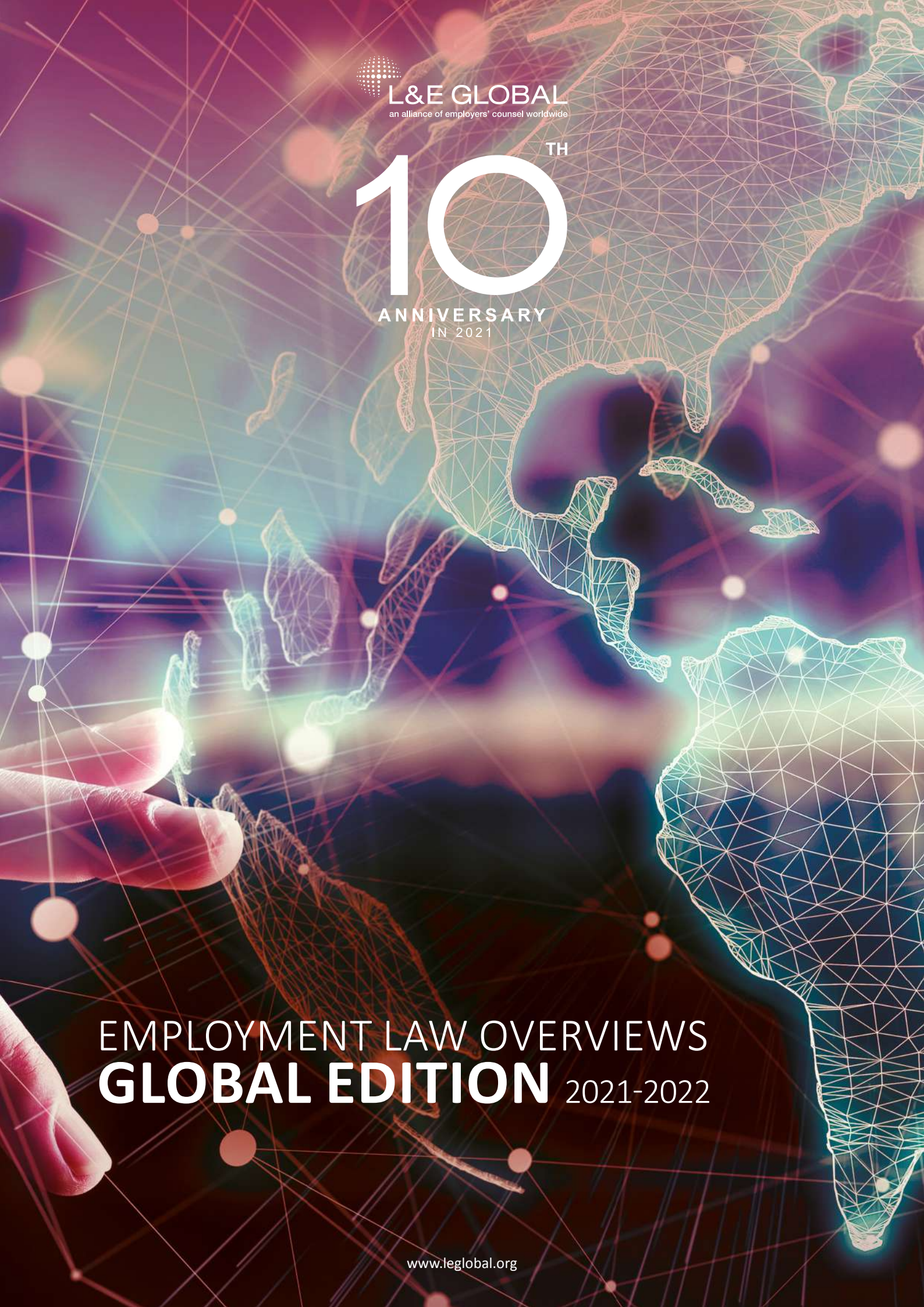
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INTRODUCTION.

L&E Global is proud to present the latest instalment in our popular series of international Employment Law Overviews. L&E Global's Employment Law Overviews are a client's trusted first source for concise, practical information about the rules, regulations and guidelines governing the workplace in a particular country or region. These informative and smartly-designed brochures have become the go-to field guides for corporate, legal and HR decision-makers. And for companies operating in multiple countries, we offer a cross-border compendium –

EMPLOYMENT LAW OVERVIEWS 2021-2022
GLOBAL EDITION

The **ELO 2021-22: Global Edition** outlines the employment law regime across 28 key jurisdictions worldwide. In keeping with the central themes of Pre-Employment, Employment and Post-Employment issues, the Global Edition guide provides invaluable insights into the fundamental, need-to-know labour and employment law principles confronting domestic and international companies.

It is our privilege to provide this resource to you, and we hope you will refer to it often. Please reach out to L&E Global or any of our member firms with any questions you may have. We look forward to speaking with you.

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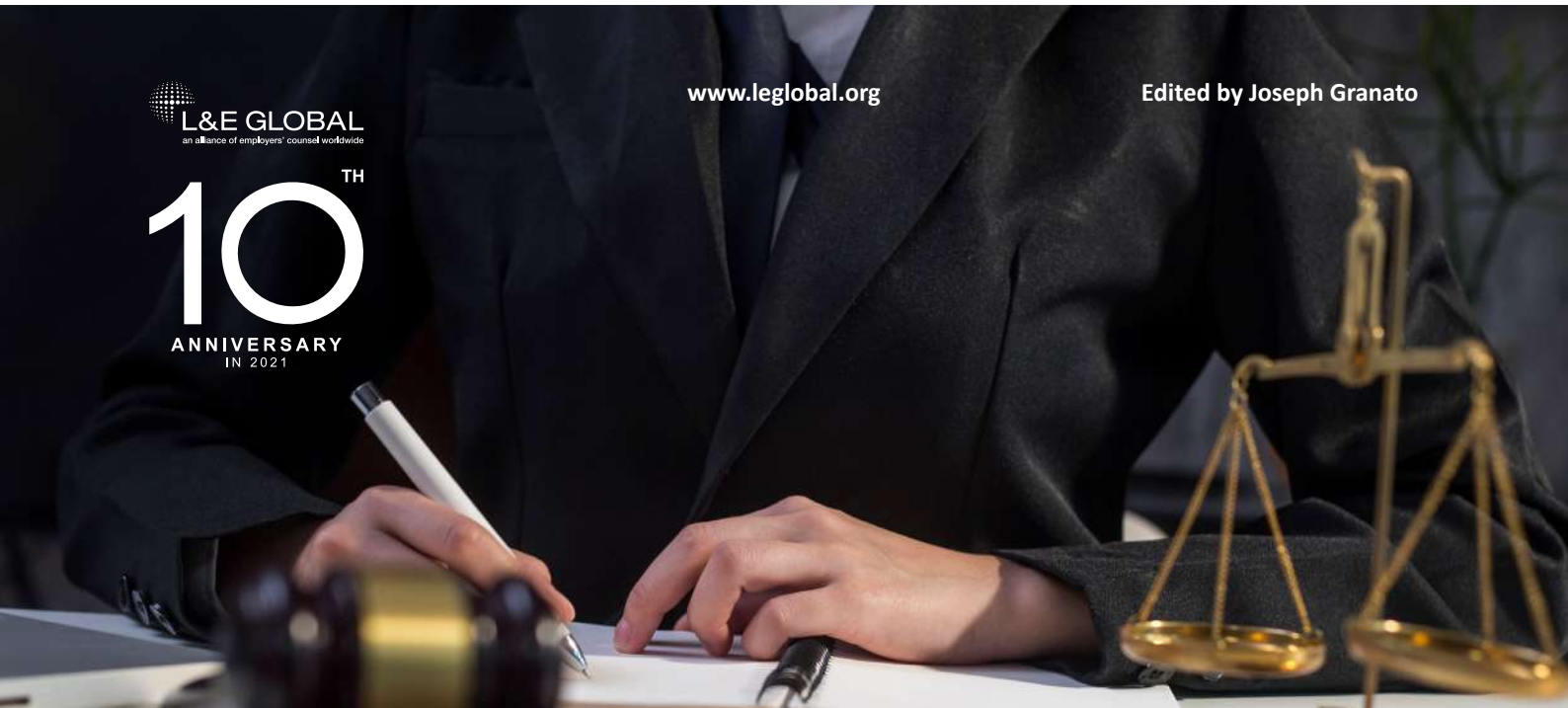

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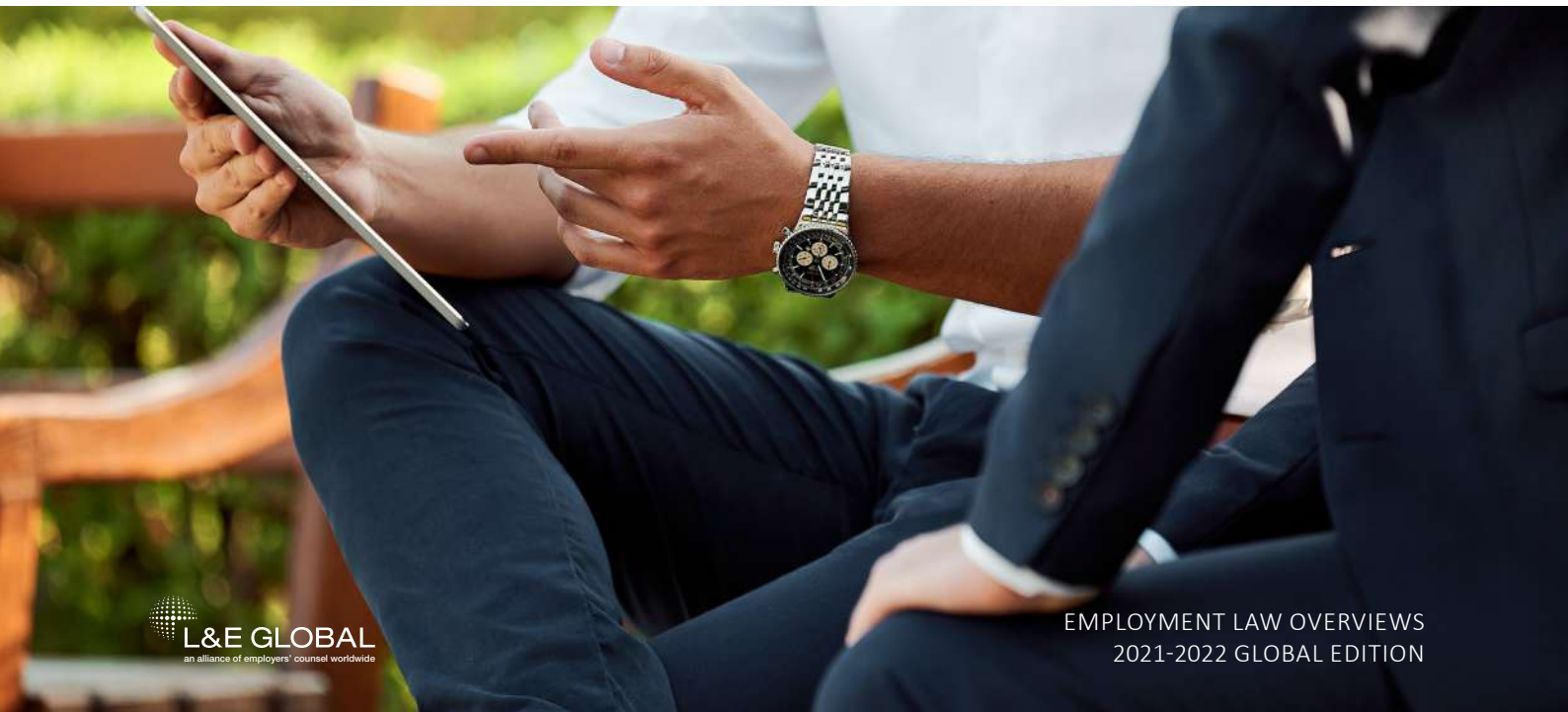

ARGENTINA.

ALLENDE & BREA

I. HIGHLIGHTS

- Argentina's labour laws are pro-employee and have been designed to safeguard the rights of employees and workers, by instituting rules governing working conditions and working hours, providing for payment of salaries during illnesses, setting surcharges on salaries for overtime, establishing annual vacations and requiring the payment of severance compensation in the event of unfair dismissal (dismissal without justified cause).
- Labour law in Argentina is comprised of public order provisions and thus cannot be ruled out, or waived by any agreement, applicable law or jurisdictional clauses subsequently included in any agreements. Accordingly, Argentina's labour laws will apply – and the labour courts will have jurisdiction – with respect to any eventual labour claim filed with the courts related to work performed in Argentina.
- Employees are entitled to a 13th salary or statutory annual bonus, called "aguinaldo" or "sueldo annual complementario/SAC", which is payable in two semi-annual installments, to be paid on 30 June and 18 December. Each installment is equal to 50% of the highest monthly salary accrued during the corresponding semester.
- Employers must pay a compulsory life insurance for all employees.
- The employer can only change the terms and conditions of employment, provided that those changes are not unreasonable and do not either: i) modify the essential terms of the employment contract; or ii) cause moral or material damage to the employee.

II. INTRODUCTION

Argentina's labour laws are remarkably comprehensive and regulate virtually all the terms and conditions of the employment relationship. Labour laws are public policy and are therefore mandatory. The employer is obligated to grant employees at least what is afforded to them under labour legislation. Hence, an employer can extend benefits on top of the standard provisions, but cannot agree to terms that are less favourable or otherwise detrimental to an employee, nor can an employee waive any known right or privilege established for his/her protection or benefit under the law.

III. ISSUES ARISING UPON HIRING INDIVIDUALS

PRE-EMPLOYMENT CONSIDERATIONS

Limitations on Background Checks

In Argentina, an employer cannot perform a criminal background check on an employee, either directly by the employer or by the use of a vendor. Only the employee can obtain the criminal background and then provide it to the employer. Also, the Criminal Records Registry will be confidential and may only provide reports to individuals who, by demonstrating the existence of a legitimate interest, request a criminal certification. Moreover, the certificate must be requested by the interested party personally or through his legal representative.

In addition, the Argentine Data Protection Act establishes that personal data referring to criminal records can be processed only by the competent public authorities.

Restrictions on Application/Interview Questions

Employers cannot include restrictions on applications that may entail any discrimination, such as gender, age, political or religious beliefs and/or marital status. Potential employees are not obliged to provide background information due to the fact that it is considered personal private information. The employer is obligated to conduct pre-employment medical examinations to determine if the employee is fit to work and to determine any prior health conditions at the beginning of the labour relationship.

AUTHORISATIONS FOR FOREIGN EMPLOYEES

Requirements for Foreign Employees to Work

There is no restriction regarding the employment of foreigners in Argentina. Requirements differ if the employee´s nationality is from a country of Mercosur or affiliated to Mercosur (Uruguay, Paraguay, Brazil, Argentina, Colombia, Chile, Venezuela, Ecuador, Bolivia and Perú) or other countries. Employees who are not nationals of a country member of the Mercosur, or affiliated to Mercosur, are required to obtain a working visa to work under an employment relationship in Argentina. Employers must first register before a registry of employers that hires foreigners. In order to obtain a working visa, the employee should be registered as an employee of a local company in Argentina. All foreigners have to file a criminal records certificate, dully legalised from the country or countries where they have been living for the last 3 years, as well as from Argentina.

Does a Foreign Employer need to Establish or Work through a Local Entity to Hire an Employee?

