time rate, although in some industries it is customary for workers to be paid “piece-rates” according to the amount of work done. Overtime at a premium rate is generally paid in respect of additional hours worked. More senior employees are normally paid monthly in arrears and are not generally paid for overtime worked.

It is not common for pay to be index-linked and, subject to the national minimum wage, there are no legal obligations on employers to increase wages.

### 6.2 Pensions

Although state pensions are provided under the social security system (comprising a basic state pension and an additional proportion currently related to an individual's earnings), private pension schemes are of importance. Private pension provision may be by way of an employer-sponsored occupational pension scheme, or by an individual employee's own personal pension scheme.

The cost of such provision, to both the individual employee and the employer, may vary enormously depending on the type of benefits provided and the individuals involved. There is no longer any statutory limit on the level of contributions, which can be made to a “registered pension

scheme”. Instead of limits on contributions there is now an “annual allowance” available to the individual. If the individual's total “pension input amounts” (essentially the value of the contributions from both the individual and the employer to a pension scheme) in any particular tax year exceeds the annual allowance for that year then a tax charge will be levied on the excess. This charge is payable by the individual.

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Prior to 1 October 2012, there was no obligation on an employer to make any pension provision other than a requirement for employers employing five or more employees to designate and facilitate access to a stakeholder pension.

However, on 1 October 2012, the government's automatic enrolment regime came into force, imposing a statutory duty on employers to

automatically enrol all eligible employees (aged 22 and above) into the National Employment Savings Trust (known as “NEST”) or their own qualifying pension scheme (although employees will be able to opt out) and make minimum contributions. Employers and employees will have to pay contributions of 3% and 4% (to be phased in over time) of relevant earnings respectively, with an extra 1% from the Government in the form of tax relief. Depending on their size, employers will be required to discharge these duties on a staggered basis. Employers who fail to comply with their duties in respect of NEST may face an initial fine from the Pensions Regulator of up to £50,000, and they may also be subject to criminal proceedings.

The staging timetable for auto-enrolment runs from 1 October 2012 until 1 February 2018, and an important obvious point to note is that for many employers, there will not be a statutory duty to provide access to a pension scheme for their employees for some years.

As far as stakeholder pensions are concerned, the requirement to designate and facilitate access to one was effectively abolished on 1 October 2012, however transitional provisions continue to protect employees who are already members of their employer's nominated stakeholder pension scheme on that date. New employees and other employees not covered by the transitional measures will no longer need to be given access to a stakeholder pension.

Supplementary provisions also apply from 1 October 2012, requiring an employer to notify an employee of the consequence of having made a request to cease making deductions.

### 6.3 Incentive Schemes

Share schemes are not mandatory in the UK but are popular because of the favourable tax treatment they receive and there is a well-developed legislative

framework in place to govern such schemes.

#### 6.4 Fringe Benefits

Common fringe benefits may typically include private medical insurance for treatment taken outside the National Health Service and cars (for more senior employees particularly). Such fringe benefits may be either contractual or ex-gratia. If benefits are contractual, care must be taken if the employer proposes to withdraw them.

#### 6.5 Deductions

Although generally employers are prohibited from making deductions from pay, they are obliged to deduct income tax at source through the "Pay As You Earn" (PAYE) scheme. They are also obliged to deduct employees' National Insurance contributions (social security contributions).

### 7. Social Security

#### 7.1 Coverage

The single state-administered social security system provides benefits by way of pensions, unemployment benefits, family-based benefits and support for individuals on low income. Employers should be aware both of the costs involved, and of the administrative burden of some state guaranteed benefits (for example, statutory sick pay and statutory maternity pay) responsibility for which has been devolved to employers.

Health care has traditionally been provided by the state-run National Health Service. However, recent reforms have been aimed at encouraging increased use of private medical insurance and private medical insurance has become an increasingly common employee benefit.

#### 7.2 Contributions

Employers must deduct from employees' pay National Insurance contributions payable by employees and make an employer's contributions in respect of each employee. National Insurance

contributions are payable by employees at a rate of 12% of earnings between the lower and upper earnings limit which are fixed each year, (for the year 2013/14 these are £149.00 and £797 per week) and a further 2% on earnings over £797 a week. Employer's contributions are 13.8% above £149 per week for the year 2013/2014 and uncapped. Lower rates are payable if the employees are in "contracted-out" employment (that is if, in return for paying the lower rate of contributions, the employer and/or the employee make separate arrangements to cover part of what would, otherwise, have been the additional state pension).

### 8. Hours of Work

The usual working week is 40 hours in industry and 35 hours in offices. Specific limitations are imposed by the Working Time Regulations on the hours worked each day and each week by "workers" (this includes employees and agency workers). Generally, working time must not average more than 48 hours per week over a reference period of 17 weeks. Workers are also entitled to a daily rest of at least 11 consecutive hours in each 24-hour period and a weekly rest period of not less than 24 hours in any seven-day period.

Night workers (i.e. where at least three hours of daily working time is worked at night as a matter of course) must not work in excess of eight hours in each period of 24 hours.

### 9. Holidays and Time Off

#### 9.1 Holidays

In England and Wales, there are normally eight public holidays per annum. All workers are entitled to a minimum of 5.6 weeks' (28 days for someone working a five day week) paid annual leave, which accrues on a *pro rata* basis from the first day of employment and can include the Bank Holidays. Money may not generally be paid in lieu of untaken statutory holiday entitlement except on termination

of employment. Employees are not necessarily entitled to take holiday when a Bank Holiday actually falls and can be required to take it at some other time if that suits the employer's business better.

#### 9.2 Family Leave

Female employees are entitled to 26 weeks' ordinary maternity leave and 26 weeks' additional maternity leave (there is no length of service requirement). Statutory Maternity Pay (SMP) is payable for 39 weeks. Subject to the employee meeting the earnings eligibility requirements. SMP is payable for six weeks at 90% of average weekly earnings and 33 weeks at a flat rate (£135.45 April 2012 to March 2013; £136.78 from 7 April 2013) or 90% of normal weekly earnings if this is lower. The flat rate of SMP is revised in April each year.

Men and women with one year's continuous service are entitled to 13 weeks' unpaid parental leave in respect of children under five. Employees of disabled children under 18 are entitled to unpaid parental leave of 18 weeks. From March 2013 the period of unpaid parental leave will increase from 13 to 18 weeks. Employees are also allowed unpaid time off to deal with emergencies arising in relation to dependants.

Fathers (and one adoptive parent) are entitled to elect to take one or two weeks' paid ordinary paternity leave, payable at the same rate as SMP. Additional paternity leave of up to 6 months is also available. Some of the additional paternity leave may be paid at the same rate as SMP, depending on when the mother returns to work. Additional paternity leave can commence from the 20th week after the child's birth provided the child's mother has ended her maternity leave. The maximum period of additional paternity leave is six months and cannot be taken beyond the child's first birthday. Accordingly the length of the additional paternity leave will be dictated by when the child's mother ends

her maternity leave. Entitlement to additional paternity leave is subject to certain qualifying conditions and notification obligations.

Additional paternity leave is only an interim measure until the new flexible parental leave regime is introduced in 2015. Under the proposed flexible parental leave regime the mother and father or mother and her partner (the parents) will (subject to meeting qualifying service and notification criteria) be entitled to share the untaken balance of the mother's 52 weeks maternity leave and take it as flexible parental leave. Flexible parental leave (FPL) may be taken at any time after the two week compulsory maternity leave period. It must, however, be taken in minimum blocks of one week. It may be taken in a pattern of the parent's choice subject to the employer's agreement. The intention is that the parents can intersperse periods of work with periods of FPL and may also take the FPL simultaneously if they so choose.

Parents who meet the qualifying conditions will be entitled to receive statutory flexible parental pay (FPP). The aggregate of Statutory Maternity Pay (SMP) and FPP must not exceed 39 weeks in total; that is, the balance of the unpaid SMP will be payable as FPP. FPP will be payable at the base rate of SMP.

### 9.3 Illness

Employees absent from work by reason of sickness or injury have a right to receive statutory sick pay (SSP) from their employer. Part of the cost may be recouped from the employer's National Insurance contributions once payments of SSP exceed a certain level. The rate of SSP in April 2012 is £85.85 and will increase to £86.70 on 6 April 2013. SSP is revised in April each year.

In addition, it is not unusual for employers to agree to pay employees an amount greater than statutory sick pay for a limited period, the length of which will vary, depending upon the

custom of the industry and the status of the employee.

### 9.4 Other time off

Certain employees have the right to request flexible working arrangements, namely those employees who are parents of disabled children under 18 or children under seventeen. This right also applies to carers of certain adults. In order to be eligible to make such a request, the employee must have worked for their employer continuously for 26 weeks. The right to request flexible working is to be extended to all employees in 2014 (April at the earliest).

## 10. Health and Safety

### 10.1 Accidents

Employers are under a duty to have regard for the health and safety of their employees while at work (but not travelling to or from work), and are obliged by statute to maintain insurance against liability for injury and disease arising out of employment. These duties arise under both statute and the common law. The Health and Safety at Work etc Act 1974 lays down the general principles to be followed by an employer in relation to health and safety, and criminal as well as civil liability may result from a failure to comply with the provisions of that Act. In addition to the general principles laid down by that Act, there are numerous specific Acts and regulations governing certain types of work place and certain types of work activity.

### 10.2 Health and Safety Consultation

Employers in the United Kingdom are under an obligation to consult with their employees on health and safety matters and are obliged to have a written statement on their general health and safety policy, which must be available to employees. Consultation must be carried out through a safety representative nominated by a recognised trade union (or a Health and Safety Committee, if required by the union), elected employee representatives or directly with

employees. Certain information must be made available by the employer.

## 11. Industrial Relations

### 11.1 Trade Unions

The importance of trade unions has declined over the last twenty years, although this position may now be changing. However, in some industries unionisation is still relatively strong. Major unions include the GMB, Unison and Unite. Trade Unions may be general unions covering many industry sectors or sector specific.

Legislation provides for compulsory recognition of a trade union by an employer where a majority of the relevant workforce support the union in businesses which employ at least 21 employees. If a union becomes recognised the employer and union must try and conclude a procedure agreement to regulate their relationship and to determine the matters to be the subject of negotiation. In the absence of agreement, a procedure based on a standard model will be imposed. Closed shops are illegal.

### 11.2 Collective Agreements

Collective agreements between employers and trade unions are most usually found in the industrial sector and often regulate matters such as pay, working hours, holidays, dispute procedures and procedures to deal with redundancy. However, whilst normally not legally enforceable between the employer and the union at present, such collective agreements may have legal consequences for the employer, since certain terms in such agreements may become incorporated (either expressly or by implication) into individual employees' contracts of employment and where this happens become enforceable (collectively agreed wage rates, for example). Furthermore, in some industries unionisation remains sufficiently strong for industrial pressure to prove an effective means of securing

observance of otherwise legally unenforceable collective agreements. Employers who have had to recognise a union as a consequence of compulsory recognition imposed on them (or have agreed to) will have to negotiate with the union concerning pay, hours, holidays and training.

### 11.3 Trade Disputes

The United Kingdom does not have a comprehensive “strike law” or any enshrined right to strike. Rather, individuals and unions are granted certain limited statutory protection from liability, which they would otherwise incur under the common law, when taking industrial action pursuant to a trade dispute. To enjoy such immunity, trade unions are required to hold ballots, which conform to statutory requirements. An employee who takes industrial action loses the right to pay during that period and is not entitled to receive unemployment benefit (although the employee’s family may in certain circumstances receive other social security benefits). It is unfair to dismiss an employee who is taking “protected” industrial action unless it lasts more than twelve weeks and the employer has complied with certain procedural requirements.

### 11.4 Information, Consultation and Participation

There are at present no formalised requirements for employee participation in the UK, although some employers operate share schemes as an additional remuneration incentive. However, obligations do arise with respect to consultation and the provision of information to appropriate representatives (these are usually either elected employee representatives or representatives of a recognised trade union). The obligations are:

- (a) where a union is recognised for the purposes of collective bargaining, certain information must be disclosed to that union to assist in that process;
- (b) to consult with appropriate representatives in the context of a

collective redundancy (see further below);

- (c) employers are required to provide certain information to appropriate representatives upon a business transfer regardless of the number of employees affected (see further below);
- (d) employers must consult with employees on health and safety matters. Consultation has to be with representatives nominated by a recognised trade union, elected employee representative or employees directly; and
- (e) employers with 50 or more employees are required to consult with prospective and active members of occupational and personal pension schemes and their representatives before making certain specified changes to the pension arrangements.

Under the Transnational Information and Consultation etc Regulations 1999 (which implement the European Works Council Directive), any undertaking or group of undertakings with at least 1,000 employees in the EU and 150 employees in more than one EU state may have to set up a works council or a procedure for informing and consulting employees at European level. While the Regulations clearly regulate the initial establishment of the employee negotiating, subsequent negotiations are generally up to the parties to regulate.

The European Public Limited Liability Company Regulations (which implement the Workers Participation Directive) provide for the regular consultation of, and provision of information to, a body representing the employees of the companies that have formed a European Company, in respect of current and future business plans, production levels, management changes, collective redundancies, closures, transfers, mergers and so on. Management of the participating companies and representatives of the employees will be required to try to reach a voluntary

agreement on the employee involvement arrangements or to agree to rely on national information and consultation requirements. Failure to reach agreement will result in default rules applying.

The Information and Consultation of Employees Regulations 2004 (which implement the Workers Information and Consultation Directive) apply to undertakings with 50 or more employees. The legislation does not oblige employers to set up a domestic works council, or similar information and consultation forum, in the absence of the legislative procedure being triggered. A request by 10% of the undertaking’s employees will trigger the procedure giving the employer an opportunity to negotiate a voluntary information and consultation process. The nature, subject matter or timing of information and consultation can be tailored to the structure and ethos of the undertaking. If no agreement can be reached a default information and consultation procedure will apply under which employers will be obliged to inform and consult employee representatives in relation to a number of matters, including the recent and probable development of the undertaking’s activities, its economic situation and business decisions likely to lead to substantial changes in the undertaking.

## 12. Acquisitions and Mergers

### 12.1 General

Upon the transfer of an undertaking, employees are provided with protection in that their contract automatically transfers from the transferor to the transferee. Any dismissal connected with the transfer will, in principle, be unfair and give rise to an entitlement to claim statutory compensation. Changes to terms and conditions of employment by reason of the transfer are void, even if agreed to by employees except in limited exceptional circumstances. First where there is an economic, technical or organisational reason for the change

and it involves a change in the workforce. This exception is narrowly construed and would not apply to a simple post-acquisition contract harmonisation exercise. The second situation where changes may be made involves insolvent employers. Finally, a change may be made if the employee regards the change as beneficial. Employees can object to the transfer, should they do so their employment is treated as at an end and no compensation is payable.

## **12.2 Information and Consultation Requirements**

In the event of a transfer of an undertaking the employer of any affected employees must inform appropriate representatives of the proposed transfer long enough before the transfer to enable consultation about any proposed measures to take place. There is no statutory timetable over which the process must occur. Affected employees can include any of the workforce of either transferor or transferee affected by the transfer, even if they are not transferring. Appropriate representatives are representatives of a trade union recognised by the employer or, in any other case, appointed or elected employee representatives. The object of the information exercise is to inform the representatives of the fact that a transfer has to take place, including when and why it is to take place, and its legal, economic and social implications for the employee. The employer must also consult with a view to reaching agreement about any proposed “measures” which will affect the employees. The measures need not have a detrimental effect in order to trigger the obligation to consult. There is, however, no obligation to reach agreement.

## **12.3 Notification of Authorities**

In the absence of any collective redundancies, there is no obligation, from an employment perspective, to notify the authorities of an acquisition or merger. Competition issues may in

some cases require prior notification and/or approval.

## **12.4 Liabilities**

In the event that a transferor or transferee fails to comply with its information and consultation requirements a complaint may be made to an Employment Tribunal and if the complaint is upheld, the Tribunal may award each affected employee compensation of up to 13 weeks’ pay, with no limit on the amount of a week’s pay. In practice the maximum award of 13 weeks’ pay will be awarded unless there are exceptional circumstances justifying a lower award. The transferor and transferee are jointly and severally liable for such compensation. Failure to inform and consult will not prevent a transaction from completing and injunctive relief is not available from the courts to prevent a transaction going ahead without the information and consultation obligations being met.

## **13. Termination**

### **13.1 Individual Termination**

An employer wishing to terminate the employment relationship must be careful to comply with both the statutory and contractual requirements with regard to reasons for and procedures leading to dismissal.

### **13.2 Notice**

Statute lays down a minimum period of notice, which will apply where the contract of employment does not make any provision for notice or the contractual notice period is less than the statutory minimum.

The statutory minimum period of notice is one week for employees with service of more than one month but less than two years, and one week for each complete year’s service for those who have worked more than two years subject to a ceiling of 12 weeks’ notice after 12 years’ employment.

In practice, employees who are senior executives will generally enjoy longer notice periods under their contracts of employment (typically three to six months) and very senior employees (for example, executive directors of large companies) may have much longer notice periods (although the UK Corporate Governance Code and institutional investor guidelines do not favour a period of more than twelve months) and the Companies Act 2006 requires shareholder approval for guaranteed terms of two years or more. Where a contract of employment does not state the notice period, whilst the statutory minimum period of notice will generally be applicable to most employees, the common law will imply into the contracts of more senior employees a right to receive “reasonable notice” in excess of the statutory minimum period. The employee’s seniority, length of service and the size of the business in which the senior employee works will be factors in determining the length of notice where the contract contains no express provision.

If an employee is dismissed without, or with insufficient, statutory or contractual notice without good cause, the employee may sue the employer for damages for breach of contract (i.e. “wrongful dismissal”). The basic measure of damages will be the salary and benefits which the employee would have received during the relevant notice period, but this may be subject to adjustment to take account of the remuneration the employee can be expected to receive from new employment during what would have been the notice period, tax and accelerated payment.

If an employer prefers that an employee does not work his or her notice period, and the employee is not being summarily dismissed for gross misconduct, the general practice is for employers to pay salary in lieu of the contractual notice period. There are no special formalities

for making such payments (except as to the deduction of tax where required).

### 13.3 Reasons for Dismissal

Although the employer is free to terminate the contract of employment, the dismissed employee may have the right to claim compensation for unfair dismissal (even though the employee has received notice or payment in lieu and has no contractual claim) unless the employer can show there was a reason for dismissal falling within the categories set out in the relevant statute; these are misconduct, capability, illegality, redundancy or some other substantial reason.

The employer must show that one of the fair reasons for dismissal existed and that it acted fairly and reasonably in deciding to dismiss. The employer must therefore be careful to ensure, not only that there is a permissible statutory reason for dismissing the employee, but that a fair and reasonable procedure has been followed in implementing the dismissal.

The compensation payable if the employer unfairly dismisses an employee is distinct from the compensation payable if the employer fails to comply with the notice period described above.

To qualify for statutory protection from unfair dismissal an employee must normally have at least one year's continuous employment.

The maximum compensation that may be awarded for most (non-discrimination) unfair dismissal claims is £87,700 as at 1 February 2013. This figure is revised annually in February. The Employment Tribunal has the power to increase or decrease an award by up to 25% if either party has unreasonably failed to comply with the provisions of the ACAS Statutory Code of Practice on disciplinary and grievance procedures. It should be noted that the vast majority of claims brought before an Employment Tribunal are settled before a hearing is reached.

Employment Tribunals in unfair dismissal cases have the power to order reinstatement or re-engagement, but historically have tended to do so only occasionally. If such an order is not complied with additional compensation will be payable and the limits referred to above do not apply to compensation awarded to an employee to cover the period from his or her dismissal until any re-engagement/reinstatement order is supposed to be complied with.

### 13.4 Special Protection

Special rules apply to dismissals connected with pregnancy or maternity, parental leave, health and safety, Sunday working, the duties of pension trustees or employee representatives, exercising the right to take time off to study, asserting a statutory right, trade union membership or activities, transfers of undertakings, "spent" criminal convictions, breach of the Working Time Regulations, making a public interest disclosure ("whistle-blowing") and the National Minimum Wage Act and selection for redundancy taking account of any of these matters.

### 13.5 Closures and Collective Dismissals

As mentioned above, redundancy constitutes a good statutory reason for dismissal and, although it may be applicable to individual termination (for example, if one employee's specific job disappears), it is commonly associated with the partial or total closure of a business.

Redundancy is a statutorily defined term and, subject to satisfying the eligibility criterion (broadly speaking two years' continuous employment), an employee will be entitled to a statutory redundancy payment. The statutory redundancy payment is calculated by reference to age and length of service and the maximum payment is £13,500 for dismissals taking effect on or after 1 February 2013. The maximum payment is revised on 1 February each year. In some industries there may be enhanced contractual redundancy

packages available. Employers should take care to comply with applicable consultation requirements (see section 12.2 above) and to select individuals for redundancy in a fair manner, since, although redundancy is a permissible statutory reason for dismissing an employee (see section 13.3 above) the employer must still prove that he acted in a fair and reasonable manner in selecting any particular individual for redundancy.

An employer must comply with the contractual notice period when employees are made redundant or make a payment in lieu of such notice.

Where 20 or more redundancies are proposed at one establishment within a period of 90 days, consultation with appropriate representatives must take place at the earliest possible opportunity. Minimum time limits for consultation are laid down and failure to consult or comply with the time limits gives the appropriate representatives the right to complain to an Employment Tribunal, which may make an award of compensation to employees of up to 90 days' pay per employee. In practice unless there are exceptional circumstances the maximum 90 days will usually be awarded. There is no cap on the amount that might be awarded. If the employer is proposing to dismiss 100 or more employees, the consultation process must start at least 90 days before the first dismissal takes effect. From 6 April 2013 the 90 day consultation period will be reduced to 45 days. Otherwise consultation must start at least 30 days before the first dismissal takes effect. The government is currently consulting on whether the 30 day consultation period should apply regardless of the number of proposed redundancies, or alternatively, whether a 45 day consultation period should apply where 100 or more redundancies are proposed. There is also an obligation to notify the Department for Business, Innovation and Skills of such proposed redundancies prior to giving notice and at least 30 or 90 days prior to the first

dismissal depending on the numbers involved. Failure to do so could give rise to a £5,000 fine. Injunctions cannot generally be granted to prevent the redundancies taking effect.

## 14. Data Protection

### 14.1 Employment Records

The collection, storage and use of information held by employers about their employees and workers (prospective, current and past) are regulated by the Data Protection Act 1998 ("DPA"), which implements the EU Data Protection Directive. In addition, a considerable amount of guidance has also been issued including the Employment Practices Data Protection Code. The Code is intended to assist employers in the understanding and implementation of the DPA. It is not legally binding, however, failure to adhere to the Code will be a factor taken into account when potential breaches of the Code are being considered by the Information Commissioner. Infringement of data protection law can lead to fines, compensation claims from affected employees or regulatory action.

Essentially employers, as data controllers, are under an obligation to ensure that they process personal data about their employees (whether held on manual files or on computer) in accordance with specified principles including the following: a requirement to ensure that data is accurate, up to date, and is not kept longer than is necessary and a requirement that it is stored securely to

avoid unlawful access or accidental destruction or damage to it.

Employers are generally advised to ensure they have some sort of document retention policy in place and to ensure that staff is aware of their data protection obligations.

### 14.2 Employee Access to Data

Employees, as data subjects, have the right to make a subject access request. This entitles them, subject to certain limited exceptions, to be told what data is held about them, to whom it is disclosed and to be provided with a copy of their personal data. There is a 40-day time limit for responding to such a request. Subject access requests cover personal data held in manual and electronic records such as email. Legally, a charge of £10 may be levied if a request is made, regardless of the volume of information sought.

### 14.3 Monitoring

The monitoring of employee email, internet and telephone usage and closed circuit TV monitoring is regulated by the DPA amongst other pieces of legislation. Monitoring is permissible provided that it is carried out in accordance with the DPA principles and processing conditions (and, where appropriate, in accordance with any other applicable legislation). Any adverse impact of monitoring on employees must be justified by its benefit to the employer and/or others. Express employee consent to monitoring is not usually required, however, employees

should be made aware that monitoring is being carried out, the purpose for which it is being conducted and to whom the data will be supplied, unless covert monitoring is justified. Where disciplinary action is a possible consequence of anything discovered, this too should be made clear to employees.