A foreign employer needs to establish a local entity to hire an employee, in order to register the employee before the local tax authorities and pay local taxes and social security obligations.

EMPLOYMENT CONTRACTS

Minimum Requirements

Written employment contracts are not required for permanent, full-time employment relationships, because labour laws are mandatory, very comprehensive and rule almost every term of the employment relationship. Labour laws only require the employer to register the employee in the company labour books and before the tax authorities, pay social security and taxes in respect to all salaries payable to the employee, and prepare and deliver to the employee the correspondent salary slips on a monthly basis. Employers must also provide for mandatory life insurance as well as working accident insurance for all employees.

Fixed-term/Open-ended Contracts

For a fixed-term contract: a written employment contract must be executed; it requires an extraordinary need that duly justifies executing a fixed term contract; there is a maximum term of 5 years; once the agreed term ends, the employer must pay a severance compensation equivalent to 50% of a regular one; and a fixed term contract has no trial period, among other requirements. A temporary contract can be used when extraordinary and transitory production demands or requirements are foreseeable, although a specific term for the contract termination cannot be foreseen. The contract will also take place when the relationship begins and ends with the specific job execution or with the specific service for which the employee was hired to execute.

Trial Period

Trial periods can be up to 3 months for indefinite term contracts. Termination during the trial period can be decided without paying any compensation or severance payment liability to the employee (except that a prior notice of 15 days is required and the wages due).

Notice Period

Employers must give a prior written notice to the employee in the event of a termination of employment, absent a justified cause. Such prior notice must be given by the employer: (i) 15 days in advance, if the labour contract is under the trial period; (ii) 1 month in advance, if the employee has served for up to 5 years; and (iii) 2 months in advance, if the employee has served for more than 5 years. Employers have the option to not give such prior notice, in which case it must pay severance compensation in lieu of notice, equal to 15 days' salary, plus one or two monthly salaries, depending on each case. It is customary that employers opt

to pay this compensation instead of giving prior notice.

PAY EQUITY LAWS

Extent of Protection

Section 14 bis of the Argentine National Constitution, provides for the principle of equal salary for equal work. Additionally, Argentina has ratified the Equal Remuneration Convention C. 100 of the International Labour Organisation. The foregoing, in addition to Labour Law No. 20,744 as well as Anti-discrimination Law No. 23,592 and international treaties entered into by Argentina, prohibit discrimination. Notwithstanding the above, different conditions (including salary variations) may be instated by the employer when it is justified by objective parameters (i.e., seniority, job position, responsibilities, tasks and performance).

Remedies

A claim challenging equal pay practices is based on discrimination. In this respect, employees who are discriminated against can assert unequal treatment, claiming payment of salary variances, under the caveat of considering themselves dismissed on a constructive basis, further claiming – i) payment of mandatory severance compensation for dismissal without just cause, severance compensation duplication (if applicable) and fines; or ii) by demanding that the employer cease all discriminatory practices, the employee may be given equal pay – in addition to pursuing moral and material damages, which is possible under either situations.

IV. ISSUES ARISING DURING THE EMPLOYMENT RELATIONSHIP

WORKING CONDITIONS

Minimum Standards

Employees are entitled to a minimum wage that is adjusted from time to time. As from October 2019, the minimum mandatory wage is AR $16,875 (currently equal to US $216.00).

Salary

A minimum wage has been established and is adjusted at intervals. However, said minimum wage is generally exceeded by the basic salaries established in the collective bargaining agreements. Collective bargaining agreements are negotiated by unions with the chambers that represent employers of each industry. The provisions of a particular collective bargaining agreement are mandatory by law and regulated by law. A particular collective bargaining agreement is applicable to all employees working in activities such as industrial, commerce, health and other sectors. In general, employees who work as managers, supervisors or in other hierarchy positions are excluded from the legal framework of the collective bargaining agreement. The consent of the employee is not necessary, since they are automatically included in the collective bargaining agreement just for working in a company under a particular agreement. Collective bargaining agreements usually provide benefits to employees on top of what is provided for under Argentine labour and employment laws.

Health and Safety in the Workplace

Employers are obliged to grant mandatory life insurance and working accident insurance to employees. Employers are also obliged to provide a healthy and safe workplace (both physical and psychological), in compliance with the labour authorities' instructions, as well as the working insurance instructions. Employers in certain industries, must provide employees with work clothes, working tools and protection equipment, and must have preventative measures in place to prevent accidents and perform regular medical examinations.

Considering the exceptional emergency context due to COVID-19, the companies currently operating from their establishments/offices must have in place, a hygiene and safety protocol to ensure that employees are working safely and to minimise the risk of transmitting the virus. Such protocols include, among other issues, the control of access of employees and suppliers, maintaining the distance between employees, defining specific personal protection items (face masks or even clothing, depending on the situation) and having an isolation protocol for suspected or confirmed cases of COVID-19.

Managing COVID-19-Related Employee Issues

Decree 367/2020 provided that the COVID-19 disease shall be presumed to be an occupational disease, in respect of dependent workers excluded by legal dispensation from compliance with the mandatory and preventive social isolation ordered by Decree No. 297/20, and its supplementary regulations, for the purpose of performing essential activities ("essential workers"), while the isolation measure provided for by such regulations is in force, or during any extended periods thereto. Based on the foregoing, Labour Risk Insurance Companies must provide medical assistance (for which purpose a special fund was created) to infected essential workers and will cover their salaries and medical expenses during medical leave. Finally, the Central Medical Commission will evaluate whether the disease was work related. Regarding childcare, employees covered by this dispensation shall: i) notify their employer that these circumstances are applicable to his/her situation; ii) justify the need for such leave; and iii) provide any relevant information which should be taken into consideration by the employer. Only one parent or responsible person per household may use this exemption. As long as the employer provides a safe workplace, employees must return to work once the mandatory isolation period is terminated. In this regard, Section 75 of the Labour Contract Law not only compels employer to provide a safe workplace, but also allows employees to refuse to work onsite, without loss or reduction of remuneration, if an imminent danger exists and/or the employer does not adhere to, or fails to adequately provide for, the necessary safety measures. Section 5 of Resolution 202/2020 of the Ministry of Labour provides that the employer must inform the Ministry of Health about confirmed and suspected cases of COVID-19, in accordance with the employer's obligation to provide a safe workplace in order to protect the health of its employees.

COVID-19: Best Practices

It is highly recommendable that employers implement teleworking policies in writing. In case employees should be required to return to the office after the isolation period has ended, it is also advisable that such policies state clearly, that teleworking is intended to be an arrangement that is temporary in nature and has been adopted as a result of the public health emergency caused by COVID-19, in order to avoid the risk of an employee filing a claim in this respect, when he/she is eventually required by the employer to return to the office. We also encourage employers to explore possibilities to reach agreements on furloughs and terminations with employees and the respective representatives. Per local authorities nationwide, companies should have safety and hygiene protocols in place prior to their employees' returning to work at the company's facilities. We also encourage employers to develop such protocols with the assistance of an expert on matters of safety and hygiene in the workplace.

SOCIAL MEDIA AND DATA PRIVACY

Restrictions in the Workplace

Employers can restrict employees' Internet use and/or social media use during working hours, instructing that it can only be used for labour purposes.

Can the employer monitor, access, review the employee's electronic communications?

Employers can monitor, access and review only labour/corporate employees' electronic communications, provided that the employee is notified in advance (by signing a corporate policy in that respect) that the electronic communications are to be used only for working purposes and can be monitored and therefore, the employee should have no expectation of privacy.

Employee's Use of Social Media to Disparage the Employer or Divulge Confidential Information

Provided that the employees have signed a copy of the company´s policy for the use of social media and provided that employer can prove the employee´s breach and the damage to the employer, employees who do not follow the social media policy can be subject to disciplinary sanctions. Employees who divulge confidential information can also be subject to disciplinary sanctions or dismissed with justified cause, depending on the seriousness of the fault, their seniority and any prior sanctions of the employee.

EMPLOYEE BENEFITS

Social Security

All employees are covered by a national retirement pension scheme, funded through mandatory contributions by both employer and employee. It is paid by the employee through withholdings of their

gross salary and by the employer through fixed contributions, with each calculated as a percentage of the employee´s salary. Employees are eligible for retirement and collect governmental pension when they reach retirement age (65 years for men and 60 years for women) and have made contributions to this system for 30 years. Employers can only compel employees to retire when they reach 70 years old, and have made contributions to this system for 30 years.

Healthcare and Insurances

Healthcare schemes exist for all employees, entitling them to free medical treatment and hospital care. These are funded through employer contributions and employee withholdings, both a percentage of the employee´s salary. Employers must obtain a mandatory insurance that covers the employee's death, illness or disability in connection to work. Employers must secure insurance contracts through authorised insurance companies. Such entities are obliged to provide financial and medical assistance to the injured employees. The employer must also provide mandatory life insurance for his employees, payable by the employer through monthly contributions. Keep in mind that applicable collective bargaining agreements might set forth other additional insurances.

Holidays and Annual Leave

Employees are entitled to an annual paid vacation period. Vacations are compulsory and the employer must grant them between 1 October and 30 April, as follows:

- up to 5 years of service: 14 calendar days
- between 5 and 10 years of service: 21 calendar days
- between 10 and 20 years of service: 28 calendar days
- over 20 years of service: 35 calendar days

The parties may always agree to a longer period than the one provided by law, but may not agree on a shorter period. National holidays must be observed, and the corresponding salary should be paid at twice (2x) the rate, whenever services are actually performed during those days.

Maternity and Paternity Leave

Female employees are entitled to 90 days' paid maternity leave. This is usually taken in the 45 days before giving birth and the 45 days afterwards. However, the employee can instead choose to take 30 days' leave before giving birth and 60 days' leave afterwards. Leave is paid by the social security system as a family allowance. Female employees can request additional unpaid leave between three and six months. While a newborn baby is breastfeeding, a female employee can take two, half-hour periods a day to feed her baby, for up to one year after the birth. Paternity leave is 2 days.

Sickness and Disability Leave

In the event of sickness leave or injury related to work, the employer must pay the employee's salary for the first fifteen days. After the fifteenth day, the working insurance company will pay the sick leave to the employee. In respect to accidents or illnesses not related to work, employees who have served for up to 5 years are entitled to 3 months of paid sick leave. If the employee has a family, the paid sick leave is 6 months. For those employees who have served for more than 5 years, the paid sick leave is 6 months and if the employee has a family, the paid sick leave is 12 months. These paid sick leaves, since they are not related to work, are not covered by any insurance nor by the government, and are paid by the employer. The employer is entitled to require the employee to submit to an examination by a medical doctor, appointed by the employer, to verify that the employee is actually ill and in no condition to work.

Once the paid sick leave term has lapsed, in case the employee is not able to return to work, the employer is obliged to keep the employee on its payroll as in leave, but without paying any salary to him/her for up to twelve more months. If, during that term, the employee is found to have a permanent disability that prevents him from being able to perform the same work, the employer is obliged to give him work in accordance with his disability. If the employer can prove that he is not able to provide the employee with work in accordance with the employee's disability, the employer can terminate the employment by paying 50% of the severance compensation as provided in a dismissal without justified cause, and must pay 100% in case of total permanent disability.

Other Forms of Leave

Argentina's labour laws also provide leaves of absence on the grounds of marriage (10 days), mourning (3 days) or educational examinations (2 days per exam and up to 10 days per year).

Applicable collective bargaining agreements usually provide for other leaves or additional days of leave.

Pensions

Employees are entitled to collect a mandatory pension when they reach retirement age (65 years for men and 60 years for women) and have made contributions to this system for 30 years. Employers can only compel employees to retire when they reach 70 years old, and have made contributions to this system for 30 years. Employees under a collective bargaining agreement for commercial activities, are entitled to a retirement insurance.

V. ISSUES ARISING ON TERMINATION OF THE EMPLOYMENT RELATIONSHIP

TERMINATION OF EMPLOYMENT CONTRACTS

Grounds for Termination

Employers can terminate employment at any time without justified cause, subject to payment of severance compensation provided by labour laws. Employees on a trial period, i.e. during the first three months of employment, are not entitled to severance compensation; exception made to prior notice (15 days). Termination of employment with justified cause does not entail payment of severance compensation. The employer can dismiss an employee with justified cause in the event of the employee's failure to fulfil his obligations which, by their gravity, do not consent to the continuation of the relationship. Labour laws do not list specific breaches that justify dismissal and should be analysed on a case-by-case basis. The employer has the burden of proving the cause of dismissal.

An employee can also resign, in which case, no severance compensation is payable. The employee can consider himself dismissed on a constructive basis due to an employer's breach, the seriousness of which, does not lend itself to the continuation of the relationship, in which case a labour court will decide if the employee had a justified cause for constructive dismissal. Lastly, an employment relationship can terminate due to the fact that the employee retires at the time he/she is granted the governmental pension plan. No severance compensation is payable in that case.

Is Severance Pay Required?

In case of termination of employment without justified cause, the employer must pay the employee mandatory severance compensation, as provided by law, within 4 days after serving notice of termination, as follows:

- Seniority compensation: equivalent to the highest monthly salary for each year of employment or period exceeding 3 months, taking, as a basis, the highest monthly salary and the regular and ordinary salary accrued during the last working year.
- Compensation in lieu of notice: the employer must give a prior written notice to the employee in the event of a termination of employment absent justified cause.
- Pending days till the end of the month: if the dismissal does not take place on the last day of the month, the employer must pay a compensation equal to the proportional salary for the pending days, to complete the entire month in which the dismissal took place.
- Compensation for unused vacations: the employee is entitled to compensation equal to the vacation pay in proportion to the days effectively worked, for the year in which the dismissal took place.
- Statutory Annual Bonus: the employee is entitled to the proportional amount of this 13th salary. The severance compensation is reduced by one half if the labour relationship ends as a result of the employee's death. relationship.

Whistleblower Laws

Argentine criminal laws provide reduction of penalties for whistleblowers in respect to crimes against the public administration (corruption and fraud against public administration) customs, criminal offenses, economic and financial crimes, drug trafficking, terrorism, human trafficking and money laundering, among others. These laws also provide a reduction of penalties to be imposed on companies for crimes committed by their employees or officers, provided that the company has set forth a compliance policy that includes, among others, the company´s protection to whistleblowers against retaliation.

RESTRICTIVE COVENANTS

Definition and Types of Restrictive Covenants

Restrictive Covenants, such as non-compete or non-solicitation of customers, after termination of the labour relationship, must comply with specific requirements to be enforceable. The provision should be limited in time (maximum 2 years), compensation (at least 50% of monthly salary approx.) and the geographical and industry/company's scope must be clearly outlined.

Use and Limitations of Garden Leave

Argentina's labour laws have no specific provision regarding garden leave. Employers cannot force employees to take garden leave (paid leave), since the employer is obliged to give work to the employee. However, the employee can accept the garden leave, in which case the employee must be paid his salary and benefits in full, as if he was working.

TRANSFER OF UNDERTAKINGS

Employees' Rights in Case of a Transfer of Undertaking

In case of a transfer of undertaking, employees are transferred as a matter of law. The consent of the employees is not necessary, and no notice is required. The new employer must maintain the employee's work category, benefits, rights, salaries and seniority acquired with the prior employer, otherwise the terms of employment may be modified, but only for the benefit of the employee. All liabilities of the in-scope employees transfer automatically to the new employer. The employee may consider himself dismissed on a constructive basis, by reason of the transfer, if the terms of employment are changed to the detriment of the employee or he suffers any damage due to the transfer. In case the assignment of personnel does not entail a transfer of undertaking, the employee must give his prior written consent and the new employer must maintain the employee's working conditions. All liabilities of the in-scope employees transfer automatically to the new employer, as in the transfer of undertaking.