### 14.4 Transmission of Data to Third Parties

An employer who wishes to provide employee data to third parties must do so in accordance with the DPA principles and processing conditions. In many cases, it may be necessary to obtain express consent to such disclosure in the absence of a legitimate business purpose for the disclosure and depending on the nature of the information in question and the location of the third party. Where the third party is based outside the EEA, it should be noted that the DPA prohibits the transfer of data to a country outside the EEA unless that country ensures an adequate level of protection for personal data or one of a series of limited exceptions apply. In the context of commercial transactions where employee data is requested, care must be taken to comply with the DPA. Where possible anonymised data should be provided, where this is not possible the recipient should be required to undertake in writing that it will only use it in respect of the transaction in question, will keep it secure and will return or destroy it at the end of the exercise.

*Contributed by Clifford Chance, London*

# European Union Law

## 1. Introduction

The EU has the right to legislate in the employment field in pursuit of social policy and the principle of free movement.

EU legislation can take a number of forms. Articles of the Treaty Establishing the European Community (and subsequent amending Treaties) and Regulations are directly applicable in Member States. Directives require Member States to legislate through domestic laws or other measures to achieve the purposes directed. In the employment field, Directives are the most usual form of legislation so that on a day-to-day basis it is still domestic legislation and practice which determines what form EU law takes in each Member State. However, a steady stream of cases passing through the European Court of Justice (ECJ) has made it clear that domestic courts must interpret domestic legislation which implements EU law, in accordance with the intent of EU law.

The principle of free movement is recognised by all Member States as a core concern of the EU; accordingly, the EU has been very active in legislating to implement it. The scope for legislation in pursuance of social policy is wide, but political factors have, in the past, limited the extent of legislative activity.

## 2. Treaty of Lisbon

The Treaty of Lisbon sets out the objectives of the European Community and Member States. These objectives include:

- (a) the promotion of employment and social progress;
- (b) the promotion of justice;
- (c) the eradication of poverty; and
- (d) the combating of social exclusion and discrimination.

The European Commission, which has responsibility for initiating the legislative process and suggesting proposals for

legal measures to implement those rights within the EU's area of competency, has pursued this responsibility with some vigour and many of the rights have now been implemented through laws, collective agreements or practices. The Commission's Work Programme for 2013 sets out the Commission's priorities for the next 12 months. One of the key objectives is to promote social inclusion and entry into the labour market.

## 3. Social Dialogue

For many years, the president of the Commission has held meetings with UNICE (Union of Industrial and Employers' Confederations of Europe), CEEP (representing public sector employers) and ETUC (the European Trade Union Confederation) in a process known as the "social dialogue". "Joint opinions" have been concluded on a number of issues, although they are vague and have no binding effect. The Lisbon Treaty gives "social dialogue" a legal status under which collective agreements can become binding at a European level. Binding agreements have been reached on parental leave, part-time work and fixed-term work.

## 4. Europe 2020 Strategy

This strategy aims, amongst other things, to increase employment among 20-64 year olds to at least 75%, to modernise and strengthen education and training policies and social protection systems, to raise corporate social responsibility and to improve access to childcare facilities and care for other dependents. There are detailed plans to implement various health and safety initiatives, to promote intra-EU labour mobility and to develop a European Skills, Competences and Occupations framework. One key plan is to promote "flexicurity" (flexibility combined with employment security), through use of, amongst other things, atypical employment contracts, in order to aid recovery from the financial crisis, increase sustainable development and social protection,

strengthen policies in employment and increase access to the labour market.

In October 2010 the Committee of the Regions Bureau (CoB) proposed the establishment of Territorial Pacts with local and regional authorities aimed at implementing the 2020 strategy.

## 5. Legal Measures

This section summarises the main measures that are already part of EU law in the employment field and those legal measures which are proposed but are now lying dormant.

### 5.1 Freedom of Movement

There is a large body of EU legislation implementing the principle of free movement. The most important effects of the legislation are to:

- (a) enable EU nationals to work in any Member State without the need for a work permit;
- (b) co-ordinate certain aspects of national social security schemes;
- (c) facilitate the recognition of certain qualifications between Member States; and
- (d) ensure that employees sent from any Member State to another to work do so on terms no less favourable than those applicable in the host country.

#### 5.1.1 European pact on immigration and asylum

The Pact is intended to form the basis of Common European Policy on immigration and asylum. The Pact aims to:

- (a) organise legal immigration to take account of the priorities, needs and reception capacities determined by each Member State, and to encourage integration;
- (b) control illegal immigration, in particular by ensuring that illegal immigrants return to their countries of origin or to a transit country;

- (c) make border controls more effective; and
- (d) create a comprehensive partnership with the countries of origin and of transit to encourage the synergy between migration and development.

The Pact was adopted by the Council in October 2008. When it did so, it decided to hold an annual debate on immigration and asylum policies and so invited the Commission to present a report to it each year, based on Member States' contributions. The Commission may also present recommendations on the implementation of the Pact. The intended aim was a Common European Policy on immigration and asylum by 2012, this however is still under development. The UK has opted out.

#### 5.1.2 Directive 2009/52 providing for minimum standards on sanctions and measures against employers of illegally staying third country nationals

This Directive places the onus on employers to check that prospective employees who are third country nationals have a residence permit, to copy it, to retain records for inspection and to notify employees to the authorities if they are not fully compliant. Sanctions such as fines, closure of business premises and loss or ineligibility for public contracts and subsidies will apply, and employers will have an obligation to pay the cost of employees' returns.

This Directive should have been implemented by Member States by 20 July 2011. The UK has opted out.

#### 5.1.3 Directive on the conditions of entry and residence of third country nationals for the purposes of highly qualified employment (Blue Card Directive 2009/50)

This Directive aims to simplify and streamline the admission/residence procedure for highly skilled non-EU nationals to work in highly qualified positions via introduction of an EU wide

'blue-card'. Member States can elect the number of blue-cards to be granted per annum. This Directive should have been implemented by Member States by 19 June 2011. The UK has opted out.

#### 5.1.4 Proposed Directive on conditions of entry and residence of non-EU nationals in the framework of an intra-corporate transfer (Com) (2010 378)

It is proposed to implement a Directive that would permit the intra-corporate temporary transfer of skilled workers on the same working conditions as non-EU posted staff. The text of the Directive is to be proposed by 2014. It is specifically aimed at responding effectively and promptly to demand for managerial and qualified employees for branches of subsidiaries of multinational companies.

## 5.2 Discrimination and Equality

### 5.2.1 Sex

The Treaty Establishing the European Community and the 1975 Equal Pay Directive require Member States to maintain the principle that men and women should receive equal pay for equal work. Decisions of the ECJ have given "pay" a very wide meaning.

Other Directives require the principle of equal treatment to be observed in relation to: access to employment, vocational training, promotion, working conditions and pension schemes.

- (a) Amendment of Directive 2006/54 on the implementation of the principle of equal opportunities and equal treatment of men and women

This amendment recasts existing legislation to incorporate ECJ decisions and to consolidate seven existing texts including the Equal Pay and Burden of Proof Directives. This recast Equal Treatment Directive does not create any notable new rights or obligations, but rather simplifies existing law.

The Directive should now have been implemented by all Member States.

- (b) Directive on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity (to replace Directive 86/613/EEC)

This Directive introduces the entitlement for self employed women and female spouses and life partners of self-employed workers, to 14 weeks' paid maternity leave and other benefits, such as having the opportunity to pay into a social insurance scheme which will cover maternity leave, sickness and old age. Member States can provide such benefits on a mandatory or voluntary basis.

Member States should have implemented the Directive by 15 August 2012.

### 5.2.2 Race, Age, Religion or Belief, Disability or Sexual Orientation

The Equal Treatment Directives (also referred to as the Race and Framework Directives) require Member States to put in place measures that will ensure the principle of equal treatment of individuals in the European Union regardless of race or ethnic origin, religion or belief, disability, age or sexual orientation in respect of access to employment or occupation and membership of certain organisations. The Directives should now have been implemented by Member States.

In 2008 the Commission published a proposal for a Directive prohibiting discrimination on any of the above grounds outside the employment sphere falling under EU competence, including access to and supply of goods and services, education and public services. The form of this Directive is still under review.

### 5.2.3 Parental leave and pregnancy-related rights

Amendment of Directive 92/85 on introduction of measures to encourage improvements in the health and safety of pregnant workers

The Commission has proposed a number of amendments to the Pregnant Workers Directive: (i) to increase the minimum period of paid maternity leave to 18 weeks (the Women's Rights and Gender Equality Committee has subsequently proposed 20 weeks) and the compulsory maternity leave period to six weeks; (ii) to ensure full pay during the 18 weeks (or 20 weeks, according to the Women's Rights and Gender Equality Committee) with Member States having the option of imposing a maternity pay ceiling of not less than sick pay; (iii) prohibiting employers from taking preparatory steps to dismiss an employee following the maternity leave; (iv) introducing a right to request flexible working upon return from maternity leave; (v) giving the right to request written reasons for dismissal if a pregnant woman is dismissed at any time from the start of pregnancy until 6 months following the end of maternity leave; (vi) giving employees the right to return from maternity leave to the same or an equivalent post. On 20 October 2010 the European Parliament voted in favour of extending maternity leave to 20 weeks and backed the extension of compulsory maternity leave to six weeks. The Parliament also voted in favour of workers on maternity leave being paid their full salary for the 20 weeks. The Council of Ministers has now rejected the Parliament's proposals. Further proposals were expected in 2012 but did not materialise.

Directive on Parental Leave to replace Directive 96/34

This new Directive increases parental leave from three to four months for each parent. The Directive applies to all workers, but there is a possibility of a qualifying period of employment of up to one year. Parents returning from parental leave have the right to request a change to their working hours and not to be subjected to detrimental treatment or dismissal. There is an obligation to assess the specific needs of parents with disabled children.

Member States had until 18 March 2012

to transpose the Directive into their national laws.

#### 5.2.4 Posted workers

(a) The aim of the Directive is to improve access to information on the terms and conditions of employment for service providers and posted workers; to ensure there is a right to equal treatment of posted workers in respect of national labour law and collective agreements in place where the work is performed; to ensure that the same rules are universally applicable; and to improve cooperation between national authorities to ensure enforcement is effectively brought about through sanctions and remedial action. A review of Directive 96/71 on the posting of workers is currently being undertaken due to concerns that the Directive's implementation has not been satisfactory due, amongst other things, to the lack of administrative cooperation or effective enforcement. The proposed amendments will, amongst other things, provide for improved access to information on host country terms and conditions of employment, clarification on when an individual qualifies as a posted worker and improved sanctions and remedies.

### 5.3 Pay

#### 5.3.1 Directive amending Directives 2006/48 and 2006/49 as regards capital trading requirements and the supervisory review of remuneration policies (Capital Requirements Directive III (CRD3))

CRD3 contains a number of principles regarding remuneration and corporate governance in the financial services sector. These aim to allow supervisors in Member States to impose sanctions on financial institutions whose remuneration policies pose an unacceptable risk. CRD3 provides that 50% of any variable remuneration should be paid in shares or equivalent and at least 40% deferred over

a period of three to five years (60% should be deferred for particularly high variable remuneration). Guaranteed bonuses should only be exceptional and should only occur in the context of hiring new staff and be limited to the first year of employment.

The remuneration policy provisions came into effect on 1 January 2011.

#### 5.3.2 Proposed Directive on the taking up and pursuit of the business of credit institutions and the prudential suspension of credit institutions and investment firms (CRD4)

CRD4 will replace and recast the Requirements Directive 2006/48 and 2006/49. Currently under discussion is whether the ratio between fixed and variable pay should be limited to 1:1 (or some other ratio) for certain employees. In addition the draft Directive requires credit institutions to put in place policies promoting gender, age, geographical, educational and professional diversity in its management body. It further provides that representation of each gender should not fall below one third on the management body. The text of the Directive is currently under review as the proposals in relation to fixed and variable remuneration are proving controversial.

#### 5.3.3 Alternative Investment Fund Managers Directive (AIFM)

Annex II of the AIFM Directive sets out principles in relation to AIFM remuneration policies aimed at discouraging excessive risk taking. The principles require an AIFM to:

- (a) Have a remuneration policy that is consistent with "risk profiles, fund rules or instruments of incorporation" of the underlying fund;
- (b) Ensure that the remuneration policy avoids conflicts of interest;
- (c) Review remuneration policies periodically;

- (d) Ensure there is some compliance/risk input in the remuneration policy;
- (e) Reward those working in risk/compliance independently from front office;
- (f) Set up a remuneration committee to monitor remuneration policy (if the AIFM is significant in size and complexity);
- (g) Take into account financial as well as non-financial criteria when assessing individual performance;
- (h) Outlaw multi-year guarantees, guaranteed remuneration is to be limited to the first year in the context of staff hiring;
- (i) Ensure that variable remuneration includes an adjustment for all types of current and future risks;
- (j) Ensure that the variable remuneration is paid or vests only if it is sustainable according to the financial situation of the AIFM as a whole;
- (k) Require staff to undertake not to use personal hedging strategies or remuneration and liability related insurance to offset the risks embedded in their remuneration arrangements;
- (l) At least 50% of variable remuneration to consist of units or shares or equivalent ownership interests;
- (m) At least 40% of variable remuneration to be deferred over a 3-5 year period (unless the AIF's life is cycle shorter);
- (n) 60% of particularly high variable remuneration to be deferred.

Member States must transpose the Directive into national law by 22 July 2013.

#### 5.3.4 Commission proposed measures to reduce gender pay gap

The Commission's 2010-2015 gender equality strategy is based on five priorities: getting more women into the labour market, equal pay, equality in senior positions, tackling gender violence and promoting equality beyond the EU.

#### 5.3.5 Commission Green Paper - Corporate Governance in financial institutions and remuneration policies

This Green Paper invites views on how to enhance the consistency and effectiveness of EU action on remuneration for directors of listed companies; what further EU measures should be taken; whether the favourable tax treatment of stock options and other similar remuneration should be discussed at EU level because of the risky practice it might encourage; whether the role of shareholders, employees and employee representatives should be strengthened in establishing employment policy; whether severance packages should be regulated at an EU level; and whether the variable component of remuneration in financial institutions which have received public funding should be reduced or suspended.

Commission Proposals are expected before the end of 2012.

### 5.4 Employment Protection

#### 5.4.1 Transfer of Undertakings

The 1977 Acquired Rights Directive required Member States to approximate their laws so that the rights of employees are safeguarded in the event of transfers of undertakings or businesses. National laws under the Directive should invalidate a transfer of a business as a good reason for a dismissal and automatically transfer employees with the undertaking or business. The Directive gave rise to interpretation problems (there have been numerous judgments of the ECJ concerning it), so an Amending Directive was adopted in June 1998 but this, although it now defines a "transfer", has not resolved all interpretation difficulties. The original Directive and the Amending Directive were consolidated into a single Directive (2001/23/EC) which took effect in April 2001.

#### 5.4.2 Insolvency

A 1980 Directive imposes on Member States a duty to ensure that in the event of an employer's insolvency, "guarantee institutions" meet employee claims where

necessary. This Directive has been amended several times and in the interests of clarity and rationality a new Directive (2008/94/EC) was published on 28 October 2008. Building on (and replacing) earlier Directives the Directive extends the protection afforded to employees in the event of their employer's insolvency by expanding the definition of "insolvency" to include situations other than liquidations and ensuring that atypical workers (e.g. part-time and fixed-term employees) are also covered. It requires Member States to expressly stipulate which institution is responsible for meeting employees' pay claims in insolvency situations. Member States should have transposed the provisions of the Directive by October 2011.

#### 5.4.3 Atypical Employment

Part-time, fixed-term and temporary employment are classed by the Commission as "atypical". Directives have been adopted in relation to this, including the Part-Time Workers Directive, which should now have been transposed into national legislation. This ensures that part-time workers are entitled to equal or pro-rata treatment with regard to all terms and conditions of employment relative to a "comparable full-time worker".

A Directive on fixed-term work was adopted to provide protection for those employees working under fixed-term contracts. It provides that employers must ensure that fixed-term employees are treated no less favourably than comparable permanent employees. A limit on the number of consecutive fixed-term contracts and the maximum duration of successive contracts is imposed in order to prevent abuse of successive fixed-term contracts. The Directive should now have been implemented in Member States.

The Temporary Agency Workers Directive (2008/104) promotes the principle of equal treatment of temporary and permanent workers and more specifically provides as follows:

- (a) Equality of treatment in basic working conditions (for example pay, maternity leave, holiday) with terms that would have applied if the employee were employed directly;
- (b) Temporary agency workers should have a right to be informed of permanent employment opportunities in the undertaking for which they are working and to have equal access to collective facilities such as childcare and transport facilities;
- (c) Derogation is permissible if the temporary agency worker has a permanent contract with agency and is paid between assignments; and
- (d) Member States are to specify whether the right to equality of treatment extends to pension, sick pay and financial participation schemes.

The Directive should have been transposed by Member States into national law by 5 December 2011.

#### 5.4.4 Proof of Employment

A Directive on written proof of employment relationships requires employers to inform employees of the terms and conditions applicable to their employment. Member States should now have implemented this Directive.

#### 5.4.5 Working Time

The Working Time Directive of 2003 consolidated earlier Directives and regulates working time including the average working week which it fixes at a maximum of 48 hours. This Directive made special provisions for certain economic sectors e.g. mobile workers, and there are also a number of additional Directives which deal with these economic sectors. This Directive should now have been implemented by all Member States.

The European Commission is currently consulting on two options to amend the Directive (i) to address practical difficulties caused by ECJ rulings that on-call time is

working time and that where rest breaks are missed compensatory breaks must be taken straight after; or (ii) a more comprehensive review dealing with additional issues including opting out of working time limits, paid annual leave and flexible working patterns.

#### 5.4.6 Equitable Wage

The Commission has adopted an Opinion on the introduction of an equitable wage by Member States, but this has no binding legal effect.

#### 5.4.7 Protection of Young People at Work

A Directive on the protection of young people at work includes restrictions on working time and provides for special health and safety protection for workers under the age of 18.

### 5.5 Pensions

#### 5.5.1 Directive on supplemental improving the portability of pension rights

The Directive aims to make it easier for workers to preserve their pension rights on changing jobs. It aims to maintain pension rights through a fair treatment of dormant rights. A vesting period (a period of active employment required in order to trigger entitlement to a supplementary pension) will be established.

The proposal was published in 2005 and has been subject to ongoing discussions. On 7 July 2010, the Commission published a Green Paper on pensions in order to collect input from a wide range of stakeholders and to break the current deadlock. Discussions are currently in a state of deadlock.

### 5.6 Information and Consultation

#### 5.6.1 Collective Redundancies

The Collective Redundancies Directive requires employers who are contemplating collective redundancies to inform and consult employee representatives and to notify the public authorities.

#### 5.6.2 Transfers of Undertakings

The Acquired Rights Directive (already referred to above) also requires

employers to give employee representatives information about proposed transfers and, in certain situations, to consult them as well.

#### 5.6.3 Health and Safety

The Health and Safety Framework Directive gives those employee representatives with specific responsibility for health and safety matters information rights on risk and consultation rights on all health and safety issues.

#### 5.6.4 European Company Statute and Worker Involvement Directive

In October 2001, the Council of Ministers of the European Union formally adopted legislation in relation to the establishment of a European Company, to be known by its Latin name of “*Societas Europaeae*” (“SE”). The European Company Statute is established by two pieces of legislation; a Regulation directly applicable in Member States establishing the company law rules and a Directive on Worker Involvement. This should now have been implemented by Member States.

The legislation gives companies the option of forming a SE which will be able to operate on a European-wide basis and be governed by community law directly applicable in all Member States. The SE is able to operate throughout the EU with one set of rules and a unified management and reporting system rather than having to comply with the various national laws of each Member State where it has subsidiaries.

The Directive on Worker Involvement stipulates that upon the creation of a European Company, negotiations must be initiated with a special negotiating body representing the employees with a view to reaching agreement on the involvement of all employees of the SE’s constituent companies in a representative body. If a mutually satisfactory arrangement cannot be negotiated, the Directive contains a set of “standard rules” in its annex that would apply instead. These measures

essentially oblige managers of the SE to provide regular reports on the basis of which there must be regular consultation of, and information to, a body representing the companies' employees. Employees also have board participation rights in certain circumstances. The companies' current and future business plans, production and sales levels, implications of these for the workforce, management changes, mergers, divestments, potential closures and lay-offs must be included in such reports.

Employment contracts and pensions are not covered by the European Company Statute; they are subject to the national law of each Member State within which the headquarters and branches are operated.

#### 5.6.5 European Works Councils

The (recast) European Works Councils Directive concerns the establishment of a European Works Council or a procedure in Community-scale undertakings, and Community-scale groups of undertakings, for the purpose of informing and consulting employees regarding business decisions made in one country covered by the Directive which affect the employees and impact on their interests in another country covered by the Directive. The Directive defines a community scale undertaking as an undertaking with at least 1,000 employees within Member States, and, at least 150 employees in two or more Member States. Companies in those countries that are not covered by the Directive, for example American

companies, will be bound by it in their divisions located in countries that have adopted the provisions of the Directive if they meet the threshold number of employees. The Directive provides that the nature, composition, competence and functioning of the Council must normally be agreed between central management and a special negotiating body drawn from employee representatives. In case no agreement can be reached, the Directive lays down minimum requirements to be complied with. The recast Directive was published on 18 May 2009 and had to be transposed by Member States by 5 June 2011.

#### 5.6.6 National Information and Consultation

The Employee Information and Consultation Directive aims to ensure that workers are adequately informed and consulted before serious decisions affecting them are taken. Employees have a right to be informed and consulted beyond consultation about redundancies and transfers of undertakings on more general issues such as the undertaking's activities and economic situation. The Directive allows Member States to limit the information and consultation obligations of undertakings with fewer than 50 or 20 employees. All Member States should now have implemented the Directive.

#### 5.6.7 Takeover Bids

A Directive on Takeover Bids was adopted on 21 April 2004. The main thrust of the Directive is to give employees information

and consultation rights in company takeover bid situations. When an offer document is made public, the boards of the offeree company and offeror must communicate it to the representatives of their respective employees or, where there are no such representatives, to the employees themselves. Member States should have implemented the Directive by 20 May 2006.

#### 5.6.8 Teleworking

A framework agreement on telework was formally signed in July 2002 and should now have been implemented by Member States. It lays down a general framework of rights and protections for teleworkers (homeworkers) including provision for workers' representatives to be informed and consulted on the introduction of teleworking.

### 5.7 Health and Safety

Workplace health and safety has been an important area of EU legislative activity. National variations in workplace health and safety rules have been generally recognised as possible obstacles to the proper development of a free market. This has encouraged the Commission to make proposals, and there are a substantial number of Directives in this area. These range from Directives laying down general health and safety management principles (the "Framework Directive") to Directives aimed at specific industries or activities. The Working Time Directive is a health and safety Directive.