Requirements for Predecessor and Successor Parties

The prior employer will be jointly liable with the new employer for any labour and social security debts arising out of the employment relationship, prior to the date of transfer. The new employer becomes solely liable for those debts generated after the transfer. There is no legal obligation to inform, consult or obtain the authorisation of trade union/employee representatives or labour authorities.

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AUSTRALIA.

HARMERS WORKPLACE LAWYERS

I. HIGHLIGHTS

Employee rights in Australia are protected and regulated in the following ways:

- The most basic source of employment terms and conditions derives from the employment contract. The contract will contain express terms, and in Australia the courts have recognised some standard terms which will be implied into the contract of employment.
- The Fair Work Act 2009 (Cth) outlines minimum employment standards, including leave, maximum weekly hours, notice of termination and redundancy pay.
- Modern Awards set out the minimum conditions of employment for specific industries or occupations, such as rates of pay and allowances.
- Federal and State anti-discrimination legislation affords employees with rights against discrimination, harassment, vilification and victimisation.
- Federal and State work health and safety legislation applies to reduce the occurrence of work-related death, injury and illness.
- State based workers' compensation legislation provides for compulsory basic insurance of employees who are injured at work.
- Superannuation Guarantee legislation requires employers to pay contributions to an approved superannuation fund for their employees.

II. INTRODUCTION

The Australian Constitution has had a major impact on labour regulation in Australia. For much of the 20th Century, there was a significant division of responsibility for labour matters between the Federal Government and the six States and two Territories. However, following the 2005 WorkChoices reforms, the responsibility for labour matters has shifted predominantly to Federal regulation. The Fair Work Act 2009 (Cth) is the primary legislative source of employment regulation in Australia; it contains employment standards and conditions, union regulation and anti-discrimination protection. Also, model laws were enacted to harmonise work health and safety legislation across Australia, to reduce the incidence of work-related death, injury and illness.

III. ISSUES ARISING UPON HIRING INDIVIDUALS

PRE-EMPLOYMENT CONSIDERATIONS

Limitations on Background Checks

In Australia, there is no express prohibition on an employer conducting pre-employment checks. There are, however, two broad qualifications to this general position. The first is that the employer will generally need the consent of the job candidate concerned to perform the relevant pre-employment checks. However, provided the purpose of the check is to objectively evaluate the candidate's qualifications and ability to perform the role, the candidate should provide his or her consent. The second qualification is that the employer will need to be wary of how it uses the information acquired from the relevant pre-employment checks. There

is express protection for employees who believe they have been discriminated against based on their criminal history in Tasmania and the Northern Territory.

Restrictions on Application/Interview Questions
Under the Fair Work Act 2009 (Cth), Australian Human Rights Commission Act 1986 (Cth), and the State and Federal legislation dealing with sex, age, race and disability discrimination, recruiters and employers are prohibited from a range of discriminatory behaviour during the application and interview process, in relation to prospective employment. Job descriptions and advertisements must avoid using discriminatory language and avoid references to personal characteristics – such as age, race or sex – unless they are part of the genuine requirements of the job.

AUTHORISATIONS FOR FOREIGN EMPLOYEES

Requirements for Foreign Employees to Work
In order to legally work in Australia, a foreign employee must have a permanent or valid long-stay visa to work. All foreign workers are guaranteed the conditions of the NES in their employment, and employers of foreign workers must abide by both workplace and immigration laws in their dealings. There are a variety of ways in which Australian businesses can employ workers from non-Australian jurisdictions, but all require the employee to be the holder of one or other of a series of visas (there are exceptions for Australian Citizens, New Zealand citizens and Australian permanent residents, who have unlimited permission to work in Australia). Note that this area of law is complex and subject to regular change, and so while expert advice should always be sought, it is strongly suggested that any business contemplating employing non-Australian citizens in Australia should obtain current expert advice before taking any steps. In very brief terms, an outside worker will require a valid visa. Visas come in a variety of forms, some permanent and some temporary. There are penalties applying to employers who breach the immigration laws (including in relevant cases, imprisonment and substantial fines).

Does a Foreign Employer need to Establish or Work through a Local Entity to Hire an Employee?
It is not necessary for foreign employers to establish or work through a local entity in order to hire an Australian employee. However, under the Fair Work Act 2009 (Cth) a foreign corporation formed outside of Australia is a national system employer and is bound to observe the Fair Work Act 2009 (Cth) in relation to employees who perform work in Australia. As a result, they have a responsibility to comply with the Fair Work Act 2009 (Cth) in relation to their Australian employees. Foreign employers will also be required to provide the employee with a contract specifying their employment terms and conditions, as well as superannuation and "pay as you go" (PAYG) withholding tax payable to the Australian Taxation Office.

EMPLOYMENT CONTRACTS

Minimum Requirements
The most basic source of employment terms and conditions is the contract of employment. It can be in writing, for example, by letter of offer; it can be oral; or it can be evidenced by a course of conduct. A contractual term may not be enforceable if the terms in the contract are less favourable to an employee than the terms prescribed by legislation, awards, or other industrial instruments. Employment contracts in Australia are formed using the general principles of contract law. The question of whether a person who performs work for another is an employee as opposed to an independent contractor has significant implications for the nature of the obligations which exist between the parties. Australian courts will, in difficult cases, examine the entire relationship.

Fixed-term/Open-ended Contracts
Employees employed under a fixed term or fixed task contract are not afforded all of the protections provided by the Fair Work Act 2009 (Cth). Although they are generally entitled to the same wages, penalties and leave as permanent employees, as employees who are employed "for a specified period of time" they are not entitled to notice periods and are generally, but not always, excluded from the unfair dismissal provisions of the Fair Work Act 2009 (Cth). For example, a teacher, who had been engaged under a series of fixed-term contracts for several years, was eligible for protection from unfair dismissal.

Trial Period
The Fair Work Act 2009 (Cth) does not refer to

probation periods. However, an employee must have worked for the employer for at least six months before he or she is entitled to make a claim for unfair dismissal, and 12 months if the employer is a small business. An employment contract can include a probation period exceeding this period, provided it is reasonable. However, an extended probation period does not affect the employee's statutory entitlements to protections from unfair dismissal and the contract should clearly specify the period of probation and how and when performance is to be reviewed.

Notice Period

If an employee's continuing service has been less than one year, one week of notice is sufficient. If the employee has worked between one and three years, two weeks' notice is required. Three weeks' notice is required if the employer has worked between three and five years, and four weeks is required if the employer has worked more than five years. If an employee is over 45 years of age and has completed at least two years' continuous service with the employer, an additional week of notice must be given. Contractual notice periods in excess of the legislative requirements are very common in Australia, with four weeks being the most common notice period for ordinary workers. Despite the minimum notice periods, employees who have no notice period specified in their contract of employment may be entitled to what is called in Australia 'a reasonable period of notice'. This 'reasonable period of notice' may be well in excess of four weeks for employees with long periods of service and where equivalent jobs are in short supply.

PAY EQUITY LAWS

Extent of Protection

Discrimination in compensation or benefits is prohibited under federal, state and territory legislation. For example, it is unlawful for an employer to discriminate on the grounds of sex relating to the terms and conditions of employment provided to employees, which relevantly includes, but is not limited to, employees' pay and related benefits in their employment. Furthermore, the Workplace Gender Equality Agency ("WGEA") collects information regarding identified "gender equality indicators" from all non-public sector employers with 100 or more employees in their corporate structure, relating to: gender composition of the workforce; gender composition of governing bodies of relevant employers; equal remuneration between women and men; availability and utility of employment terms, conditions and practices relating to flexible working arrangements for employees and to working arrangements supporting employees with family or caring responsibilities; and consultation with employees on issues concerning gender equality in the workplace. The Fair Work Commission is empowered to make equal remuneration orders, requiring that certain employees be provided equal remuneration for work of equal or comparable value.

Remedies

Employees covered by workplace and anti-discrimination laws are entitled to lodge complaints with the relevant body in respect of any unlawful discrimination to which they are subjected. Should the relevant body fail to resolve the complaint by investigation or conciliation, the employee will, then, generally be entitled to proceed to have their complaint determined, either in court or in a tribunal. Should the Court or tribunal find that the employer has engaged in unlawful discrimination, the Court or tribunal may generally make "such orders as it thinks fit", including, for example: an order declaring the employer has committed unlawful discrimination and directing the employer not to repeat or continue such unlawful discrimination; an order requiring the employer to perform any reasonable act to redress any loss suffered by an applicant, which can include an apology and undertaking to train the workforce on gender equality; and an order requiring the employer to pay damages, including damages for past economic loss, future economic loss, and damages for "hurt, distress and humiliation", suffered by the employee.

IV. ISSUES ARISING DURING THE EMPLOYMENT RELATIONSHIP

WORKING CONDITIONS

Minimum Standards

The minimum conditions established by law are as

follows: maximum weekly hours of work; requests for flexible working arrangements; parental leave and related entitlements; unpaid family and domestic violence leave; annual leave; personal / carer's leave and compassionate leave; community service leave; long service leave; public holidays; notice of termination and redundancy pay; and the Fair Work Information Statement.

Salary

The current national minimum wage in Australia is $19.84 per hour or $753.80 per 38-hour week, effective from 1 July 2020. Modern Award wages also increased by 1.75% from 1 July 2020 within certain industries, and will increase by 1.75% for all other industries on either of 1 November 2020 or 1 February 2021. All Australian employers must also pay superannuation. Employers pay a percentage of the ordinary time earnings of their employees (including part-time and casual employees) who are aged over 18, and who are generally paid at least $450 (before tax) a month, into a complying superannuation fund or retirement savings account. The current Superannuation Guarantee rate is at 9.5% for the 2019/2020 financial year. Under current legislation the rate will remain at 9.5% until 30 June 2021, and will then increase to 10% from 1 July 2021, and then increase by 0.5% increments each year until it reaches 12% by 1 July 2025.

Health and Safety in the Workplace

The primary duty is to ensure, so far as is reasonably practicable, the health and safety of workers while the workers are at work in the business or undertaking. The primary duty is also to ensure, so far as is reasonably practicable, that the health and safety of other persons is not put at risk from work carried out as part of the conduct of the business or undertaking. Officers have a duty to exercise due diligence to ensure that the person conducting the business or undertaking complies with its duties or obligations. Workers and other persons at the workplace have the duty to take reasonable care for their own health and safety and the health and safety of others from their own actions, and to cooperate with persons conducting the business or undertaking to comply with the laws.

Managing COVID-19-Related Employee Issues

On JobKeeper: As part of the Australian Government's JobKeeper scheme, a qualifying employer can: i) request an eligible employee to take paid annual leave (as long as they keep a balance of at least 2 weeks); ii) agree in writing with an eligible employee for them to take annual leave at half pay for twice the length of time.

Sick leave: as paid sick leave covers only situations where an employee has illness, including COVID-19, employees cannot take sick leave for compulsory or voluntary self-isolation if they are not sick with any illness or injury. They can take sick leave in these occasions if they are sick with illness or injury.

Compulsory or voluntary self-isolation: employees must use their annual leave entitlements or take unpaid leave if they do not have annual leave available. This covers employees who are not sick and required to self-isolate because they have come into contact with a case of COVID-19 or have returned from overseas.

Childcare: employees can use paid carers leave to take care of children if schools or childcare centres close, or if their child is sick. i) if an employee is on Parental Leave Pay, and their employer cannot continue to afford to pay them because of the impact of COVID-19, the employee can apply to the Government to receive their Parental Leave Pay. ii) Notably, from 6 April 2020, the Australian Government implemented the Early Childhood Education and Care Relief Package. This means that between the period 6 April 2020 to 12 July 2020, families have not been charged fees for early childhood education and care. This has lessened the need to take childcare leave for employees.

Employers should first and foremost develop a COVID-19 plan. This means adhering to the four-square-metre rule and compliance with other WHS laws. Any employee who refuses a lawful and reasonable direction to return to work is in breach of an implied term of employment. A direction will be considered 'lawful' if it does not involve illegality, and falls within the scope of the employee's employment. Notably, a direction could be construed as unlawful if it would create risks to WHS. Thus, it is crucial for employers to develop and follow a COVID-19 Safe plan. Whether a direction will be considered reasonable is based on the express and implied terms of the contract, nature of employment, established custom and relevant instruments. It may be considered reasonable in some instances to give a direction to go back to work, such as those roles that need

physical presence (such as hospitality staff), but not reasonable in others (in white collar professional roles where work can be easily performed from home). If an employer refuses a lawful and reasonable direction, it may provide a valid reason for dismissal of the employee under the Fair Work Act 2009 (Cth). An employer can also discipline an employee or decide to take no action. Alternatively, employers can direct employees to use their paid and unpaid leave entitlements.

Safe Work Australia has outlined the Steps an employer must take when responding to an incident of COVID-19 in the workplace, which are as follows: isolate the person; seek advice and assess the risks; ensure the person has transport home, to a location they can isolate, or to a medical facility if necessary; identify and tell close contacts while maintaining the privacy of all individuals involved; and review risk management controls. If an employee is infected with COVID-19, employers are directed to call their state or territory helpline and follow the advice of public health officials. For assessing the risk to the workplace, workers and others, employers should ensure they have the current contact details for the infected person and make a note about the areas they have been in the workplace, who they have been in close contact with and for how long.

COVID-19: Best Practices
Employers should:

- Obtain legal advice as soon as possible and if necessary, financial advice.
- Review contracts of employment, industrial instruments, and statutory obligations, as well as any policies or documents such as handbooks to ensure compliance.
- Ensure they consult with employees about change (including consultation with unions where applicable).
- Ensure compliance with Work Health and Safety obligations.
- Ensure compliance with any public health orders or regulations.
- Implement any changes necessary to ensure compliance and safety as identified.
- Ensure proper support for employees, including assistance programs generally, counselling, financial advice, health advice etc. as appropriate to the workforce.

SOCIAL MEDIA AND DATA PRIVACY

Restrictions in the Workplace
The obligations of employers with respect to privacy are found within various federal, state and territory laws. In some respects, the law differs between the states and territories.

Can the employer monitor, access, review the employee's electronic communications?
The general position is that an employer can monitor its employees' usage of work computers (in some states legislation requires specific notices and warnings to employees before allowing computer monitoring) and restrict the use of the Internet and social media during work hours. In certain circumstances, an employer may also be able to monitor its employees' conduct on social media outside of work hours and rely on that conduct when considering appropriate disciplinary action. However, it is important for employers to implement a thorough and clear Internet and Social Media Policy if it intends to monitor, restrict, access and review employee usage.

Employee's Use of Social Media to Disparage the Employer or Divulge Confidential Information
The ability of an employer to take disciplinary action based on Internet usage and conduct on social media is typically addressed in the contract of employment, however, it is best for an employer to also have a detailed policy which deals with these matters so that employees are made aware of the employer's expectations. This should include the employer's expectations around internet and social media use, both during and outside of work hours. This becomes particularly important if an employee uses the Internet or social media to disparage the employer, or divulge its confidential information, and the employer wishes to rely on that conduct in taking disciplinary action. There are, however, limitations on the extent to which an employee's conduct on social media could provide a valid reason for their termination. This will depend, in part, on the nature of the comments and statements made and the width of their publication.