# Appendix Country by Country Comparisons

	Austria	Belgium	Bulgaria
<b>Minimum Wage</b>	<ul style="list-style-type: none"> <li>No statutory minimum wage, but minimum wage fixed by collective agreements covering virtually all employees.</li> <li>Employees entitled by collective agreements and individual contracts to a 13th-month (holiday) bonus and a 14th-month (Christmas) bonus.</li> </ul>	<p>As at September 2012:</p> <ul style="list-style-type: none"> <li>Minimum monthly gross wage €1,472.40.</li> <li>For full time employees of 21½ years of age with more than six months' service €1,511.48.</li> <li>For employees of 22 or over with more than twelve months' service €1,528.88.</li> <li>"Wage moderation" measures have been introduced to dictate salary increases at a national level. For 2013-2014, the government imposed a salary freeze.</li> </ul>	<ul style="list-style-type: none"> <li>From 1 January 2013 the minimum monthly wage is BGN 310 (approx. €158).</li> </ul>
<b>Maximum Weekly Hours</b>	<ul style="list-style-type: none"> <li>Eight hours per day and 40 hours per week, although more may be possible in certain industries, provided that the average weekly working hours over a specified period do not exceed 40 hours.</li> <li>Longer hours can be provided for by collective agreements, to the extent permitted by the AZG.</li> <li>Overtime is permissible as long as no more than ten hours worked in total on any one day and no more than ten hours overtime during one week (subject to a maximum of 60 additional hours overtime annually); once 60 hours overtime has been worked the weekly maximum overtime is 5 hours.</li> </ul>	<ul style="list-style-type: none"> <li>38 hours per week.</li> <li>Overtime must be compensated by additional payment and compensatory rest.</li> </ul>	<ul style="list-style-type: none"> <li>Eight hours per day and 40 hours per week.</li> <li>Hours can be extended to maximum of ten hours per day and 48 hours per week. Such extensions only permissible up to 60 working days in one calendar year and not more than 20 successive working days.</li> </ul>
<b>Holiday Entitlement**</b>	<ul style="list-style-type: none"> <li>30 working days a year (36 working days after 25 years' service).</li> <li>Saturdays are counted as working days.</li> <li>Employees entitled to paid absence from work on any public holiday, unless the public holiday falls on a Sunday whereby there is no obligation to provide regular pay.</li> </ul>	<ul style="list-style-type: none"> <li>Minimum of 20 days per year.</li> <li>Ten public holidays per year.</li> </ul>	<ul style="list-style-type: none"> <li>Minimum of 20 working days per year.</li> <li>During first year of service, employee only entitled to paid annual leave after eight months' service.</li> </ul>

<b>Maternity and Family Leave Entitlement</b>	<ul style="list-style-type: none"> <li>■ Pregnant women entitled to eight weeks' maternity leave prior to expected birth, and eight weeks after. Entitled to full pay throughout.</li> <li>■ Either parent has the right to unpaid parental leave for two years.</li> </ul>	<ul style="list-style-type: none"> <li>■ Women entitled to 15 weeks' maternity leave.</li> <li>■ Father entitled to ten days' paid paternity leave after the birth.</li> </ul>	<ul style="list-style-type: none"> <li>■ Female employees entitled to 410 days' leave for each child. 45 days of this leave should be before expected birth.</li> <li>■ Entitlement to leave for two years following birth in respect of first, second and third child. Six months for every child thereafter.</li> <li>■ Maternity and Family Leave Entitlement leave may be used by the father of the child or by one of the child's grandparents.</li> </ul>
<b>Minimum Notice by Employer and Termination Payments</b>	<ul style="list-style-type: none"> <li>■ If employment commenced before 31 December 2002, unless agreed otherwise, white or blue-collar employees are entitled to severance pay provided he or she has completed three years' service.</li> <li>■ Amount of payment depends on length of service and ranges from 2 to 12 months' salary.</li> <li>■ If employment commenced after 31 December 2002, the Statutory Corporate Employee Retirement Schemes Act applies. Employers to contribute 1.53% of remuneration to a fund, employee receives the balance of the contributions upon termination.</li> <li>■ Blue-collar notice period: generally 14 days.</li> <li>■ White-collar notice period: six weeks, increases to five months after 25 years' service.</li> <li>■ With effect from 1 January 2013 employers have to pay a levy of approximately €113 (2013) upon the termination of an employment that was subject to mandatory unemployment insurance. However, in certain cases the employer is exempt from the levy.</li> </ul>	<p>Contracts for an indefinite period of time (outside the trial period):</p> <ul style="list-style-type: none"> <li>■ Blue-collar workers: 35 days notice when 6 months' to five years' service. Increases to 112 days' notice (for employees hired before 2012) or 129 days' notice (for employees hired after 2012) depending on length of service.</li> <li>■ White-collar workers: Not less than three months when up to five years' service. Increases depending on length of service.</li> <li>■ Employment can also be terminated by payment in lieu of notice.</li> </ul>	<ul style="list-style-type: none"> <li>■ Contracts with an indefinite term: 30 days' written notice, longer notice period can be agreed, but not in excess of three months.</li> <li>■ If the employer fails to comply with the minimum notice period the employee is entitled to an amount equal to his/her gross remuneration for the period of non-compliance.</li> <li>■ Upon termination of employment, the employee is entitled to be paid in lieu of accrued but untaken holiday entitlement.</li> <li>■ Upon termination of employment by reason of illness the employee is entitled to compensation from the employer of two months' gross pay provided that he has at least five years' service and has not received compensation on the same grounds during the last five years of employment service.</li> <li>■ In the case of dismissal as a consequence of the closure of all or part of the enterprise, a reduction in workforce or in the volume of work and suspension of work for more than 15 working days employees are entitled to compensation equal to their gross pay for the period of unemployment up to a maximum of one month's remuneration.</li> <li>■ Upon termination of employment (for whatever reason), if the employee is eligible for a retirement-age pension, he is entitled to compensation equal to two months' gross pay, if the employee has worked for the same employer for the last ten years of his employment, the compensation is equal to six months' gross remuneration.</li> </ul>

	The Czech Republic	Cyprus	Denmark
<b>Minimum Wage</b>	<ul style="list-style-type: none"> <li>Statutory minimum wage: CZK 8,000 (approx. €280) per month or CZK 48.10 (approx. €1.70) per hour, based on a 40-hour week.</li> </ul>	<ul style="list-style-type: none"> <li>€855 per month for office clerks and shop assistants - rising to €909 after 6 months' employment.</li> </ul>	<ul style="list-style-type: none"> <li>No statutory minimum wage, but minimum wage set by collective agreement for a large percentage of the workforce; other employees receive customary wage for industry sector.</li> </ul>
<b>Maximum Weekly Hours</b>	<ul style="list-style-type: none"> <li>48 hours per week (40 hours of standard weekly hours + eight hours of overtime) averaged over a reference period of 26 or 52 weeks if agreed in a collective agreement (up to one year).</li> <li>Often reduced by collective agreements.</li> </ul>	<ul style="list-style-type: none"> <li>48 hours.</li> </ul>	<ul style="list-style-type: none"> <li>48 hours on average.</li> <li>Generally reduced by collective agreement to 37 hours.</li> </ul>
<b>Holiday Entitlement**</b>	<ul style="list-style-type: none"> <li>Minimum four weeks, five weeks for employees of state bodies (seven day week).</li> </ul>	<ul style="list-style-type: none"> <li>20 or 24 days depending on length of working week.</li> </ul>	<ul style="list-style-type: none"> <li>Five weeks and holiday supplement.</li> </ul>
<b>Maternity and Family Leave Entitlement</b>	<ul style="list-style-type: none"> <li>28 weeks' maternity leave, 37 weeks if the mother gave birth to more than one child.</li> <li>Statutory maternity pay and other benefits payable by social security.</li> <li>Unpaid parental leave until the child reaches three years of age.</li> </ul>	<ul style="list-style-type: none"> <li>18 weeks paid maternity leave.</li> <li>Each parent may have an 18 week unpaid leave due to a birth or adoption of a child.</li> <li>7 days' unpaid emergency leave per annum due to force majeure.</li> </ul>	<ul style="list-style-type: none"> <li>4 weeks' pregnancy leave before birth.</li> <li>Up to 14 weeks' maternity leave after birth.</li> <li>Two weeks' paternity leave after birth.</li> <li>32-46 weeks' parental leave for each parent.</li> <li>Pay: 50% of salary during pregnancy and maternity leave for salaried employees.</li> <li>No salary entitlements for blue-collar employees. However, usually such employees are entitled to full or partial salary for up to 14 weeks subject to collective agreements, if any.</li> <li>Remaining leave is unpaid by the employer, however, employees will be entitled to government benefits.</li> </ul>
<b>Minimum Notice by Employer and Termination Payments</b>	<ul style="list-style-type: none"> <li>At least two months' notice, depending on the reasons for dismissal.</li> <li>Statutory entitlement to redundancy payment in an amount ranging from 1-3 months' average salary depending on the length of employment, also payable by mutual agreement concluded on termination of employment for selected statutory termination reasons.</li> <li>Unfair dismissal: compensation for wages and benefits which the employee would have received if the employment had continued or during the relevant notice period in the case of lawful termination. Compensation exceeding six months may be reduced by the court, upon the employer's application.</li> </ul>	<ul style="list-style-type: none"> <li>One to eight weeks' paid notice depending on length of service.</li> <li>Two weeks' to two years' wages depending on a number of factors.</li> </ul>	<ul style="list-style-type: none"> <li>Usually 14 to 120 days' notice for workers.</li> <li>One month's notice for salaried employee with one to six months' service.</li> <li>Thereafter notice period one month's notice for every three years of employment up to six months' notice after nine years' service.</li> <li>Severance pay of one, two and three months' salary for salaried employees with 12, 15, and 18 years' service respectively.</li> </ul>

	<b>Estonia</b>	<b>Finland</b>	<b>France</b>
<b>Minimum Wage</b>	<ul style="list-style-type: none"> <li>■ €290 per month and €1.80 per hour.</li> </ul>	<ul style="list-style-type: none"> <li>■ No statutory minimum wage.</li> <li>■ Minimum wages set or influenced by sectoral collective agreement.</li> </ul>	<ul style="list-style-type: none"> <li>■ Statutory minimum wage (SMIC).</li> <li>■ June 2012 : €9.40 per hour.</li> </ul>
<b>Maximum Weekly Hours</b>	<ul style="list-style-type: none"> <li>■ Eight hours per day or 40 hours per week.</li> <li>■ Overtime must be compensated preferably by time off in lieu or by additional payment. Additional remuneration for overtime must not be less than 50% higher than the employee's hourly rate of pay.</li> </ul>	<ul style="list-style-type: none"> <li>■ Usually 40 hours.</li> <li>■ Generally reduced by collective agreement.</li> </ul>	<ul style="list-style-type: none"> <li>■ 10 hours per day, or 48 hours per week or an average 44 hours per week in a 12 week period.</li> </ul>
<b>Holiday Entitlement**</b>	<ul style="list-style-type: none"> <li>■ 28 calendar days per calendar year.</li> </ul>	<ul style="list-style-type: none"> <li>■ Four to five weeks annually.</li> <li>■ Holiday bonus usual but not statutory.</li> </ul>	<ul style="list-style-type: none"> <li>■ Five weeks.</li> </ul>
<b>Maternity and Family Leave Entitlement</b>	<ul style="list-style-type: none"> <li>■ Female employees entitled to 140 days leave, starting at least 70 days prior to expected birth.</li> <li>■ Pay - 100% average income payable from state funds.</li> <li>■ Father entitled to 10 days paid leave during the mother's leave, or within two months of the birth. This is paid by the state.</li> <li>■ After the pregnancy and maternity leave one of the parents is entitled to parental leave. The first one and a half years is compensated by the state is at a rate equal to the employees' average salary. The parents are entitled to use the leave until the child is three. During the second half of the leave the parent is entitled to a childcare allowance.</li> <li>■ Parents are also entitled to 3-6 days off during the year. This is compensated by the state in the amount of minimum salary.</li> </ul>	<ul style="list-style-type: none"> <li>■ 105 days' maternity leave (including Saturdays).</li> <li>■ 158 days' parental leave (including Saturdays).</li> <li>■ Pay: average 65% of gross salary paid by Social Security during maternity and/or parental leave.</li> <li>■ In general, collective bargaining agreements include an entitlement to full salary during up to the first three months of the maternity leave to be paid by the employer.</li> <li>■ 54 days paternity leave from 1 January 2013.</li> <li>■ Pay: average 65% gross salary paid by Social Security.</li> <li>■ Unpaid parental leave until child is three years old.</li> </ul>	<ul style="list-style-type: none"> <li>■ 16 weeks' maternity leave.</li> <li>■ Pay: 80.32% of salary up to a ceiling paid by Social Security.</li> <li>■ Three days' birth paternity leave on full pay.</li> <li>■ 11 days' unpaid paternity leave.</li> <li>■ Three years' unpaid parental leave.</li> </ul>