EMPLOYEE BENEFITS

Social Security
Social security refers to welfare payments provided by the Australian Federal Government. These

payments generally fall under one of four pieces of legislation:

- Social Security Act 1991 (Cth) ("the SSA") provides for payment to eligible people, certain pensions, benefits and allowances, such as the age pension, unemployment, carer allowance and payment, and disability pension.
- New Tax System (Family Assistance) Act 1999 (Cth) provides for family tax benefits, maternity allowances and childcare benefits.
- Student Assistance Act 1973 (Cth) provides for allowances and benefits for eligible groups of students and apprentices.
- Paid Parental Leave Act 2010 (Cth) provides financial support to eligible working parents of newborn or recently adopted children.

The current Superannuation Guarantee rate is at 9.5% for the 2019/2020 financial year; the rate will remain at 9.5% until 30 June 2021; it will increase to 10% from 1 July 2021 and then increase by 0.5% increments each year until it reaches 12% by 1 July 2025. Employees can choose to make extra voluntary contributions to their superannuation funds and receive tax benefits for doing so. If individuals contribute more than the cap, they must pay the superannuation excess concessional contributions tax, which is set at 31.5%.

Healthcare and Insurances

Employers are not obliged to provide health insurance for employees in Australia.

Holidays and Annual Leave

The NES entitles employees to be absent on certain public holidays and also preserves the right of an employer to make a reasonable request that an employee work on a holiday, as well as the employee's right to refuse upon reasonable grounds. Under the NES, full-time employees are entitled to four weeks of paid annual leave (calculated by reference to the employee's base rate of pay) and part-time employees to a pro-rata amount. Certain shift workers are entitled to five weeks of paid annual leave. Annual leave accrues over a year according to the employee's ordinary hours of work (i.e. the hours set out in the relevant modern award or enterprise agreement). If the period during which an employee takes annual leave includes a public holiday, a period of another kind of leave (including sick leave, personal leave or community service leave, but not unpaid parental leave), that holiday or period of other leave is not counted as annual leave and therefore, if an employee falls ill during a period of annual leave, for the period that he qualifies for sick leave, he will have that amount of annual leave credited, and sick leave debited.

Maternity and Parental Leave

Unpaid leave is provided for parents who are giving birth to, or are adopting, a child; up to 12 months' unpaid leave (or 24 months with the employer's consent) for employees with a minimum of 12 months continuous service. Firstly, some employers will have their own paid leave scheme, where longer serving employees will be granted paid leave for a period (usually, this is for a short period and not for the entire period of leave). This type of entitlement is purely contractual: in the absence of any agreement, there is no right to such leave. Secondly, government funded leave provides financial support to eligible working parents of newborn or recently adopted children. Paid parental leave is paid to the child's primary carer for up to 18 weeks of pay based on the rate of the national minimum wage. Eligible working fathers and partners (including same-sex partners) also get 2 weeks leave paid at the national minimum wage. Both parents may take separate periods of 12 months' parental leave, including up to eight weeks of leave taken concurrently; these provisions have been extended to apply to same-sex couples.

Sickness and Disability Leave

Permanent employees are entitled to accrue 10 days of paid personal/carer's leave per year, and 2 days of compassionate leave per year (to spend time with a member of their immediate family or household who has sustained a life-threatening illness or injury, or after a death of a member of the employee's immediate family or household). The term 'personal/carer's leave' effectively covers both sick leave and carer's leave. Australian law also entitles casual employees to 2 days of unpaid carer's leave and 2 days of unpaid compassionate leave, but not personal or sick leave.

Meanwhile, disability leave is not applicable in Australia. An employee's entitlement accrues over each year of employment according to the number of ordinary hours worked; continues to accrue when an employee takes leave; and accumulates from year to year. In 2020, the High Court of Australia (by majority) clarified how personal/carer's leave

accrues to permanent part-time employees who worked irregular and longer hours. The Court explained that a person employed to work 36 hours per week, over three 12-hour shifts, would accrue 72 hours of personal/carer's leave over the course of a single year (being the product of 36 hours and 52 weeks, divided by 26), and rejected the proposition that such a person would be able to accrue 120 hours of leave over the course of a single year (being the product of 12 hours and 10 days). For all periods of personal/carer's leave or compassionate leave, an employee must give his or her employer notice. The employer is entitled to request evidence to prove the reason for the leave and a failure to provide this will cause the employee to lose his entitlement to the leave. As with parental leave, paid personal and carer's leave provisions stipulate that awards and agreements may include terms regarding the cashing out of such leave; any cashing out terms however, must require that the employee be left with a balance of at least 15 days' accrued leave after the cashing out. As with annual leave, the cashing out arrangement must be included in a separate written agreement.

Other Forms of Leave

Community Service Leave: employees are entitled to be absent from work for three main reasons (termed "eligible community service activities"): jury service; a "voluntary emergency management activity"; and any other activity in the nature of community service that the regulations prescribe. Long Service Leave: the NES does not specifically provide for a long service leave entitlement; it merely provides that an employee is entitled to long service leave as stipulated in the applicable, pre-modernised award. In cases where there is no applicable award, an employee's entitlement will be derived from state and territory legislation, except where an industrial instrument modifies or excludes the legislative provisions. Domestic Violence Leave: all employees, including part-time and casual, who are experiencing family domestic violence, or who are providing care or support to another member of their family/household who is experiencing domestic family violence are now entitled, under the NES, to 5 days of unpaid family and domestic violence leave in a 12-month period (parties may agree to employees taking more than 5 days).

Pensions

Age Pension: a pension is paid to residents of Australia who have reached pension age and are assessed as not having adequate levels of income or assets that can be used to support themselves. From 1 July 2017 the qualifying age increased to 65 years and 6 months, to continue increasing by six months every two years for the following six years, reaching 67 years by 1 July 2023. The maximum rate paid for an individual is $916.30 per fortnight and $690.70 for a couple. Unlike pension payments of many other countries, in Australia, workers do not contribute to a pension or insurance within Australia, and the payment is available subject to means testing.

V. ISSUES ARISING ON TERMINATION OF THE EMPLOYMENT RELATIONSHIP

TERMINATION OF EMPLOYMENT CONTRACTS

Grounds for Termination

The grounds for dismissal can include capacity, performance, misconduct (including serious misconduct) and redundancy. In addition to a valid reason for dismissal, the dismissal must be fair, in that it is not "harsh, unjust or unreasonable". Furthermore, employees must not be dismissed on the basis of a protected attribute or as retaliation for exercising a workplace right. Finally, collective dismissals are not applicable in Australia. A performance related dismissal requires the giving of notice, or payment in lieu of notice if the payment in lieu is allowed by the contract itself. Where payment is made in lieu of notice, the date of termination is the date on which the notice is given, and the moneys are paid to the employee.

Is Severance Pay Required?

Severance pay may be required if the employee has been made redundant and has an entitlement under the Fair Work Act 2009, an award, enterprise agreement or contract of employment.

Whistleblower Laws

Whistleblowers currently have protections under three legislative instruments at the Federal level: the Corporations Act 2001 (Cth); the Public Interest

Disclosure Act 2013 (Cth), regarding disclosures with respect to the Australian Public Service, statutory agencies, Commonwealth authorities, the Defence Force and contractors; and the Fair Work (Registered Organisations) Act 2009 (Cth), relating to disclosures about corruption or misconduct in unions and employer organisations. Whistleblowers can also rely on safeguards under the general protection provisions of the Fair Work Act 2009, if their disclosure pertains to a complaint or inquiry related to their employment, and the protections against 'discriminatory conduct' for a 'prohibited reason' under the Work Health and Safety Model Laws.

To address criticisms that the existing laws, in particular the private sector whistleblower protections, are insufficiently broad to fully enable whistleblowers to come forward, in December 2017 the government introduced the Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017 to the Senate. In addition to far-reaching categories of wrongdoing, strengthened privacy protections for the whistleblowers and harsher penalties, the Bill also aims to harmonise the existing Federal legislation and also imposes an obligation on certain corporations (dependent on size and purpose) to have a whistleblower policy. On 12 March 2019, the Bill was enacted into law. To date, there have been no case decisions that have considered or applied these new whistleblower protections.

RESTRICTIVE COVENANTS

Definition and Types of Restrictive Covenants

Restraints of trade are common clauses found in most senior employee contracts of employment. The following restrictive covenants are recognised and may be enforceable under the law: i) non-compete clauses; ii) non-solicitation of customers; and iii) non-solicitation of employees.

Use and Limitations of Garden Leave

Where the employer gives notice to an employee, but puts the employee on "garden leave" (which involves giving them no work to perform and effectively requiring them to stay at home or perform duties other than their normal duties), wages are paid in the usual manner throughout the notice period and the employment does not end until the expiry of that period. The advantage of garden leave to an employer is that it removes a potentially damaging employee from the workplace but, unlike regular pay in lieu, prevents the employee from immediately going to work for a competitor because the employment contract remains on foot. The ability to put an employee on garden leave will, however, need to be provided in the contract of employment.

TRANSFER OF UNDERTAKINGS

Employees' Rights in Case of a Transfer of Undertaking

Where a transfer of employment occurs, the transferred employee's service with their original employer will be counted as continuous service with their new employer. As such, any benefits acquired under the NES (such as annual leave) will be retained through the transfer of business and the employee's service will remain continuous in the eyes of the law (even in circumstances where there has been a substantial period of inactivity). However, should the new employer fail to recognise these accrued rights, the original employer must pay out all entitlements accrued under the NES, which often times may only occur in the case of non-associated entities. It is worth noting that there are a number of complexities to this process. Nevertheless, the underlying notion is to preserve the rights held under a bargained award or agreement where the work done is largely the same as it was under the previous employer. On this basis, the instrument is also transferred so as to cover the new employer as well.

Requirements for Predecessor and Successor Parties

For the entitlements to successfully transfer with the employee, the employee must have their employment first terminated with the old employer. Then, within three months following the termination, the employee is reemployed by the incoming business owner. The usual practice is for the new employer to issue, at the time of purchasing the business, a list that sets out those persons whom the business intends to reemploy. It is also a requirement that the work performed by the transferring employee is the same or substantially the same as the work previously performed.

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BELGIUM.

VAN OLMEN & WYNANT

I. HIGHLIGHTS

- Collective bargaining agreements are entered into on national or industry level between the trade unions and employers' organisations or on company level between the trade unions and an individual employer. They include provisions with regard to wages and working conditions.
- Belgian labour law is characterised by stringent language regulations. All labour documents and labour-related communications with the employees must be conducted in either Dutch, French or German, depending on the location of the employer's operating unit. The sanction is the nullity (with the exception of the Brussels and German regions where the sanction is the replacement of the document).
- As a rule, termination of an employment contract is not subject to any prior administrative or court approval in Belgium. The calculation of notice periods is based on the seniority of the employee. Moreover, all employees have the right to ask for the concrete reasons which have led to dismissal.
- Well-being and anti-discrimination have an increased importance in Belgian labour relations. For example, the way psychosocial risks are dealt with on the work floor was adapted to a great extent in 2014.
- The Belgian labour market is characterised by a high insider-outsider effect (especially for migrant workers, older workers and people with disabilities) and low professional mobility because of high minimum wages and high levels of protection offered by labour law provisions and the social security system.

II. INTRODUCTION

Belgium has fairly extensive protective labour laws, as enacted by Parliament. Moreover, collective bargaining between the so-called 'social partners', i.e. the employers' organisations and the trade unions, plays a very important role in the shaping of the rules of labour law. Case law, in particular that of the Supreme Court and the Constitutional Court, can have considerable influence on the application of labour and employment law in practice. In Belgium, labour courts deal with disputes in relation to employment relationships. Enforcement of labour law provisions may also be initiated by other authorities, including the labour inspectorate or tax and social security authorities. The Social Inspectorate also provides information to employers and workers, gives advice, arbitrates and verifies whether labour law and the various collective labour agreements are complied with.

III. ISSUES ARISING UPON HIRING INDIVIDUALS

PRE-EMPLOYMENT CONSIDERATIONS

Limitations on Background Checks

Extensive background checks on employees are not common in Belgium. They should be limited to the strict necessity of assessing the applicant's professional skills relevant to the job offered. The most common background checks relate to education, experience (past employment records), criminal records for certain occupations (e.g. in the security sector), confirmation that the applicant has the appropriate permission to work in Belgium, health and medical checks (which are required by law for roles involving safety, vigilance jobs that come in contact with food, or the driving of motorised vehicles, cranes or hoists); and more and more commonly, social media checks, despite the potential that such searches can come into

conflict with the right to privacy of the applicant. However, a lot will depend on the public status of the information.

Restrictions on Application/Interview Questions
Employers are forbidden by law, or restricted by CBAs, from asking certain questions of applicants or requiring them to undergo certain tests. As a rule, an employer can only ask questions to an applicant that are genuinely relevant, taking into consideration the nature and working conditions of the job offered (such as diplomas, previous jobs, etc.). The applicant has the right not to answer questions that are not relevant for the job or violate privacy and anti-discrimination laws. However, it is worth noting that applicants have an obligation to cooperate in good faith during the selection process. As a general rule, the employer may not ask questions about an applicant's credit/financial background, and any discrimination based on personal wealth is prohibited.

AUTHORISATIONS FOR FOREIGN EMPLOYEES

Requirements for Foreign Employees to Work
In principle, every non-EEA national working in Belgium must be in possession of a work permit, although some categories of workers are exempt from this requirement (e.g. students or spoused of EEA nationals). In 2019, Belgium introduced the single permit, which combines the work permit and the residence permit into one single procedure. The single permit has to be applied for in Belgium by the employer or an agent, and the employer must obtain prior authorisation to employ the foreign worker. The necessary documents have to be sent to the competent department of the Region where the worker is posted (where he will carry out his work).

Most important for the majority of employers, are the categories of highly skilled workers and managerial employees. This means that the employees have to fulfil certain conditions of higher education degrees and higher wages or they have to take up certain leading functions within the company. Employing a foreign employee on the Belgian territory, when he does not have a single permit is a serious crime, for which the employer can be punished with a penal fine of 4.800 to 48.000 euro, an administrative fine of 2.400 to 24.000 euro or imprisonment of 6 months to 3 years.

Does a Foreign Employer need to Establish or Work through a Local Entity to Hire an Employee?
A foreign employer does not need to work through a local entity in order to hire employees in Belgium. However, there are a couple of registrations and formalities to be fulfilled by the foreign entity, including registration at the National Social Security Office (NSSO), registration at the Tax collector's office, conclusion of an industrial injuries insurance, and appoint an authorised officer to keep the required employment documents and receive official correspondence from the NSSO. In general, foreign employers join a Belgian pay roll agency, which can handle most of these requirements on behalf of the employer and will act as spokesperson with regard to the social security and tax authorities.

EMPLOYMENT CONTRACTS

Minimum Requirements
In principle, an employment contract may be written or verbal. Uniquely characteristic to Belgium is that, when in written form, an employment contract must be drafted in French, Dutch or German, depending on the location of the employer's operating unit. If the operating unit where the employee works is located in the Flemish region, the employment contract must be drafted in Dutch. If this operating unit is in the Walloon region, the employment contract must be drafted in French and if the location is in the German-speaking region, the contract must be in German. For the Brussels region, the employment contract must be either in French or Dutch depending on the language used by the employee.

Yet, in the particular context of a cross-border employment contract, the European Court of Justice rendered a landmark decision stipulating that the principle of freedom of movement for employees requires the parties to be able to draft their contract not only in the official language of the Region of the workplace. Consequently, the Flemish Decree on the use of languages in social relations has, to a certain extent, been amended accordingly. This means that for employees who are employed in Flanders, next to the Dutch version, an English version of the contract can be added.

Fixed-term/Open-ended Contracts
The standard type of employment contract used in Belgium is the open-ended employment contract. With the exception of the clauses referred to

above, a written contract is not required. Fixed term contracts are permitted, but a written contract must be produced by the commencement of the employment at the latest. Failing this, contracts for a fixed term are deemed to be open-ended contracts.

Trial Period
Trial periods have been suppressed by the Unified Employment Status Act (except in relation to students, temporary workers and temporary agency workers).

Notice Period
An important Belgian labour law reform entered into force on 1 January 2014, aligning notice periods for blue- and white-collar employees.

PAY EQUITY LAWS

Extent of Protection
The principle of equal pay between male and female employees for equal work was rendered obligatory by Royal Decree, imposes equal pay for men and women for equal or equivalent work. The Belgian legislature took additional measures in order to fight against the wage gap between men and women. These measures include both the industry level (the CBAs and function classification systems at the industry level must be gender-neutral, which is checked by the Employment Ministry) as well as the company level. In this regard, Belgium adopted an Act on reducing the gender pay gap on 22 April 2012. According to this Act, differences in pay and labour costs between men and women should be outlined in the company's annual audit ('social balance'). These annual audits are transmitted to the National Bank in order for it to be publicly available. Moreover, the Act stipulates that every two years, companies with over fifty employees should establish a comparative analysis of the wage structure of female and male employees. If this analysis shows that women earn less than men, the company will be required to produce an action plan. Finally, if discrimination is suspected, women can turn to their company's mediator.

Remedies
As stated above, if the publication of the social balance or the bi-annual report leads to the suspicion of pay discrimination against women, an internal mediator can be appointed by the employer (at the proposal of the works' council or, in absence, of the Committee for Prevention and Protection at Work). The mediator will establish whether there is indeed a pay differential and, if so, he will try to find a compromise with the employer. Next, it is also possible for women who are victims of pay discrimination to file a complaint against their employer, based on the anti-discrimination act relating to gender. In this case, the Belgian Institute for Equality between Men and Women may assist alleged victims before the courts.

IV. ISSUES ARISING DURING THE EMPLOYMENT RELATIONSHIP

WORKING CONDITIONS

Minimum Standards
In Belgium, the terms and conditions of employment are not only embedded in laws, but also in collective bargaining agreements (CBA's). CBA's are entered into either on an industry level between the unions and employer organisations or on a company level between the unions and an individual employer.

Salary
In principle, minimum wages are fixed per sector of industry in collective bargaining agreements. Yet, these minimum wages may not be lower than the guaranteed average minimum monthly wage, fixed by national CBA, which amounts to 1.688,03 EUR (as of the age of 20 with 1-year seniority; figure in 2020). In addition to their monthly gross salary, employees are entitled to double holiday pay. Moreover, in most sectors of industry, the payment of an end-of-year premium is mandatory.

Health and Safety in the Workplace
Every employer is obliged to establish an "Internal Service for Prevention and Protection at Work". This body assists the employer, the members of the hierarchical line and the employees with implementing the legal and regulatory provisions regarding the well-being of the employees and all prevention measures and activities. For this purpose, every employer has at least one 'prevention advisor', competent for safety at work (the 'Safety Prevention Advisor'), who is an employee of the undertaking and connected

to an Internal Service. In companies employing less than twenty employees, the employer may exercise the function of Safety Prevention Advisor. Other specialised prevention advisors intervene in matters related to psychosocial risks at work (the 'Prevention Advisor-Psychosocial Risks') or occupational medicine (the 'Prevention Advisor-Occupational Physician').

The employer determines the means and the way to carry out the well-being policy as well as the competences and responsibilities of the persons in charge of applying the well-being policy. Furthermore, the employer is required to draw up a number of mandatory documents pertaining to health and safety rules, the most important of which include: a) Global Prevention Plan (in this 5-year plan the results of the company's risk analysis and the prevention activities to be developed and adopted with regard to safety and health need to be programmed, taking into account the size of the company and the nature of the risks attached to the activities of the company); b) Yearly Action Plan (works out the Global Prevention Plan on a yearly basis); and c) Yearly report on the activities of the Internal Service.

Managing COVID-19-Related Employee Issues

If employees become sick due to COVID-19, it will be treated according to the normal rules of sick leave (COVID-19 might become recognised as an occupational disease, which will give right to a higher allowance). The government has created a new medical certificate, the quarantine certificate, which is meant for employees who should confine themselves, because they came into contact with persons who are infected or because they tested positive, but do not show any signs. In that case, the employer can put these employees on temporary unemployment. Further, the government has introduced a system of corona-parental leave (applicable until 30 June) for parents of children up to 12 years (or disabled children). They can use this specific form of parental leave to decrease their working time with 1/5th or ½ in order to take care of their children. They will receive a higher allowance than is provided for the normal parental leave.

In order to prevent these situations, it is important to involve the structures for social dialogue at the company. The preventive measures should be discussed in the works council and the health and safety committee. In this way, the employees' representatives can help to create support for the measures and facilitate their enforcement. Communication of the measures is key and it is equally important to effectively enforce the hygienic and safety rules. Concerned employees can address their worries to their superiors, the prevention advisor or the health and safety committee. If they still feel like the employer is not taking sufficient measures, they could contact the competent social inspection, which might control the company (after contacting the prevention advisor). Some academics have argued that workers have a right to remove themselves from the workplace in case of a grave and imminent danger (like the coronavirus). However, the relevant legal provision has never been called upon before the courts. Most Belgian employers will try to address these issues with a clear policy, which is communicated to the workers. If this does not help, it could be possible to take disciplinary measures against the illegally absent employees.

By virtue of the principle of confidentiality (GDPR Article 5.1, f) and the principle of minimum data processing (GDPR Article 5.1, c), an employer may not simply disclose the names of the infected persons involved within the company. Proportionality is also an important principle to be observed when processing personal data (medical or otherwise). With a view to, for example, preventing further dissemination, the employer may of course, inform other employees of an infection, without mentioning the identity of the person(s) involved. The name of the infected person may, however, be communicated to the occupational physician or the competent government services. The Federal government also introduced some flexibility in labour law (mostly restricted to essential sectors).

COVID-19: Best Practices

- Be sure to have a clear policy with measures to prevent the spread of COVID-19, based on the recommendations of the Generic Guide or the sectoral instructions. This will allow your company to reopen safely, assure your employees and clients, and prevent a fine or even a company closure by the social inspection.
- Involve the Health and Safety Committee and the expertise of the prevention advisors. If necessary, consult an external prevention service to provide the necessary expertise.

- When implementing measures, take into consideration the privacy rights of your employees and other limitations set by Belgian employment law.
- Enforce the prevention measures and communicate with employees about their fears in order to prevent or overcome issues with work refusals.
- If possible, allow your employees to telework and provide a clear telework policy.
- Show your employees that the company is doing everything in its power to create a safe workplace in order to create goodwill among the employees, to show flexibility and a positive attitude during the current crisis.

SOCIAL MEDIA AND DATA PRIVACY

Restrictions in the Workplace

It is common practice to regulate employees' use of Internet and social media through provisions of an Internet Policy. This policy must however, be established respecting employees' privacy with regard to the control of electronic communications networks.

Can the employer monitor, access, review the employee's electronic communications?

Subject to compliance with legal, regulatory and contractual provisions, employers are free to determine the conditions in which the employment contract is to be performed. Nowadays, it is undisputed that this includes the conditions of use of equipment made available to employees by the employer. Employers can therefore freely regulate the use of communication instruments within their company, particularly by prohibiting private use of the communication equipment available for use by the employees, by banning the access to certain websites (including social media sites) or by blocking this access by the use of filters.

Employee's Use of Social Media to Disparage the Employer or Divulge Confidential Information

An employee who disparages the employer via social media can be dismissed for serious cause when the statutory requirements are met. However, as always in case of serious case, the precise circumstances and the possible aggravating or alleviating circumstances should be taken into account. Furthermore, it is advisable to adopt clear guidelines in the company with rules on who can speak on behalf of the company via social media, both for professional and personal accounts, and what types of information may be divulged. Recent case law accepts as evidence of serious grounds for dismissal, the information present on public profiles, as well as some private profiles, where the confidentiality parameters allow the access of posts to an important number of friends and / or colleagues.

EMPLOYEE BENEFITS

Social Security

Unless stated otherwise by an international agreement, employees working in Belgium for an employer established in Belgium, or an operational office in Belgium, will in principle be subject to the Belgian social security scheme for salaried persons. It is impossible to deviate from the Belgian social security scheme by special agreement, which would be null and void by law. The Belgian social security system for employees covers: old-age and survivor's pensions; unemployment benefits; insurance for accidents at work; insurance for occupational diseases; family allowances; sickness and disability benefits; and annual vacation (only for blue-collar employees).

Healthcare and Insurances

On top of the protective Belgian healthcare system, employees benefit on a regular basis from complementary insurances covering the costs of hospitalisation, medical treatments or ambulatory fees (those costs are sometimes even covered for the employee's family members).

Holidays and Annual Leave

Employees are entitled to remuneration for 10 official public holidays. As from April 2012, employees who are starting their careers or who are restarting their activities after a long time off, are entitled to additional holidays after an introductory period of three months, so that they have the possibility to benefit from four weeks of holiday over one year. The employee will receive holiday pay that is equal to his/her regular salary. The holiday pay will be financed through a deduction from the double holiday pay of the next year. The number of days of annual leave to which an employee is entitled for a given year, is determined in proportion to the number of days worked (and deemed to have worked e.g. where

the employee was on maternity leave or sick leave) during the preceding calendar year, referred to as the 'holiday reference year'. Generally, for a full holiday reference year, employees have the right to between 20 and 24 days of annual leave, depending on whether their working regime includes five or six working days per week.

Maternity and Paternity Leave

Women may take up to 15 weeks of maternity leave (with a possible extension of 2 weeks in case of multiple births). At least nine weeks must be taken after the birth and at least one week must be taken before the expected date of birth. Following the birth of a child, the father has a right to ten days of paternity leave, seven of which will be paid for by the social security system at 82 percent of the employee's ceiled salary. This leave must be taken up within four months after the birth. Women receive maternity benefits whilst on maternity leave. This benefit, paid by the social security system, is equal to 82 percent of the employee's salary for the first 30 days and then drops to 75 percent of her salary (which will be capped). During this period, the employer is not obliged to make any payments to the employee. Subject to compliance with legal, regulatory and contractual provisions, employers are free to determine the conditions in which the employment contract is to be performed. This leave must be taken within four months after the birth.

Sickness and Disability Leave

It is important to note that there is no difference between sickness leave and disability leave in Belgium. In case of illness or private accident, the employee continues to receive his/her normal salary during a period of thirty calendar days. This is the so-called 'guaranteed salary'. To be entitled to the guaranteed salary, the employee needs to comply with some legal obligations, which includes, amongst other things, immediately informing his/her employer of his/her incapacity to work and presenting a medical certificate. Moreover, the employer may call upon an independent medical officer (the 'controlling officer') to verify an employee's incapacity for work. In 2017 a new procedure came into force to reintegrate employees who have been absent from the workforce during a long period, because of illness (now included in the Code of the Well-being at Work).

In short, the employee or the employer can request a reintegration procedure. In this procedure, the (medical) prevention advisor will investigate the rest capabilities of the employee, in order to see whether he/she can (gradually) return to the workplace, and if the workplace, or the work itself, should be adapted. The employer should investigate the recommendations of the prevention advisor, in order to evaluate if the necessary changes to the work or the workplace are possible or not. However, until now in most cases the prevention advisor has concluded that the employees concerned were not able to be reintegrated, which often resulted in the end of the employment contract due to medical force majeure.

Other Forms of Leave

Employees have the right to be absent from work without loss of salary on the occasion of: 1) certain family events (marriage, funeral, childbirth, adoption, holy communion, non-confessional youth celebration, etc.); 2) for meeting civil duties (jury service, participation in the electoral process, etc.); and 3) appearance before a court.

Pensions

The statutory retirement age in Belgium is officially 65. However, by the Act of 10 August 2015, the Federal government has decided at the beginning of June 2015, that this age will increase to 66 by 2025 and to 67 by 2030. Apart from the social security benefits (the "first pillar"), many employees are entitled to an additional pension insurance (the "second pillar") paid by the employer as part of their salary package. Occasionally, the second pillar pension is organised on sectoral level. Some people also add to these two pillars, a private pension insurance scheme (the "third pillar").

The following benefits are often granted to Belgian employees: collective bonus, warrants, stock options, profit sharing; company car, company bike or mobility budget; computer, tablet, smartphone, Internet connection ; travel and subsistence costs; family allowances and other kinds of allowances complementary to fringe benefits; meal vouchers; and eco-vouchers.

V. ISSUES ARISING ON TERMINATION OF THE EMPLOYMENT RELATIONSHIP

TERMINATION OF EMPLOYMENT CONTRACTS

Grounds for Termination

From 1 April 2014, all employees with more than six months of seniority have the right to be informed of the reason for their dismissal. If the employer fails to inform the employee of the reason for dismissal, the employee can require the employer to give an explanation. If no (timely) explanation is provided, the employer owes a lump-sum civil fine of two weeks of salary. The employee is entitled to dispute the reason for dismissal before the labour court.

Is Severance Pay Required?

An employer can choose to either terminate an employment contract with the granting of a notice period or to terminate the employment contract immediately with the payment of an indemnity in lieu of notice. A combination of both, where the serving of a notice period is followed by the payment of an indemnity for the remainder of the notice period is also possible. If the employment contract is terminated with the payment of an indemnity in lieu of notice, no formalities need to be complied with; this is contrary to a termination through serving a notice period.

Whistleblower Laws

Since whistleblowing can involve the processing of personal data, it is subject to the provisions of the GDPR and the Act on the protection of privacy in relation to the processing of personal data. Also, protection must be provided for the whistleblower (against dismissal, discrimination, and harassment) and for the person against whom allegations have been made. The latter must be informed immediately and has the right to access, rectify, or delete the personal data concerning him/her.

Further, the EU approved the Whistleblowing Protection Directive 2019/1937 on 23 October 2019. The Directive is applicable to companies with 50 or more employees and provides protection to a wide scope of persons working in the private or public sector, who have acquired information on breaches in a work-related context, irrespective of whether they are, factually, employees, self-employed, freelance or civil servants. The Directive demands the introduction of an internal reporting procedure to deal with whistleblowing in order to prevent direct leaks to the public or press. In this way, companies would be obliged to confirm the receipt of a complaint within seven days and will have to give feedback to the reporter within three months. Also, external reporting processes to the authorities have to be made clear and easily accessible (by the Member States).

Finally, reporting publicly (to, e.g., the media or online) is addressed as a possibility when the reporters have reasonable grounds to believe that there is an imminent or manifest danger to the public interest or a risk of irreversible damage. Interestingly enough, the Directive offers a protection for whistleblowers against any form of retaliation, including dismissal, negative evaluation, suspension, demotion, discrimination, etc. The main deadline for the implementation of the Directive is 17 December 2021. However, for companies of 50 to 249 employees, the implementation deadline is two years later. At the moment of publication, Belgium has not yet implemented the Directive.