Minimum Notice by Employer and Termination Payments	Estonia (continued)	Finland (continued)	France (continued)
	<ul style="list-style-type: none"> <li>■ Between 15 and 90 calendar days depending on the statutory grounds relied on for termination.</li> <li>■ Termination without notice is permissible only in extreme circumstances e.g. a severe violation of work duties.</li> <li>■ If notice obligations are not complied with, employee entitled to compensation equal to a day's average wage for each day of notice not given.</li> <li>■ Redundancy termination payment is one month's salary.</li> </ul>	<ul style="list-style-type: none"> <li>■ 14 days to six months' notice depending on length of service, unless otherwise agreed.</li> <li>■ Full pay over notice period.</li> <li>■ Compensation of 3 to 24 months' salary in cases of unlawful termination.</li> </ul>	<ul style="list-style-type: none"> <li>■ Less than six months' service – usually provided for in Collective Bargaining Agreements or company customs.</li> <li>■ Six months' to two years' service - usually one month's notice.</li> <li>■ Above two years' service - two months' notice.</li> <li>■ Executives - three months' notice.</li> <li>■ 1/5th of monthly salary for each year of service after one year's service plus 2/5th of monthly salary for each year of service beyond 10 years' service.</li> </ul>

	Germany	Greece	Hungary
<b>Minimum Wage</b>	<ul style="list-style-type: none"> <li>Statutory minimum wage in the nursing services and temporary employment sectors; minimum wages set or influenced by sectoral/regional collective bargaining agreement or ordinance.</li> </ul>	<ul style="list-style-type: none"> <li>A new system for formulating the legal minimum salary will be established Q1 2013. Minimum wages established by collective agreements bind only the employers who are members of the contracting union.</li> <li>Unskilled adults with less than three years service have a minimum monthly salary of €586.08 / minimum daily wage €26.18 (over 25 years of age) and a minimum monthly salary of €510.95 / minimum daily wage €22.83 (under 25 years of age).</li> </ul>	<ul style="list-style-type: none"> <li>Monthly minimum wage for 2012 is HUF 93,000 (approx. €330).</li> <li>Guaranteed minimum wage for 2012 is HUF 108,000 (approx. €385) for employees with secondary education or secondary professional education and perform work with a secondary professional education requirement.</li> <li>Collective agreements may also establish a minimum pay rate for employees of certain categories.</li> </ul>
<b>Maximum Weekly Hours</b>	<ul style="list-style-type: none"> <li>48 hours per week (eight hours per day, six days a week).</li> <li>Max. daily hours may be extended to 10 only if the average working hours within six calendar months or 24 weeks do not exceed eight hours per day.</li> <li>Prohibition on working on Sundays and public holidays except where the nature of the work requires continuous operation.</li> <li>Different rules may be agreed in collective agreements or approved by the supervising state trade office.</li> </ul>	<ul style="list-style-type: none"> <li>40 hours.</li> <li>Reduced by collective agreement to 37-40 hours in certain cases (banks etc).</li> </ul>	<ul style="list-style-type: none"> <li>Eight hours per day and 40 hours per week.</li> <li>Employer and employee may agree up to 12 hours per day in certain exceptional circumstances (extended daily working time).</li> <li>Prohibition on working on Sundays and public holidays except where the nature of the work requires continuous operation.</li> </ul>
<b>Holiday Entitlement**</b>	<ul style="list-style-type: none"> <li>Minimum four weeks' paid holiday.</li> <li>25-30 days (based on a five-day work week) standard for salaried employee.</li> <li>Age-related holiday entitlement is no longer permitted.</li> </ul>	<ul style="list-style-type: none"> <li>20 days (5 day week)/ 24 days (6 day week).</li> <li>Increased with seniority up to 25 days (five day week) or 30 days (six day week) / for employees with over 25 years of prior service 26 days (five day week) or 31 days (six day week).</li> </ul>	<ul style="list-style-type: none"> <li>Statutory entitlement depends on the employee's age and varies from a minimum of 20 days to 30 days.</li> <li>Collective agreements may provide for more paid holidays or extra holidays in certain circumstances.</li> </ul>

	Germany (continued)	Greece (continued)	Hungary (continued)
<b>Maternity and Family Leave Entitlement</b>	<ul style="list-style-type: none"> <li>14 weeks' maternity leave (four weeks before the expected birth and eight weeks after birth).</li> <li>Pay: 100% usual net daily pay (partially reimbursed by social fund).</li> <li>Three years' parental leave per child - either parent.</li> <li>During parental leave, monthly payment of 65 to 67% of the former regular net pay, up to €1,800 per month, for a maximum period of 14 months (subject to a maximum period of 12 months of parental leave being taken by one parent).</li> </ul>	<ul style="list-style-type: none"> <li>17 weeks' maternity leave.</li> <li>Pay* 50% of notional salary by social fund, balance of normal salary payable by employer for 15 or 30 days. Thereafter, paid by state.</li> <li>Two days paid family leave for fathers.</li> <li>At least four months' unpaid parental leave.</li> <li>Additional maternity leave - 6-months during which, mothers are paid the minimum wage by the State Organization for the Unemployed (OAED).</li> </ul>	<ul style="list-style-type: none"> <li>Female employee entitled to 24 weeks' maternity leave, which they may take from four weeks before the expected birth.</li> <li>After the 24 week maternity leave, in certain circumstances, either parent is entitled to additional unpaid leave of up to three years from the child's birth.</li> <li>Fathers are entitled to a five-day paid holiday following the birth of their child (seven days in the case of twins).</li> <li>Extra holidays where there are children under 16 years (up to seven days depending on the number of children).</li> </ul>
<b>Minimum Notice by Employer and Termination Payments</b>	<ul style="list-style-type: none"> <li>Up to two years' service - four weeks' notice to the 15th day or the end of the calendar month.</li> <li>Up to 20 years' service - notice is on a sliding scale of 1 to 7 months to the end of the calendar month.</li> <li>Generally, no statutory redundancy payment (unless required under collective bargaining agreement or social plan).</li> </ul>	<ul style="list-style-type: none"> <li>White collar employees: minimum notice one to four months' notice and severance pay from 1 to 6 months' pay depending on seniority or no notice given and severance pay from 2 to 12 months' pay depending on seniority. Special regulations provide for additional severance pay for employees who fulfilled seventeen years of service or more on 12 November 2012.</li> <li>Blue collar employees: five to 165 days' pay.</li> </ul>	<ul style="list-style-type: none"> <li>Minimum 30 days notice, increasing up to 90 days depending on length of service.</li> <li>Longer notice of up to six months can be agreed.</li> <li>Statutory notice period may not be applicable to executive employees.</li> <li>Employer must exempt employee from work for at least half of the notice period and must continue to pay the employee's salary while he performs work and his absence fee while he is exempt from work.</li> <li>Severance pay: 1-6 months absence fee depending on the length of employment.</li> </ul>

	Ireland	Italy	Latvia
<b>Minimum Wage</b>	<ul style="list-style-type: none"> <li>Statutory minimum wage of €8.65 per hour.</li> <li>Minimum pay levels exist in certain industries.</li> </ul>	<ul style="list-style-type: none"> <li>No statutory minimum wage.</li> <li>Collective agreements provide minimum level of pay/benefits.</li> </ul>	<ul style="list-style-type: none"> <li>In 2013 LVL 200 (approx. €285) per month for full-time employees. Minimum hourly rate is LVL 1.203 (approx. €1.72).</li> </ul>
<b>Maximum Weekly Hours</b>	<ul style="list-style-type: none"> <li>48 hours.</li> <li>Standard working week is generally 35 to 39 hours.</li> </ul>	<ul style="list-style-type: none"> <li>48 hours.</li> <li>Standard working week generally 40 hours.</li> </ul>	<ul style="list-style-type: none"> <li>Normal working time is 40 hours per week.</li> <li>Aggregated working time may not exceed 56 hours a week.</li> </ul>
<b>Holiday Entitlement**</b>	<ul style="list-style-type: none"> <li>20 days..</li> </ul>	<ul style="list-style-type: none"> <li>Four weeks' paid leave.</li> <li>Collective agreements may provide for more.</li> </ul>	<ul style="list-style-type: none"> <li>Four weeks' paid leave.</li> </ul>
<b>Maternity and Family Leave Entitlement</b>	<ul style="list-style-type: none"> <li>42 weeks' maternity leave (state benefit: 80% of salary up to ceiling payable during first 26 weeks).</li> <li>40 weeks' adoptive leave (state benefit: 80% of salary up to ceiling payable during first 24 weeks).</li> <li>14 weeks' unpaid parental leave per child.</li> </ul>	<ul style="list-style-type: none"> <li>15 days' paid marriage leave.</li> <li>five months' paid maternity leave + one day father's leave in 2012-2015 (with the possibility of an additional two days in place of the mother).</li> <li>Maternity pay - 80% of normal pay (collective agreement may provide for additional pay, up to 100% pay).</li> <li>Father's leave – 100% of normal pay.</li> <li>10 – 11 months' paid parental leave.</li> <li>Parental leave pay - 30% of normal pay for six month period (in alternative, baby sitting vouchers subject to specific regulations and budget limits in 2013-2015).</li> </ul>	<ul style="list-style-type: none"> <li>112 days' paid maternity leave (max 140 days).</li> <li>State maternity pay of 80% of average monthly earnings (subject to specified limits until 31 December 2014), payable by social security.</li> <li>10 days' paid paternity/adoption leave.</li> <li>State paternity pay of 80% of average monthly earnings (subject to specified limits until 31 December 2014), payable by social security.</li> <li>1 ½ years' childcare leave.</li> <li>70% of average monthly earnings is paid until the child reaches the age of one (subject to specified limits until 31 December 2014), payable by social security.</li> </ul>
<b>Minimum Notice by Employer and Termination Payments</b>	<ul style="list-style-type: none"> <li>1 to 8 weeks' notice depending on length of service.</li> <li>Statutory entitlement to redundancy payment subject to certain conditions.</li> <li>Compensation for unfair dismissal up to two years' remuneration.</li> <li>Damages for wrongful breach of contract.</li> </ul>	<ul style="list-style-type: none"> <li>Two weeks to 12 months' notice depending on length of service/grade.</li> <li>Deferred compensation termination payment - annual salary divided by 13.5 x n° of years' service.</li> <li>Unjust dismissal compensation and/or reinstatement depending on the case and/or on the employer's workforce.</li> </ul>	<ul style="list-style-type: none"> <li>None/10 days'/1 month's notice depending on grounds for dismissal.</li> <li>Employee is entitled to full pay during notice period.</li> </ul>