RESTRICTIVE COVENANTS

Definition and Types of Restrictive Covenants

The following restrictive covenants are recognised and may be enforceable under the law: i) non-compete clauses; ii) non-solicitation of customers; and iii) non-solicitation of employees.

Use and Limitations of Garden Leave

Garden leave is not allowed under Belgian employment law, because it entails that the employee would not be allowed to perform his/her job, as this condition is deemed an essential element of every Belgian employment contract. A garden leave where the employee is exempt from performing his/her duties during the notice period, is only possible with the employee's explicit consent. The unilateral decision of an employer to send an employee on garden leave, would grant the employee the right to claim damages, or the contract could even be regarded as being terminated by the employer (constructive dismissal).

TRANSFER OF UNDERTAKINGS

Employees' Rights in Case of a Transfer of Undertaking

If a business or a division of a business, forming an economic entity, is transferred to a new employer, so that there is a 'going concern' of the activity of the business (division) after the transfer, there is a transfer of undertaking.

Requirements for Predecessor and Successor Parties

Under Belgian law, the transferor and the transferee have an obligation to inform their respective employee representative bodies (i.e. the Works Council, or in the absence thereof, the Trade Union Delegation, or in the absence thereof the CPPW) about a proposed transfer (which includes a merger, concentration, take-over, closure or other important structural change negotiated by the company).

The employees must be informed individually about the proposed transfer in case (i) there is only a Committee for Prevention and Protection at Work, or (ii) there are no employee representative bodies within the undertaking. The transferor and the transferee must also consult the employee representative bodies in particular with regard to the repercussions on the employment prospects for the personnel, the work organisation and the employment policy in general. The information and consultation process should take place before a decision on the planned transfer is made. Failure to comply with this obligation would render the employer liable to criminal sanctions (a fine of 300€ to 3.000€, multiplied by the number of employees involved, up to a maximum of 300.000€).

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BRAZIL.

TOZZINIFREIRE ADVOGADOS

I. HIGHLIGHTS

- The most common practice is hiring workers as employees.
- Employment agreements in Brazil are usually for indefinite term; fixed term employment agreements are only allowed in specific situations.
- All companies and employees are mandatorily represented by Unions.
- Employments are at will, meaning that any party may terminate the employment agreement without cause upon mandatory prior notice and payment of the severance.
- Work permits must be requested whenever a foreigner wants to work in Brazil.

II. INTRODUCTION

In Brazil, Labour Law is protective of employees. Some basic principles implicitly or expressly provided by Law will govern any employment relationship in Brazil. The most relevant principles are: (a) prevalence of facts: in the determination of labour consequences, the relevant facts surrounding an employment relationship will prevail over formal documents; (b) prohibition of detrimental changes: employers are prevented from making changes to employment terms and conditions that are detrimental to employees, whether or not the employee has previously consented with the change; and (c) joint liability (group of companies): companies belonging to a group of legal entities under the same control, direction or management are jointly liable for the obligations of any company belonging to such group with respect to employment relationships.

III. ISSUES ARISING UPON HIRING INDIVIDUALS

PRE-EMPLOYMENT CONSIDERATIONS

Limitations on Background Checks

There is no specific provision in Brazilian Labour Laws either prohibiting or authorising the employer to perform background checks on its prospective employees. However, protection of personal information pertaining to any Brazilian citizen is granted in a broad scope by the Federal Constitution, which grants protection and inviolability of any citizen's intimacy and personal life. The Federal Constitution also prohibits any kind of discrimination. In addition, the law prohibits any discriminatory or restrictive measure for the admission of an employee or maintenance of employment based on sex, origin, race, color, marital status, family situation or age. There are only a few exceptions to the general rule that justify some types of background checks (i.e. criminal check for bank employees). In view of the above, currently, as a general rule, Brazilian Labour Courts understand that some type of search that a company performs regarding its prospective employees' information characterises discrimination, thus being illegal, and entitling the individuals to an indemnification for moral damages. Therefore, in order to evaluate the candidate's background, and in order to make a hiring decision, the company should only use public information about the individual.

Restrictions on Application/Interview Questions

With regards to the employment application and interview questions, the law prohibits any kind of discriminatory practice which may limit the access or the maintenance of employment due to sex, origin, race, color, marital status, family

situation, disability, professional rehabilitation, age, among others. Therefore, the employer must avoid questions like "Are you married?", "Do you have any children?'', ''What is your nationality/ religion/marital status?'', among others that may be discriminatory on an employment application or during an interview. With respect to women, the requirement of statements, examinations or similar measures related to sterilisation or state of pregnancy are considered discriminatory under the law, which also prohibits inducing or instigating birth control. In addition, the Brazilian General Data Protection Law, so-called "LGPD", was enacted in August 2018 and has been in force since August 2020. Per the LGPD, personal and sensitive data can only be processed on an underlying lawful basis. Thus, companies will have to be careful not only with the personal and sensitive data of employees that is processed, but also the data of candidates (e.g. résumé, background checks, among others).

AUTHORISATIONS FOR FOREIGN EMPLOYEES

Requirements for Foreign Employees to Work

Whenever a foreigner is transferred to Brazil and/ or retained by a Brazilian company to render services in Brazil, an appropriate work visa/permit must be requested in advance. If the foreigner will bring his/her dependents, it is necessary to apply for a residency permit based on family reunion. The proper visa depends on the activities that will be performed in Brazil. After the applicable visa is selected, the Brazilian entity will have to comply with the applicable rules concerning the relationship to be maintained with the foreigners.

Does a Foreign Employer need to Establish or Work through a Local Entity to Hire an Employee?

A foreign employer needs to establish or work through a local entity to hire an employee in Brazil, because only local companies are able to comply with all labour rights and obligations, which include payment of labour and social security charges, as well as deduction of the applicable income tax.

EMPLOYMENT CONTRACTS

Minimum Requirements

In Brazil, workers may be hired in several ways, but the most common practice is to hire workers as employees. An employment relation is characterised by the simultaneous presence of four requisites. Whenever the requisites of employment relation are not present in a labour relation, the parties are free to structure it in a different way other than employment, such as: independent contractors/ consultants, service providers/outsourced workers, temporary workers, intern, non-employed officers, among others, provided that the specific rules and regulations regarding such other forms are complied with. The Labour Code is applicable solely for employees, while the other work structures are governed by different statutes.

Fixed-term/Open-ended Contracts

Employment agreements in Brazil are usually for an indefinite term. As per the Labour Code, fixed-term employment agreements are only allowed: (a) for up to two years when: (1) the temporary nature of the service justifies a pre-established term, or (2) the business activities have a temporary nature. The fixed-term agreement may become an indefinite term employment agreement (if certain criteria is met). In addition, a new type of hiring was introduced – "intermittent work" – wherein the employee renders services with subordination, alternating between periods of provision of services and inactivity, but not on a habitual basis. The employee can work for any other employer during the inactivity periods.

Trial Period

The trial period, also called "probation period", may be established for a period up to 90 days and may be renewed once if the limit of 90 days is observed, e.g., 45 days renewable for 45 days, or 30 days renewable for 60 days.

Notice Period

The notice period, also called "prior notice", is only applicable in the event of termination of employment agreements for an indefinite term. In the event of termination of the employment agreement for an indefinite term, without cause and upon the employer´s initiative, the employer must provide the employee with a prior notice proportional to the length of service; minimum of 30 days if the employee has worked up to 1 year and 3 additional days for each year of service limited to 60 additional days (maximum of 90 days prior notice). In the case of a termination of employment agreements for an indefinite term, without cause and upon the employee's initiative (resignation),

the employee must provide a prior notice to the employer of 30 days or request to be released from working during the prior notice period. In the event of termination by mutual consent, the prior notice period will be reduced by half.

PAY EQUITY LAWS

Extent of Protection

The Federal Constitution prohibits salary differences based on sex, age, color or marital status. As mentioned above, such prohibition also applies to disabled employees. In addition, the Labour Code ensures that employees performing the same activity, with equal value, to the same employer, at the same facility, are entitled to the same remuneration, except if the difference in their length of service: (a) with the same employer is longer than 4 years and (b) at such position is longer than 2 years. In accordance with law, "equal value work" is the work performed with the same productivity and same technical perfection.

Remedies

If a company does not comply with the equal pay rules mentioned above, the company may be subject to (a) inspection from the Ministry of Economy, which may subject the company to the payment of administrative penalties, (b) investigation by the Ministry of Labour Prosecution and/or (c) individual labour claims filed by employees or former employees, claiming moral damages due to the discriminatory treatment and payment of salary differences.

IV. ISSUES ARISING DURING THE EMPLOYMENT RELATIONSHIP

WORKING CONDITIONS

Minimum Standards

Employees are entitled to the rights established by Federal Constitution, Brazilian labour legislation, including all regulations and supplementary rights set forth by the respective collective bargaining agreement. Individual employment agreements and internal policies may establish additional rights, which must always be greater than the rights established by law. Collective bargaining agreements should prevail over law, even when the conditions agreed are worse than the ones established by law, except as they relate to: (i) health and safety rights, (ii) third party rights (i.e. social security contributions) and (iii) labour rights, among other conditions established by law.

Salary

The employee's salary must be paid in Brazilian currency. Compensation comprises not only the employee's fixed salary, but also any commissions, bonuses (Christmas or otherwise), fringe benefits, such as personal or family benefits and living expenses. Compensation, with some exceptions, must be paid at least monthly. Employees are entitled to receive a Christmas bonus corresponding to one monthly salary per year. Half of the Christmas bonus must be paid by the 30th of November, and the other half on or before the 20th of December. The national minimum wage (established by law) is currently BRL 1,045.00. Collective bargaining agreements may establish a "professional salary", a minimum wage for a specific category that must be higher than the national minimum wage.

Health and Safety in the Workplace

Employers are obliged to provide a healthy and safe workplace to employees and to comply with all mandatory regulations regarding healthy and safety matters. There are several regulations providing for strict rules concerning mandatory periodical medical examinations, medical examinations upon admission and termination, medical records, environmental risks prevention, creation and maintenance of an Internal Commission for Accident Prevention (CIPA), health-hazard and dangerous activities and the corresponding allowances and ergonomics, among others.

Managing COVID-19-Related Employee Issues

Brazil does not recognise family leave, administrative leave or unpaid parental leave. However, employers may choose to adopt unpaid leave if requested by employees. Employees affected by COVID-19 will be on medical leave. Employers are responsible for the payment of the regular remuneration during the first 15 days of leave, and the social security agency is responsible for the payment of a sick leave allowance for the remaining period of the medical leave. Depending on the terms of the applicable collective bargaining agreement, employers may have to pay a supplementary sick leave allowance. We recommend verifying if there is any valid

reason other than a "fear of infection". Depending on the situation, employers may agree on remote working or may demand the immediate return to in-office work. Disciplinary measures may also be adopted. Individuals who may have been exposed to suspected or confirmed cases of infection, should be advised to monitor their health for 14 days from the last day of possible contact. However, in general, the name of the infected employee should not be disclosed; employers should communicate just the department where he/she works.

COVID-19: Best Practices

We recommend updating policies regarding health and safety measures in the workplace, implementing employee training programs, evaluating the need for work-related travel and in person meetings, accommodating employees of at-risk-groups or those who live with members of an at-risk group, adopting reduced in-office working hours, rotating shifts for (groups of) employees, flexibility in working hours and offering the option for teleworking, if possible.

SOCIAL MEDIA AND DATA PRIVACY

Restrictions in the Workplace

Brazilian Labour Courts recognise that the employer can restrict the personal use of the Internet and social media by the employees during the working hours, due to the employer's power of command.

Can the employer monitor, access, review the employee's electronic communications?

There is no specific provision in Brazil regarding this matter. However, it is advisable to include such a provision in an internal policy of the employer. If the employer restricts the use of the Internet and social media to professional use only, the employer is allowed to inspect such use, and if the employee is using the Internet/social media improperly, it could lead to disciplinary measures (in accordance with rulings by Brazilian Labour Courts).

Employee's Use of Social Media to Disparage the Employer or Divulge Confidential Information

There is also no specific provision in Brazil regarding this matter. However, Brazilian Labour Courts understand that the use of social media to disparage the employer or to divulge confidential information, may lead to disciplinary measures. Prior decisions by these courts on this issue, found that this type of conduct could lead to termination with cause by the employer, and payment of an indemnification due to moral damages by the employee to the employer.

EMPLOYEE BENEFITS

Social Security

Employers and workers must make compulsory contributions to the Brazilian Social Security Agency, which is in charge of managing a system designed to protect the employee in case of illness and retirement. With regards to healthcare, despite the fact that employers are not obliged to grant private healthcare to their employees, it is a very common practice. The employer's contributions average twenty-seven percent (27%) of the employee's overall salary. Contributions may be higher than this average if the employees are subject to health hazardous working conditions. Companies in some specific industries are subject to a 1% or 2% social security contribution on top of their revenue instead of the employees' salary. The employer withholds the employee's individual contributions. The individual contribution is proportional to the salary amount and is capped by the Federal Government, currently at approximately BRL 855.00 per month and adjusted on an annual basis. For different labour structures which are not employment, other mandatory social security schemes may apply.

Healthcare and Insurances

The social security authority provides the following insurances to workers who have contributed to the system, which will depend on the number of contributions made and on the amounts involved in each contribution. The main insurances provided by the social security authority are: 1) death allowance; 2) accident allowance; 3) disease allowance; and 4) imprisonment allowance.

Holidays and Annual Leave

Employees are entitled to be absent from work on public holidays as established by law to celebrate some special occasion (e.g. Christmas, Independence Day, etc.), being entitled to the regular remuneration for such days. Local (Municipal or State) holidays may also apply, depending on where the company is based. If the employer demands the employee to work on a holiday, the remuneration paid with respect to the worked holiday must be at least double the regular

compensation. Applicable collective bargaining agreements may establish a higher rate for the holiday remuneration. After each period of 12 months worked, employees are entitled to a 30 calendar-day paid vacation, which must be taken within the subsequent period of 12 months, in the period that is most convenient to the employer. The Labour Reform allows the split of the vacation period, provided that the employee agrees. The vacation period can be taken in up to three periods, one of which cannot be less than 14 days and the others cannot be less than 5 days each. Moreover, the vacation period cannot start 2 days before a holiday or a weekend. Additionally, note that the employee may "sell" 1/3 of his/her vacation period. The vacation remuneration corresponds to the monthly salary plus 1/3 of the employee's monthly salary as vacation bonus.

Maternity and Paternity Leave

All female employees are eligible for maternity benefits, including when adopting a child. The maternity benefit will be paid to the employee for a period of 120 days and is paid by INSS, the Brazilian social security agency. In practical terms, the employer pays the benefit to the employee and deducts the amount from the social security contributions due to the INSS. Male employees are entitled to 5 days of paid paternity leave. If the company is enrolled in a government program called "Empresa Cidadã", the maternity leave may be extended to 180 days and the paternity leave to 20 days, provided some requirements established by the government program are observed.

Sickness and Disability Leave

In the event of sickness leave, the employer will be responsible for the employee's salary during the first fifteen days. After the fifteenth day of absence due to sickness, the INSS will pay a sick leave benefit to the employee. However, the benefit does not correspond to the actual salary, but rather to a specific INSS based calculation made over the last contributions and is capped at approximately BRL 6,100.00. In the event of an injury at work, the employer will be responsible for the employee's salary during the first fifteen days.

Pensions

According to the new rules (effective 13 November 2019), to be eligible to receive the retirement pension, male individuals must be at least 65 years old and have paid a minimum of 240 monthly contributions to INSS. Females must be at least 62 years old and have paid a minimum of 180 monthly contributions to INSS. In addition, retirement is no longer based solely on the length of service; nowadays individuals must have met the minimum age mentioned above to be eligible for the retirement pension. There is also a special retirement for employees who have worked under unhealthy conditions; their contribution periods are shorter than the regular period.

A company that has employees working under unhealthy conditions that entitle them to the special retirement, must pay additional social security contributions. The additional contribution is 6%, 9% or 12% of the employees' salary, depending on the level of the risk. Disability pensions are also available to workers who have become disabled due to work related illness or accident. A Social Security medical expert must document such disability and the beneficiary must be subject to regular exams. The benefit payments end when the employee recovers his/her ability to work. Apart from the aforementioned public retirement system, some companies provide their employees with a private pension plan, in which the amounts of the contributions from both parties (employers and employees), can be defined by the companies directly, subject to specific rules in Brazil as issued by the government agency Superintendência de Seguros Privados (SUSEP).

V. ISSUES ARISING ON TERMINATION OF THE EMPLOYMENT RELATIONSHIP

TERMINATION OF EMPLOYMENT CONTRACTS

Grounds for Termination

In Brazil, employments are at will, meaning that any party may terminate the employment agreement without cause upon the mandatory prior notice and payment of the severance. It is not necessary to mention any reason for termination, except if it is a termination with cause. Termination with cause is the most severe sanction for an employee and results in the reduction of the employee's

severance entitlements. Fixed-term employment relationships may terminate exactly on the last day of such term or may end before it. If it terminates on the last day, the employee is entitled to the severance payments set forth by law.

Is Severance Pay Required?

In Brazil, severance pay is mandatory, but the amount differs based on the type of termination, i.e. in case of resignation, termination by mutual agreement, without cause, and with cause in indefinite term/fixed-term agreements.

Whistleblower Laws

While there is no specific law regulating whistleblowing systems, the Brazilian Clean Company Act provides credits for companies that have implemented a compliance program. In this context, a whistleblowing channel is an important element of a compliance program. Internal policy should regulate it, establishing provisions about confidentiality, privacy and non-retaliation, among others. Principles such as the right of privacy and intimacy, the protection of image and reputation and non-discrimination rights, should be complied with when implementing a whistleblowing program.

RESTRICTIVE COVENANTS

Definition and Types of Restrictive Covenants

The following restrictive covenants are recognised and may be enforceable under the law: i) non-compete clauses; ii) non-solicitation of customers; and iii) non-solicitation of employees.

Use and Limitations of Garden Leave

Garden leave in Brazil is not legally regulated, nor is it a common practice. The enforceability of a garden leave provision is quite easy to challenge in court.

TRANSFER OF UNDERTAKINGS

Employees' Rights in Case of a Transfer of Undertaking

Employee labour conditions must not be reduced or negatively impacted from a transfer of undertaking. Employers are prevented from making changes to employment terms and conditions that are detrimental to employees, whether or not the employee has previously consented to the change.

Due to the concept of labour succession, the new owner of a company or business will be considered liable for all labour rights and liabilities. Brazilian Labour Courts have consolidated the concept that an acquisition of a company's control or a transfer of relevant parts of its assets to another company – when assets represent a business unit – characterise labour succession. Once the succession is characterised, the new owner is liable before the employees for any and all labour liabilities relating to the acquired business units or companies, even those connected with the period preceding the transfer of ownership.

Requirements for Predecessor and Successor Parties

From a labour standpoint, there is no need to request any authorisation, from a union or other authority, in order to proceed with a takeover.

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CANADA.

FILION WAKELY THORUP ANGELETTI LLP

I. HIGHLIGHTS

- In Canada, "employment law" concerns the relationship between an individual and an employer, while "labour law" regulates the collective representation of employees by trade unions.
- There is no "at will" employment in Canada. Dismissed employees are entitled to notice of termination or pay in lieu of notice, unless employment was terminated "for cause".
- Provincial employment standards legislation establishes minimum standards for wages, vacation, leaves, notice of termination and severance. However, the common law provides greater entitlements upon termination and can otherwise regulate the employment relationship.
- Employment contracts can be used to set out the terms of employment for non-union employees. Provided that the contract's terms do not violate applicable statutory minimum requirements, the terms of the contract will displace the common law. As such, employers are encouraged to utilise written employment agreements, particularly with respect to entitlements upon termination.
- All jurisdictions have legislation prohibiting discriminatory practices and harassment in the workplace. Employers have significant positive obligations to ensure equality in the workplace.

II. INTRODUCTION

In Canada, the power to make laws is divided between the federal and provincial governments. Generally, for historic, constitutional reasons, provinces have jurisdiction over most employment matters, while the federal government has jurisdiction over employment only in respect of specific industries, such as airways, shipping and banks. Employment law in Canada is quite similar from province to province and is governed by both federal and provincial legislation as well as by the common law (judge-made law). Quebec is the notable exception to this rule, as Quebec operates under a civil law system based on a written "civil code" founded on France's Napoleonic Code.

III. ISSUES ARISING UPON HIRING INDIVIDUALS

PRE-EMPLOYMENT CONSIDERATIONS

Limitations on Background Checks

Even when an individual has consented to a background check, the collection, use and disclosure of personal information must be reasonable under the circumstances, given the purpose for which it is being collected, used or disclosed. Employers must therefore have some justification for requesting that employees consent to a background check, criminal or otherwise. British Columbia and Quebec require that any criminal background check, and any decision relating thereto, must be directly relevant to the particular staff position at issue. At the other end of the spectrum, Alberta currently has no restriction on criminal background checks in its legislation at all. Other provinces are somewhere between these two extremes. For the foregoing reasons, employers generally should not conduct record checks until a conditional offer of employment has been made, and then only with employee's consent (and, often, participation).

Restrictions on Application/Interview Questions

Most employers seek to limit the amount of information sought at the application stage that could unintentionally solicit disclosure of a characteristic that is protected. More in-depth questions will be appropriate when a conditional offer of employment is made. Additionally, in most Canadian jurisdictions, it is prima facie

discrimination for an employer to refuse to hire someone because their relative works for the company. Also, employers are generally not permitted to test prospective employees for drug use, or to refuse to employ a person because of the results of a drug test. Pre-employment drug and alcohol testing is presumptively discriminatory on the basis of disability and/or perceived disability. Where a position is safety sensitive, drug or alcohol testing may be a valid requirement on the job, but is rarely permissible pre-employment.

AUTHORISATIONS FOR FOREIGN EMPLOYEES

Requirements for Foreign Employees to Work

To be lawfully employed in Canada, one must be a citizen, a landed immigrant or have a work permit. No work permit is required for business visitors who come to Canada to meet with Canadian clients or assess business opportunities; however, a work permit will be required for foreign nationals who will be providing their services in Canada. Apart from senior executives, professionals and workers with specialised skill-sets, most foreign workers in Canada are employed in the domestic care or agriculture sectors. New legislation was recently introduced to: rigorously assess the authenticity of employment offers, in order to minimise fraudulent offers and better protect foreign workers from exploitation and abuse; to bar employers from hiring temporary foreign workers when the employer has failed to meet its commitments regarding terms and conditions of employment; and temporary foreign workers can hold a temporary work permit for only four years at a time, though some workers are exempt from this limit.

Does a Foreign Employer need to Establish or Work through a Local Entity to Hire an Employee?

A foreign employer has several options when hiring a Canadian. One option is to hire the person as an independent contractor; however this means that the person is not technically an "employee" of the foreign company, and could work for other companies as well. Further, it can be difficult to impose the same duties (such as loyalty) on independent contractors. Finally, just calling someone a contractor does not make them one in the eyes of Canadian law. There are significant risks created by misclassification, making it a choice best taken only with great caution. Another option is for a foreign employer to work with a Professional Employer Organisation (PEO), Canadian companies that help ensure foreign employers comply with the applicable laws of Canada. It is also possible for a foreign entity to register with the applicable government agencies, so as to "do business" in Canada, which then allows them to employ workers. In other words, it is not essential that a foreign company create a separate Canadian affiliate or subsidiary. Finally, a foreign employer can create a corporation in Canada, which can then hire employees itself. This is the most common structure used by international employers of significant size.

EMPLOYMENT CONTRACTS

Minimum Requirements

In order to be enforceable, an employment contract must fulfill the essential elements of a binding contract at common law, and must not contravene any applicable legislation. A binding contract must be formed by offer, acceptance and consideration. In the case of most employment contracts, the consideration is the exchange of remuneration for work. Courts have found that continued employment is generally not sufficient consideration, unless there is evidence that the employer intended to dismiss the employee if the post-hire agreement was not executed. Employment contracts are subject to increasingly close scrutiny in Canada and will not be enforceable if they do not comply with minimum employment standards, occupational health and safety legislation and human rights legislation. An employee cannot waive or contract out of his or her minimum entitlements under the applicable employment standards legislation. Any ambiguity in an employment contract will generally be interpreted in the employee's favour.

Fixed-term/Open-ended Contracts

Most employment agreements are for an indefinite term. In the absence of an express agreement to the contrary, an employment contract for an indefinite term can only be terminated by the employer by the provision of reasonable notice at common law. In general, the statutory notice period is much shorter than the notice period at common law. Where an employment agreement stipulates that employment will be for a fixed term, the employee may not be entitled to notice of termination if his employment is terminated when the contractual term expires.

Trial Period
A probationary term will not be implied in an employment contract. If an employer wishes to hire an employee on a probationary basis to determine their suitability for the position, this should be clearly set out in a written employment contract.

Notice Period
All employees must be provided with notice of termination or pay in lieu thereof in accordance with the applicable employment standards legislation. Unless the parties have expressly agreed otherwise, there is a legal presumption that an employee will also be entitled to reasonable notice period under common law, which is intended to approximate the length of time it would likely take an employee to obtain similar employment. The range of the notice period that may be awarded by a court generally may range from two or three months up to twenty-four months. In exceptional cases, a notice period exceeding twenty-four months may be awarded.

PAY EQUITY LAWS

Extent of Protection
Canada is a country that takes pride in the diversity of its population. Although generally not required, many major companies in Canada have made concerted efforts to increase the diversity of their workforce. Certain federally regulated workplaces are also governed by the Employment Equity Act, which identifies and defines four groups (women, aboriginal peoples, persons with disabilities and members of visible minorities) and helps ensure they have fair representation in the workforce. In addition, certain jurisdictions in Canada including Manitoba, New Brunswick, Nova Scotia, Ontario, Prince Edward Island and Quebec also have pay equity legislation. Employees in jurisdictions without provincial pay equity legislation may seek equal pay protection under human rights legislation.

Remedies
Complaint mechanisms for pay equity concerns are different in each jurisdiction. Generally, employees are able to make complaints to regulatory bodies alleging that an employer is not implementing or maintaining compensation practices that provide for pay equity. Such complaints are investigated in due course, and a decision is rendered which determines whether an employer is in compliance with the requisite statute. Employers who fail to cooperate during the investigatory stage may be subject to financial penalties. In jurisdictions without pay equity legislation, complaints may be made under human rights legislation.

IV. ISSUES ARISING DURING THE EMPLOYMENT RELATIONSHIP

WORKING CONDITIONS

Minimum Standards
The specific obligations an employer owes to its employees will typically depend upon the jurisdiction in which it operates, be that federal, provincial or territorial and will, in general, comprise the various workplace statutes, including employment standards, health and safety legislation, human rights, pay equity and workers' compensation.

Salary
Employees must be paid an amount equal to or greater than the applicable minimum wage. Minimum wages in Canadian jurisdictions range from $11.00 per hour to $14.00 per hour. Where employees are paid a salary rather than an hourly wage, the employer must nevertheless ensure that employees' compensation is at least equal to the minimum wage in light of hours worked.

Health and Safety in the Workplace
Occupational health and safety legislation exists in all jurisdictions and places an obligation on both employers and employees to minimise the risk of workplace accidents, through the exercise of "due diligence". Legislation also provides employees with certain rights designed to promote workplace safety, including the right to be informed of hazards and the right to refuse work that they reasonably believe is dangerous. Finally, in many Canadian jurisdictions, there are laws that require that employers assess the risk of, and develop programs to deal with, violence and harassment in the workplace.

As a result of the COVID-19 pandemic, employees may face a number of challenges including being at a greater risk of contracting COVID-19 as a

result of having a weaker immune system, or increased child-care obligations and responsibility for sick relatives. Actions against persons who have contracted COVID-19, or refusals to provide accommodations for employees at a greater risk of contracting COVID-19 and employees with family and child-care obligations, may constitute discrimination. For employees facing challenges as a result of the COVID-19 pandemic, employers must consider accommodations that may include work from home arrangements if possible, modifying the employee's workstation to reduce the risk of infection, or allowing the employee to utilise a statutory job-protected leaves or company leaves.

Managing COVID-19-Related Employee Issues

Employers should work with their employees to create flexible work schedules, facilitate work from home arrangements, or provide their employees with a temporary leave of absence. Several Canadian jurisdictions have expanded statutory leaves for employees who are absent from the workplace because they are self-isolating, because they have family or child-care obligations, or as a result of other issues related to COVID-19. The nature of the request will dictate the leave of absence that will be appropriate. As a result of the COVID-19 pandemic, employees may be entitled to the following leaves: i) Short-term sick leave; ii) Long-term illness or injury leave; iii) Compassionate care leave; and iv) Emergency leave. The details and requirements for these leaves vary by jurisdiction. Usually these leaves are unpaid. Where child-care obligations are pressing or lengthy, employees may be entitled to human rights accommodations on the basis of the protected ground of family-status. In addition, employers will often have policies that provide for more generous leave entitlements. Employers should assess their workplace policies that provide for leaves and, where they qualify, allow employees to access these leaves. Where the leaves are unpaid, the employee may be entitled to income replacement under government benefit programs.

Courts and adjudicators will most likely weigh all of the relevant factors in the circumstances to determine whether the workplace created a greater risk of the worker contracting COVID-19 than the community at large. A decision-maker must gather all of the relevant information in order to assess and weigh each piece of evidence to determine whether the worker's COVID-19 is work-related. The key issue to be determined, as part of the assessment of work-relatedness, is whether the worker's employment duties or requirements were a significant contributing factor in the worker contracting COVID-19.

COVID-19: BEST PRACTICES

- Keep up with New Developments - employers should continually monitor government orders and directives as well as public health websites to ensure they are in compliance with re-opening guidelines and health and safety measures.
- Have a Plan - re-opening plans should include updated health and safety measures; updated workplace policies and training; COVID-19 hazard identification in the workplace; provision for human rights accommodations; updated leave policies for employees experiencing COVID-19 related challenges; updated privacy policies and guidelines for dealing with information related to COVID-19; and methods for effective communication channels to keep employees, clients, and other stakeholders updated and informed.
- Maintain Health and Hygiene Practices - employees should be trained on updated health and safety guidelines and posters can be placed around the workplace that educate and encourage good personal hygiene.
- Maintain Compliance with Statutory Employment obligations - while the pandemic may have altered the way businesses and workplaces operate, employers must continue to follow applicable employment standards and meet relevant legal obligations.