	Lithuania	Luxembourg	Malta
<b>Minimum Wage</b>	<ul style="list-style-type: none"> <li>LTL 5.15 (€1.49) per hour; LTL 850 (€246.18) per month.</li> </ul>	<ul style="list-style-type: none"> <li>Statutory minimum wage.</li> <li>As at 1 October 2012: €1,846.51 per month for non-qualified employees over 18/€2,215.81 for qualified workers.</li> </ul>	<ul style="list-style-type: none"> <li>National minimum wage of €158.11 per week.</li> <li>€151.33 per week in the case of young people and trainees aged 17.</li> <li>€148.49 per week in the case of young people and trainees aged 16 and younger.</li> </ul>
<b>Maximum Weekly Hours</b>	<ul style="list-style-type: none"> <li>48 hours per week (including overtime).</li> <li>40 hours per week (excluding overtime).</li> </ul>	<ul style="list-style-type: none"> <li>40 hours per week.</li> </ul>	<ul style="list-style-type: none"> <li>48 hours per week averaged over a reference period ranging from 17 to 52 weeks. An individual opt-out is also possible.</li> </ul>
<b>Holiday Entitlement**</b>	<ul style="list-style-type: none"> <li>28 calendar days.</li> </ul>	<ul style="list-style-type: none"> <li>25 working days' holidays.</li> </ul>	<ul style="list-style-type: none"> <li>Minimum four weeks and four days excluding national and public holidays.</li> </ul>
<b>Maternity and Family Leave Entitlement</b>	<ul style="list-style-type: none"> <li>126 days' paid pregnancy and childbirth leave.</li> <li>One months' paid paternity leave.</li> <li>14 calendar days' unpaid parental leave per year for employees who have children under 14 years old.</li> <li>Up to three years' child care leave, 70% of insured income is paid until the child is one year old, 40% of insured income is paid until the child is two years old or 100% is paid until the child is one year old (payments are subject to statutory thresholds).</li> </ul>	<ul style="list-style-type: none"> <li>16 to 20 weeks' maternity leave (state indemnity is payable).</li> <li>Six months' full time parental leave or 12 months' part-time parental leave (state indemnity is payable).</li> <li>Special leave of up to 2 days per child per year in cases of serious illness or accident of a dependent child.</li> <li>Special paid leave days (i.e. death of a relative, wedding, etc).</li> </ul>	<ul style="list-style-type: none"> <li>18 weeks' maternity leave.</li> <li>100% ordinary pay for 18 weeks.</li> <li>Special leave (8 weeks with nominal payment determined by the Social Security Department; the remainder unpaid) if required.</li> <li>Four months' unpaid parental leave.</li> </ul>
<b>Minimum Notice by Employer and Termination Payments</b>	<ul style="list-style-type: none"> <li>Generally, two months' notice (four months in specified cases). Full pay over notice period, compensation for unused vacation and severance compensation between 1 and 6 months' salary, depending on the length of service.</li> <li>No notice or severance pay for dismissal for cause</li> </ul>	<ul style="list-style-type: none"> <li>No notice in case of termination for serious misconduct.</li> <li>Legal notice: 2 to 6 months' notice depending on length of service.</li> <li>Statutory severance indemnity: 1 to 12 months' pay depending on length of service.</li> </ul>	<ul style="list-style-type: none"> <li>No notice required in cases of termination for disciplinary reasons.</li> <li>A maximum of 12 weeks' notice depending on the length of service for redundancy.</li> </ul>

	The Netherlands	Poland	Portugal
<b>Minimum Wage</b>	<ul style="list-style-type: none"> <li>Statutory minimum wage.</li> <li>€1,469.40 per month for employees aged 23 or over, excluding holiday allowance.</li> </ul>	<ul style="list-style-type: none"> <li>In 2013 the minimum statutory wage is 1,600 PLN gross (approx. €400) per month.</li> </ul>	<ul style="list-style-type: none"> <li>Statutory minimum wage.</li> <li>In 2012 €485 per month.</li> </ul>
<b>Maximum Weekly Hours</b>	<ul style="list-style-type: none"> <li>60 hours.</li> <li>Average 36-40 hours by collective or individual agreement.</li> </ul>	<ul style="list-style-type: none"> <li>Average 40 hours (generally eight hours per day in a five day work week).</li> <li>Can be extended up to an average of 48 hours per week by overtime hours.</li> </ul>	<ul style="list-style-type: none"> <li>40 hours.</li> <li>Generally reduced by collective agreement.</li> </ul>
<b>Holiday Entitlement**</b>	<ul style="list-style-type: none"> <li>20 days, usually increased by individual or collective agreement plus holiday allowance of 8% of salary.</li> </ul>	<ul style="list-style-type: none"> <li>20 working days when the employee has been working up to 10 years.</li> <li>26 working days when the employee has been working more than 10 years.</li> </ul>	<ul style="list-style-type: none"> <li>22 days (five day week).</li> </ul>
<b>Maternity and Family Leave Entitlement</b>	<ul style="list-style-type: none"> <li>16 weeks' maternity leave.</li> <li>Pay: 100% of salary up to ceiling.</li> <li>26 weeks' unpaid parental leave.</li> <li>Two days' paid paternity leave.</li> <li>Four weeks' foster care or adoption leave.</li> </ul>	<ul style="list-style-type: none"> <li>20 – 37 weeks of maternity leave (depending on the number of children born).</li> <li>Additional 4 -6 weeks of maternity leave (which can be granted to mother or father of child upon their request).</li> <li>Two weeks' paid paternity leave at 100% of remuneration.</li> <li>Maternity/ paternity pay of 100% of remuneration paid by social security.</li> <li>Three years' unpaid parental leave for each parent up to child's fourth birthday.</li> </ul>	<ul style="list-style-type: none"> <li>120 days' initial parental leave: Mother entitled to minimum of six weeks' exclusive parental leave.</li> <li>Father 10-20 days exclusive parental leave - balance of 120 days can be shared.</li> <li>30 additional days at parents' option (i.e. 150 days).</li> <li>30 additional days (i.e. 180 days in total).</li> <li>Parental leave allowance - 100% average wage for 120 days or 80% average wage for 150 days or 83% average wage for 180 days - payable by social security.</li> </ul>
<b>Minimum Notice by Employer and Termination Payments</b>	<ul style="list-style-type: none"> <li>One to four months' notice depending on length of service.</li> <li>Generally between a half and two months' salary per year of service depending on age and length of service and reasons for termination.</li> </ul>	<ul style="list-style-type: none"> <li>Employment contract of indefinite duration:             <ul style="list-style-type: none"> <li>Two weeks' if the employee was employed up to six months;</li> <li>One month if the employee was employed for at least 6 months;</li> <li>Three months if the employee was employed for at least three years;</li> </ul> </li> <li>The employee receives remuneration during the whole notice period.</li> <li>Additional statutory severance payment in the case of redundancy amounting from 1-3 months' remuneration depending on length of service.</li> </ul>	<ul style="list-style-type: none"> <li>15 to 75 days depending on the length of service for redundancy dismissal.</li> <li>No notice required in cases of termination for disciplinary reasons.</li> <li>Notice of termination of term employment contract is 7 to 60 days depending on the type of term employment contract and its duration.</li> <li>Redundancy compensation where employment commenced before 1 November 2011:             <ul style="list-style-type: none"> <li>Service under a permanent employment contract prior to 31 October 2012: 1 month basic salary (MBS) + Seniority allowance (SA) X No. of years service. Compensation cannot be less than three MBS and SA</li> </ul> </li> </ul>

	The Netherlands (continued)	Poland (continued)	Portugal (continued)
			<ul style="list-style-type: none"> <li>• Service under fixed term contract up to 31 October 2012: two days' salary for each month of the contract if it is &gt; 6 months in duration. Three days' salary for each month if it is &lt; 6 months</li> <li>• Service under permanent and fixed term employment contracts after 31 October 2012:             <ul style="list-style-type: none"> <li>– Service will only be considered if the employee has less than 12 years' service and/or the compensation for the previous period of service does not exceed 240 x minimum national wage (i.e. €116,400 for 2012)</li> <li>– 20 days of MBS + SA per year of service</li> <li>– 1 day = (1 MBS + SA) /30</li> <li>– MBS ceiling of 20 x minimum national wage (i.e. €9,700 for 2012)</li> </ul> </li> <li>■ Redundancy compensation where employment commenced on or after 1 November 2011:             <ul style="list-style-type: none"> <li>• Permanent and fixed term contracts:                 <ul style="list-style-type: none"> <li>– 20 days of MBS and SA per year of seniority</li> <li>– 1 day = (1 MBS + SA) /30</li> <li>– MBS ceiling of 20 x minimum national wage (i.e. €9,700 for 2012)</li> </ul> </li> <li>■ 15 to 45 days' salary and a seniority payment for each full/partial year of service, in the case of an unlawful dismissal.</li> </ul> </li> </ul>

	Romania	Slovakia	Slovenia
<b>Minimum Wage</b>	<ul style="list-style-type: none"> <li>RON 700 per month (approx €155) for 170 hours per month.</li> </ul>	<ul style="list-style-type: none"> <li>Statutory minimum wage: EUR 337.70 per month or €1,941 per hour as of 1 January 2013.</li> </ul>	<ul style="list-style-type: none"> <li>Minimum wage of €763.06 per month (as at 1 January 2012).</li> </ul>
<b>Maximum Weekly Hours</b>	<ul style="list-style-type: none"> <li>40 hours plus eight hours overtime.</li> <li>By exception, maximum weekly hours may not exceed 48 hours calculated as an average over four months.</li> </ul>	<ul style="list-style-type: none"> <li>40 hours.</li> <li>38.75 in two shift operations.</li> <li>37.5 in three shift operations.</li> </ul>	<ul style="list-style-type: none"> <li>40 hours plus a maximum eight hours overtime.</li> <li>In case of an uneven distribution of working hours: 56 hours.</li> </ul>
<b>Holiday Entitlement**</b>	<ul style="list-style-type: none"> <li>20 working days.</li> </ul>	<ul style="list-style-type: none"> <li>Four weeks (20 working days).</li> <li>Five weeks if employee reaches 33 years of age.</li> </ul>	<ul style="list-style-type: none"> <li>Four weeks.</li> </ul>

	Romania (continued)	Slovakia (continued)	Slovenia (continued)
<b>Maternity and Family Leave Entitlement</b>	<ul style="list-style-type: none"> <li>126 days' maternity leave.</li> <li>Pay: 85% of average income up to a ceiling of 12 months' minimum salary i.e. RON 8,400 (approx. € 1,860) payable by social security.</li> <li>5 or 15 days' paid family leave for birth of a child, depending on attendance of child raising courses.</li> <li>Childcare leave until the child is one or two years old (or three for children with disabilities), at the parent's election.</li> <li>Pay: 75% of the average income but not less than a monthly statutory pay of RON 600 (approximately €133) and not more than RON 3,400 (approximately €755) for childcare leaves until the child turns one, and RON 1,200 (approximately €270) for childcare leaves until the child turns two, payable by the state.</li> </ul>	<ul style="list-style-type: none"> <li>34 weeks' normal maternity/paternity leave (but only one parent eligible).</li> <li>37 weeks' maternity leave if single parent.</li> <li>43 weeks' maternity leave if multiple births.</li> <li>Payments provided by state Social Insurance Company from sickness insurance funds.</li> <li>Unpaid parental leave until the child is three years old, parental leave is funded by the state.</li> </ul>	<ul style="list-style-type: none"> <li>105 days' maternity leave to begin 28 days before the expected date of childbirth at the latest.</li> <li>After maternity leave a further 260 days' parental leave to be taken by either parent.</li> <li>All maternity, paternity and parental leave pay borne by social security.</li> <li>Paternity leave: 15 days to be taken within 6 months of childbirth and 75 days to be taken before the child's third birthday.</li> </ul>
<b>Minimum Notice by Employer and Termination Payments</b>	<ul style="list-style-type: none"> <li>20 business days' notice.</li> <li>No legal termination payment.</li> </ul>	<ul style="list-style-type: none"> <li>One month's notice in general.</li> <li>Two months' notice from employer if employed for at least one year and less than five years.</li> <li>Three months' notice from employer for termination due to organisational reasons or employee's inability to perform work on health grounds if employed for at least five years.</li> <li>Compensation equal to salary otherwise payable for the duration of court proceedings up to 36 months where dismissal in breach of Labour Code.</li> <li>Statutory severance payment for termination due to organisational reasons or employee's inability to perform the work on health grounds ranging from at least the average monthly earnings to at least five times the average monthly earnings depending on the length of the employment.</li> <li>Statutory severance payment for termination due to occupational accident or disease (or a threat thereof), overexposure to a dangerous environment of at least 10 times the average monthly earnings.</li> </ul>	<ul style="list-style-type: none"> <li>30 - 120 days' notice depending on ground for termination and length of service.</li> <li>Severance pay of between 1/5<sup>th</sup> and 1/3<sup>rd</sup> of a month's salary in each case capped at 10 months' salary according to length of service.</li> </ul>

	Spain	Sweden	UK
<b>Minimum Wage</b>	<ul style="list-style-type: none"> <li>■ €641.40 per month.</li> </ul>	<ul style="list-style-type: none"> <li>■ No statutory minimum wage: wage rates often regulated by collective agreement.</li> </ul>	<ul style="list-style-type: none"> <li>■ Statutory minimum wage: £6.19 per hour (from October 2012) for adults, £4.98 (from October 2012) for young people aged 18 to 20, and £3.68 for 16 and 17 year olds (from October 2012).</li> </ul>
<b>Maximum Weekly Hours</b>	<ul style="list-style-type: none"> <li>■ 40 hours averaged on annual basis.</li> <li>■ Often reduced by CBAs.</li> </ul>	<ul style="list-style-type: none"> <li>■ 40 hours - may be reduced by collective agreement.</li> <li>■ Average weekly working hours in total (including overtime) may not exceed 48 hours during any four month period or 50 hours per calendar month, with an annual limit of 200 hours general overtime per year.</li> </ul>	<ul style="list-style-type: none"> <li>■ 48 hours per week averaged over 17 weeks.</li> </ul>
<b>Holiday Entitlement**</b>	<ul style="list-style-type: none"> <li>■ 30 calendar days.</li> </ul>	<ul style="list-style-type: none"> <li>■ Minimum 25 days.</li> </ul>	<ul style="list-style-type: none"> <li>■ 5.6 weeks (28 days).</li> </ul>
<b>Maternity and Family Leave Entitlement</b>	<ul style="list-style-type: none"> <li>■ 16 weeks' maternity leave (18 weeks' leave if more than one child is born). The same leave applies to adoption.</li> <li>■ Pay: 100% of reference contribution base provided by the Social Security System during maternity leave.</li> <li>■ Two days' paid leave for child's birth and for death, accident, critical illness, hospitalisation, or surgical intervention without hospitalisation of a close relative. (If it requires a journey the paid leave is four days).</li> <li>■ 13 days of paternity leave (plus two extra days per additional child born).</li> </ul>	<ul style="list-style-type: none"> <li>■ 60 days maternity leave before birth.</li> <li>■ 480 days' paid parental leave (pre-birth maternity leave included). The benefit which is paid by the Social Insurance Office may be drawn at any time until the child reaches the age of eight or completes the first class of school.</li> <li>■ Pay is 80% of ordinary salary as per rules of National Social Security System for 390 days (up to a certain cap), plus SEK 180 per day for 90 days.</li> <li>■ Different rules apply if the child was born before 1 January 2002 or before 1 July 2006 respectively.</li> </ul>	<ul style="list-style-type: none"> <li>■ One year's maternity leave.</li> <li>■ Statutory Maternity Pay for 39 weeks.</li> <li>■ 13 weeks' unpaid parental leave (rising to 18 weeks from March 2013).</li> <li>■ Two weeks' paid paternity leave at basic SMP rate.</li> <li>■ Adoption leave of between 26 weeks and one year.</li> <li>■ Until 2015 - 6 months' additional paternity leave (up to three months' at basic SMP rate).</li> </ul>

Minimum Notice by Employer and Termination Payments	Spain (continued)	Sweden (continued)	UK (continued)
	<ul style="list-style-type: none"> <li>■ 15 days' notice for objective dismissal.</li> <li>■ Unfair dismissal: 45 days' salary per year of service up to 42 months' salary for the period of services rendered between the commencement date and 11 February 2012 and 33 days' salary per year of service up to 24 months' for the period of services from 12 February 2012 onwards.</li> <li>■ 20 days' salary per year of service up to 12 months' salary (fair objective dismissal).</li> <li>■ Upon termination of a temporary contract a severance payment of eight days' salary per year of service. This will increase progressively: nine days' pay for contracts entered into after 1 January 2012; 10 days' pay for contracts entered into after 1 January 2013; 11 days' pay for contracts entered into after 1 January 2014 and 12 days' pay for contracts entered into after 1 January 2015.</li> </ul>	<ul style="list-style-type: none"> <li>■ One to six months' notice depending on the employee's length of service or age (the latter, if the employee was employed prior to 1 January 1997). Longer notice period may be stipulated in collective agreements or the individual employment contract.</li> <li>■ Full pay and other benefits throughout notice period.</li> <li>■ No statutory severance pay.</li> </ul>	<ul style="list-style-type: none"> <li>■ One to 12 weeks' notice depending on length of service.</li> <li>■ Statutory redundancy payment (if redundancy) up to a maximum of £13,500 depending on length of service (from 1 February 2013).</li> <li>■ Compensation for unfair dismissal combined maximum of £87,700 plus annual indexation (from 1 February 2013).</li> </ul>

\* Provided by the state and by the employer by law and/or collective agreement

Note: the contents of this table provide a broad overview only, for greater detail please see the relevant section of the Guide

\*\* Exclusive of public or religious holidays

# Contacts

This publication has been prepared with the assistance of lawyers in each of the 27 Member States of the European Union.

This publication and its companion booklet *Employee Share Plans in Europe* read together, provide an introduction to employee benefits and employment law in each Member State. Copies of *Employee Share Plans in Europe* are available from Clifford Chance's Publications Unit in London.

This publication has been prepared by the Employment Unit of Clifford Chance in London with assistance from lawyers in other European offices of Clifford Chance and contacts in other law firms in Europe. The principal Clifford Chance contributors were:

- Tania Stevenson (editor) (London) –  
Tel: +44 207006 8938. Email:  
Tania.Stevenson@CliffordChance.com
- Sara Schermerhorn (Amsterdam) –  
Tel: +31 20711 9332. Email:  
Sara.Schermerhorn@CliffordChance.com
- Xavier Remy and Gert Cuppens (Brussels) – Tel: +32 2 533 5911.  
Email:  
Xavier.Remy@CliffordChance.com /  
Gert.Cuppens@CliffordChance.com
- Nicole Engesser Means (Frankfurt) –  
Tel: +49 697199 3163. Email:  
Nicole.EngesserMeans@CliffordChance.com
- Albert Moro and Isabelle Comhaire (Luxembourg) – Tel: +352 48 50 50 1.  
Email:  
Albert.Moro@CliffordChance.com /  
Isabelle.Comhaire@CliffordChance.com
- Juan Calvente and Jorge Martin-Fernandez (Madrid) – Tel: +34 91 590 75 00. Email:  
Juan.Calvente@CliffordChance.com /  
Jorge.Martin-Fernandez@CliffordChance.com
- Simonetta Candela and Marina Mobiglia (Milan) – Tel: +39 02 806 341.  
Email:  
Simonetta.Candela@CliffordChance.com /  
Marina.Mobiglia@CliffordChance.com
- Christian Lacheze (Paris) –  
Tel: +33 14405 5337. Email:  
Christian.Lacheze@CliffordChance.com
- Janka Brezaniova (Prague) –  
Tel: +420 22255 5250. Email:  
Janka.Brezaniova@CliffordChance.com
- Stanislav Holec (Prague for his contribution in respect of the Slovak Republic) -  
Tel: +420 22255 5251. Email:  
Stanislav.Holec@CliffordChance.com
- Anna Halas (Warsaw) -  
Tel: +48 22429 9512. Email:  
Anna.Halas@cliffordchance.com
- Dr Martin Huger/Hans Laimer -  
Schönherr Rechtsanwälte GmbH  
Attorneys at Law, Tuchlauben 17,  
A-1010 Vienna, POB 41, Austria.  
Tel: +43 1 534 37-384.  
Fax: +43 1 534 37 64082. Email:  
m.huger@schoenherr.at. Web:  
www.schoenherr.at
- Sergey Penev/Svetla Ivanova - Penev  
LLP, 19A Patriarch Evtimii Blvd, 1142  
Sofia, Bulgaria.  
Tel: +359 2/930 0970, 988 8036.  
Fax: +359 2 930 0978.  
Email: siranova@penev.eu.  
Web: http://www.penev.eu
- Xenios L. Xenopoulos & Co, Aluminium  
Tower, 5th Floor, 2 Limassol Avenue  
2003 Nicosia, Cyprus, PO Box  
210036, 1500 Nicosia Cyprus.  
Tel: +357 22 33 69 33.  
Fax: + 357 22 33 69 33.  
Email: chloexen@logos.cy.net.  
Web: www.xenopoulos.com.cy
- Helene Amsinck/Tommy Angermair -  
Kromann Reumert, Sundkrogsgade 5,  
DK-2100 Copenhagen, Denmark.  
Tel: +45 70 12 12 11.  
Fax: +45 70 12 13 11.  
Email: LKN@kromannreumert.com /  
TMA@kromannreumert.com.  
Web: www.kromannreumert.com
- Karin Madisson/Kaia Kuusler -  
Sorainen Law Offices, Pärnu mnt.15,  
10141, Tallinn, Estonia.  
Tel: +372 640 0900.  
Fax: +372 640 0901.  
E-mail: karin.madisson@sorainen.com /  
kaia.kuusler@sorainen.com.  
Web: www.sorainen.com
- Johanna Haltia-Tapio – Hannes  
Snellman Attorneys Ltd, Eteläranta 8,  
FIN 00131, PO Box 333, Helsinki,  
Finland.  
Tel: +358 9 2288 4298.  
Fax: +358 9 2288 4210.  
E-mail: johanna.haltia-  
tapio@hannessnellman.com.  
Web: www.hannessnellman.com
- Betty Smyrniou – Bahas, Gramatidis &  
Partners, 26 Filellinon Street, Athens  
105 58, Greece.  
Tel: +30 210 33 18 170.  
Fax: +30 210 33 18 171.  
E-mail: b.smyrniou@bahagram.com.  
Web: www.bahagram.com
- Richard Lock/Adrienn Piskóti –  
Lakatos, Köves És Társai, 1075  
Budapest Mádach Imré ut 14, Hungary.  
Tel: +361 429 1300.  
Fax: +36 1 429 1390.  
Email: Richard.Lock@lakatoskoves.hu;  
Adrienn.Piskoti@lakatoskoves.hu
- Terence McCrann/Paul Buchanan –  
McCann FitzGerald, Riverside One, Sir  
John Rogerson's Quay, Dublin 2,  
Ireland.  
Tel: +353 1 829 0000.  
Fax: +353 1 829 0010. E-mail:  
Terence.McCrann@mccannfitzgerald.ie

The principal contributors from other law firms in Europe, whose help and assistance we gratefully acknowledge, were:

/ Paul.Buchanan@mccannfitzgerald.ie.  
Web: www.mccannfitzgerald.ie

- Andis Burkevics/Lāsmā Rugāte - Sorainen Law Offices, Kr.Valdemara iela 21, Riga LV 1010, Latvia.  
Tel: +371 67 365 000.  
Fax: +371 67 365 001. E-mail: andis.burkevics@sorainen.com / lasma.rugate@sorainen.com.  
Web: www.sorainen.com
- Algirdas Pekšys/Jurgita Venckutė - Sorainen Law Offices, Jogailos G.4, LT0 1116 Vilnius, Lithuania.  
Tel: +370 526 85040.  
Fax: +370 526 85041.  
E-mail: algirdas.peksys@sorainen.com / jurgita.venckute@sorainen.eu.  
Web: www.sorainen.com
- Matthew Brincat - Ganado & Associates, Advocates; 57 St Christopher Street, Valletta, Malta VLT08.  
Tel: +356 21 247902;  
Fax: +356 21 240550. E-mail: mbrincat@jmganado.com.  
Web: www.jmganado.com
- Sandra Lima Da Silveira – Cuatrecasas Gonçalves Pereira RL, Praça Marquês de Pombal, 2 1250-160 Lisbon, Portugal.  
Tel: +351 21 355 3803.  
Fax: +351 21 354 97 84.  
E-mail: slimasilveira@cuatrecasasgoncalvespereira.com
- Mara Moga Paler - Clifford Chance Badea, Excelsior Center, 28-30 Academieistreet, Sector 1, Bucharest 01006, Romania.  
Tel: +40 (21) 21 66 66 17.  
Fax: +40 (21) 21 66 66 111.  
E-mail: mara.moga-paler@badea.cliffordchance.com
- Dr. Ralf Peschek / Urška Gliha- Wolf Theiss, Bleiweisova 30, 1000 Ljubljana, Slovenia.  
Tel: +386 1 438 00 00.  
Fax: +386 1438 00 25.  
E-mail: rpeschek@wolftheiss.com / urksa.gliha@wolftheiss.com.  
Web: www.wolftheiss.com
- Henric Diefk/Kerstin Kamp-Wigforss – Mannheimer Swartling, Lilla Torget 1, Box 1711, SE-11187, Stockholm, Sweden.  
Tel: +46 8 5950 6391.  
Fax: +46 8 5950 6001.  
E-mail: henric.diefke@msa.se / kka@msa.se.  
Web: www.mannheimerswartling.se

# CLIFFORD CHANCE

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Registered office: 10 Upper Bank Street, London, E14 5JJ.

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