SOCIAL MEDIA AND DATA PRIVACY

Restrictions in the Workplace

It is unlikely that an employer accessing publicly accessible information on the Internet could violate an employee's privacy rights. However, privacy concerns may arise where an employee uses an employer-provided computer or cell phone for personal matters, particularly if such use is permitted or condoned by the employer. The relevant question in such instances is whether the employee had a reasonable expectation of privacy in the computer or cell phone's contents. Employers often have workplace policies that expressly advise employees that they will have no entitlement to

privacy with respect to any activity engaged in on employer-provided technology. Employers may also have policies in place permitting the employer to monitor, search or otherwise police the use of employees' computers or cell phones. The existence of a policy will not always be sufficient to establish that an employee had no reasonable expectation of privacy. The question of whether or not a reasonable expectation of privacy exists will depend on a consideration of all of the relevant circumstances. A balance must be struck by employers between the freedom of employees to use the internet on their own time, and their ability to damage an employer's reputation or workplace relationships by doing so.

Can the employer monitor, access, review the employee's electronic communications?

Employers are entitled to restrict an employee's use of Internet and social media during working hours. Employers may also place limits on the use of employer-provided technology outside of working hours. Like any workplace rule, an employer's Internet and social media policy must be clear and well-publicised in order to be relied upon by the employer in issuing discipline.

Employee's Use of Social Media to Disparage the Employer or Divulge Confidential Information

It is not uncommon for employees to be disciplined or even discharged for just cause for publishing posts on social media that are insubordinate, critical of the employer, or breach employees' confidentiality obligations. Breaches of confidentiality by employees may be particularly serious for employers expected to safeguard the confidential information of patients or clients. Although employers are generally not entitled to discipline employees for off-duty conduct, this will not be the case where an employee's actions are significantly injurious to the interests of the employer, or infringe the rights of other employees. For example, many employees have been disciplined or discharged for engaging in "cyber-bullying" or online harassment of other employees.

EMPLOYEE BENEFITS

Social Security

There are a number of "social safety nets" in Canada. The most significant is the federal Employment Insurance system, which provides benefits in the event of a loss or interruption of employment. Canada's public health care system also greatly decreases the cost to employers of providing private medical insurance to employees, in comparison to countries without such systems. Participation in a government-run workers compensation program in each province is either mandatory or optional, depending on the type of work the employer is engaged in.

Healthcare and Insurances

Citizens and landed immigrants have significant health care coverage, unemployment insurance coverage and pensions for retirement, generally covered by public funds and payroll taxes. Most basic health care services are covered by provincial health insurance however, prescription drugs are not covered under the plan. Employment Insurance ("EI") provides income replacement benefits for Canadian employees who have lost their jobs through no fault of their own (EI is generally not available to employees who have been terminated for just cause). The current weekly benefit amount for a claimant is 55% of the average weekly earnings from the previous calendar year to a maximum weekly benefit of $573.00.

Holidays and Annual Leave

Employees are entitled to between 6 to 10 paid statutory holidays per year. In all provinces, employees are entitled to at least two weeks of vacation per year. In many provinces, this entitlement will increase with an employee's length of service. If an employee is required to work a holiday, the employee is entitled to premium pay (typically time-and-one-half) as well as to holiday pay for that day.

Maternity and Paternity Leave

Maternity leave and parental leave are addressed under employment standards legislation in each province. EI is available for employees who are pregnant, have recently given birth, are adopting a child, or are caring for a newborn. Because EI benefits provide only a portion of an employee's regular wages, many employers offer "top up" benefits to employees for some portion of their leave.

Sickness and Disability Leave

Many jurisdictions also provide a variety leaves based on illness, disability, or the illness or disability of a family member. Employers are generally not

required to pay employees for these leaves of absence. Specialised EI coverage is also available for employees who are unable to attend work because of illness because they have taken a compassionate care leave to care for a family member who is gravely ill with a significant risk of death, or a leave to care for a critically ill child, though employers are not required to pay employees during these types of leave. There is no federal workers' compensation system. If eligible for coverage, employees in the federal jurisdiction are covered by the provincial workers' compensation system where they are employed. Participation is compulsory for employers. This creates a trade-off system, whereby employees injured on the job receive coverage, and in return, lose the right to sue their employers with respect to the injury.

Pensions

Almost all individuals who work in Canada contribute to the Canada Pension Plan (CPP), which is a defined benefit plan. Employers are required by law to deduct and remit CPP contribution from employees' income. Employers are also required to make contributions to CPP on behalf of their employees. Employees may apply for and receive a full CPP retirement pension at age 65. Alternatively, employees may receive a reduced pension at 60, or as late as 70 with an increase. Many employers and employees participate in workplace pension plans or group RRSP arrangements in order to supplement employees' CPP entitlements. Some common benefits include private pension programs, as well as supplemented health benefits (which cover costs of items or care that are not covered by the universal healthcare system (e.g. prescription drugs or vision ware).

V. ISSUES ARISING ON TERMINATION OF THE EMPLOYMENT RELATIONSHIP

TERMINATION OF EMPLOYMENT CONTRACTS

Grounds for Termination

Employment can be terminated at any time if the employee is provided with appropriate notice of termination as well as any applicable legislative entitlements. However, if an employee engages in conduct that is incompatible with the fundamental terms of the employment contract, he or she may be dismissed without notice. Although it is very difficult to establish just cause for dismissal, the types of activities that may constitute cause for dismissal include theft, workplace harassment, criminal activity, and significant dishonesty or fraud.

Is Severance Pay Required?

Employees are entitled to statutory notice of termination or pay in lieu thereof in all Canadian jurisdictions, unless they have been terminated for "just cause" or "willful misconduct". The statutory notice period is based on an employee's length of service, but does not exceed eight weeks in any jurisdiction. Mid-size to large employers operating in Ontario will be required to dispense severance pay to persons who were employed for at least five years (this requires a lump sum payment that is calculated as one week per year of service to a cap of six months).

Whistleblower Laws

Canada makes it a criminal offence for an employer to retaliate (or threaten to retaliate) against an employee in order to convince them "to abstain from providing information to a person whose duties include the enforcement of federal or provincial law, respecting an offence that the employee believes has been or is being committed". There are also specific protections offered to employees under almost every employment-related statute, should they come forward with a valid complaint about their employer, or if they assert their statutory rights. It should also be noted that employees generally have a duty of loyalty to their employer. Depending on the facts of a situation, an employee may be in breach of that duty (which can be grounds for termination) if their "whistleblowing" is for political or other purposes, unrelated to asserting statutory rights.

RESTRICTIVE COVENANTS

Definition and Types of Restrictive Covenants

In the employment context, restrictive covenants are most commonly found in employment contracts. Courts have held that restrictive covenants are presumptively unenforceable on the basis that

they are considered a restraint of trade contrary to public policy. An employee whose position involves a significant authority and responsibility, may be a "fiduciary" and will thus have a common law obligation to refrain from competing with or soliciting customers or employees. The following restrictive covenants are recognised and may be enforceable under the law: i) non-compete clauses; ii) non-solicitation of customers; and iii) non-solicitation of employees.

Use and Limitations of Garden Leave

Garden leave is fairly uncommon in Canada, although some employers have begun to view garden leave as a viable alternative to restrictive covenants which are notoriously difficult to enforce. In the absence of any contractual provision contemplating that an employer may remove some or all of an employee's job duties, there is some risk that an employee placed on garden leave may claim that he or she has been constructively dismissed, and therefore entitled to treat the employment relationship as severed, and immediately begin seeking other employment.

TRANSFER OF UNDERTAKINGS

Employees' Rights in Case of a Transfer of Undertaking

Employers cannot defeat legitimate bargaining rights held by a union either by organising their affairs in an attempt to change their legal identity or by selling the affected business to a third party (whether or not that third party has any relationship with the vendor). Two or more legally distinguishable entities may be considered to be one employer for labour relations purposes and bind a third party to a pre-existing collective bargaining relationship. Also, a purchaser may be bound to the collective bargaining relationship of the vendor. Provincial employment standards legislation generally contain a "deemed continuity" provision (where a purchaser retains or hires the employees of a vendor company, the service of those employees may be deemed to be continuous for the purpose of calculating notice and severance, as well as other benefits linked to length of service under the law).

Employees of the vendor who are not employed by the purchaser are entitled to, at minimum, notice of termination under the applicable employment standards legislation. However, if the employee is offered employment by the purchaser, employment will be deemed to be continuous for the purposes of employment standards legislation. Therefore, employees will be given credit for their past service, which may impact on their entitlements upon termination, which generally increase according to an employee's length of service.

Requirements for Predecessor and Successor Parties

The liabilities of the vendor and purchaser depend on whether the transaction was a share purchase or an asset purchase. In a share purchase, the legal identity of the employer does not change, so there will be no change in the obligations and liabilities attached to the business. The purchaser will therefore acquire all obligations owed to employees, unless the parties have agreed otherwise under the agreement of purchase and sale. In an asset purchase, the legal identity of the employer changes, such that the employment relationship will be severed. The vendor employer will be liable for any notice of termination payable to severed employees. However, if an employee of the vendor is employed by the purchaser, his or her employment will be deemed to be continuous for the purposes of employment standards legislation in most provinces.

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CHILE.

CARIOLA DÍEZ PÉREZ-COTAPOS

I. HIGHLIGHTS

- Chile's labour laws are established as a general system to protect employees.
- Terminations in Chile -both for cause and without cause- must be duly grounded in writing.
- Labour Courts normally rule looking for employees´ protection.
- Labour Courts ponder the evidences according to the "rule of reason".

II. INTRODUCTION

The Chilean Labour Statute contains several minimum rights granted to employees that must be honored by employers. Those minimums cannot be waived by employees. The most relevant minimum labour rights are: minimum legal wage (currently approx. US$425); 15 working days' vacation per year; profit sharing; maximum 45 hours of work per week; severance; and social security contributions.

III. ISSUES ARISING UPON HIRING INDIVIDUALS

PRE-EMPLOYMENT CONSIDERATIONS

Limitations on Background Checks

In Chile, employers are not allowed to condition a hiring on economic records (exceptions apply) and cannot request pregnancy certificates nor HIV checks.

Restrictions on Application/Interview Questions

Distinctions and preferences are forbidden if based on: race, color, gender, maternity, religion, politic opinion, language, social origin, nationality, gender identity, sexual orientation, or union affiliation. An application cannot be rejected because of any of the above conditions.

AUTHORISATIONS FOR FOREIGN EMPLOYEES

Requirements for Foreign Employees to Work

In companies with 25 or more employees, at least 85% of those hired must be Chilean citizens. To determine this ratio, the law excludes technicians. For these purposes the law deems the following persons as Chileans: (i) foreigners whose spouse or civil partner or whose children are Chilean, including widows or widowers of a Chilean spouse; and (ii) foreigners who have resided in the country for more than five years, not considering accidental absences. National Employees: remunerations of employees are subject to a monthly Second Category Income tax, under a progressive tax scale to be deducted at source by the employer. This tax is payable by the company to the Treasury within the first 12 days of the month following that of the deduction. Currently, the tax brackets range from exemption to a 40% tax rate. Foreign Employees: foreign employees rendering services in Chile and also domiciled or residing in Chile are likewise subject to the Second Category tax. As a general rule, foreigners neither domiciled nor residing in Chile and working in Chile are subject to a flat 35% Additional Income tax to be deducted by the company that employs them in Chile upon payment of the salary or fee, and the tax is payable to the Treasury within the first 12 days of the month following that in which the tax was deducted.

Does a Foreign Employer need to Establish or Work through a Local Entity to Hire an Employee?
Foreign employers do not need to establish a local hiring entity. However, when services are rendered in Chile to a foreign employer under labour subordination, the latter must designate a representative in Chile (typically a payroll provider) to sign a local employment contract on its behalf, as well as to pay salaries and social security contributions.

EMPLOYMENT CONTRACTS

Minimum Requirements
Chilean legislation provides three categories of labour contracts: individual labour contracts, collective labour contracts and special contracts. The minimum provisions that must be included in the individual labour contract, such as date and place of the contract, the identity of the parties, the position of the employee and job description, the place of work, the remuneration to be paid by the employer, the terms of payment (at maximum 1-month intervals), workday, the duration of employment and the benefits in cash or in kind to be provided by the employer. The law also provides for several other special labour contracts (e.g. the apprenticeship contract which is restricted to individuals under 21 years of age; farm employees' contracts; contracts for employees on ships or at sea and temporary dock employees, and contracts for domestic help). In Chile, it is common that large companies subcontract businesses to perform specific tasks or render special services (e.g. security, cleaning, catering, etc.)

Fixed-term/Open-ended Contracts
The parties may either agree on an indefinite contract or places limits on terms (to the completion of a particular job to be performed by the employee, or else agree on a fixed period of time). In this last case, the contract's term cannot exceed one year, or two years in the case of managers, professionals and technicians. However, local law allows term extension (which cannot surpass the overall time previously mentioned). If the employee continues rendering services for the same employer after the contract term's expiration, it will automatically become indefinite. It is also important to consider that in November 2018, certain changes were introduced to contracts for a special job task. The new scheme provides that different tasks or stages of a specific work may not be individually considered as two different successive contracts for it will be legally presumed as indefinite. Also, any contract engaging permanent services will not be deemed as a contract for a specific job. Lastly, these employees are entitled to vacation and a special kind of termination severance if certain requirements are fulfilled.

Notice Period
To terminate an employment contract for cause, the employer can produce an immediate termination, without notice requirements. Other terminations require 30 days' notice. Immediate terminations are allowed as well, if paying a severance in lieu of notice (1 month capped remuneration).

PAY EQUITY LAWS

Extent of Protection
The Equal Pay Law establishes that companies shall comply with the principle of equal remuneration between men and women performing the same work, and objective differences in remuneration based on, among other reasons, capabilities, qualifications, suitability, responsibility or productivity, shall not be considered arbitrary. Differentiated remuneration may be agreed upon, in the event that any of the following situations arise:

- differences in the individual capacities of the employees;
- differences in the qualifications or objective evaluations of the personnel taken or performed by the company, based on, among other aspects, the fulfillment of objectives, the employee's productivity, attendance and punctuality;
- suitability for the position (e.g., those individuals who meet the necessary or optimal conditions for a given function or work);
- different levels of responsibility within the company's organisation, which will be expressly stated in the respective employment contracts;
- difference in the employee's productivity.

Remedies
Any employee who considers that he/she has been or continues to be affected by events that threaten the equality of remuneration between men and women, has the right to petition, in writing, the head office, or the management, or

the respective personnel unit directly, demanding equal remuneration.

IV. ISSUES ARISING DURING THE EMPLOYMENT RELATIONSHIP

WORKING CONDITIONS

Minimum Standards

Employers have a general duty as follows: to have in place all necessary tools and conditions to efficiently protect the life and health of all employees rendering services in its facilities, as well as to avoid labour accidents or diseases. Employers must inform their employees of the possible risks that they could face at the workplace.

Salary

The law considers as remuneration the cash payments and cash-equivalent benefits in kind that the employee receives from the employer on account of the employment agreement. The remuneration includes base salary, overtime payment, commissions, profit sharing and bonuses. The law sets a minimum level, which in the case of the monthly base salary for employees working 45-hour weekly cannot be lower than one legal monthly minimum wage (CL$326,500; US$425 approximately), as from 1 September 2020. If a company earns profits, it must share part of them with its personnel. The law stipulates that companies must distribute 30% of net profit to the employees, calculated in proportion to the employee's salary. The basis used to determine profits is the corporate taxable income (subject to certain adjustments) less 10% of net equity. However and in lieu of the above obligation, the employer may pay a bonus of 25% of the yearly salary, but the bonus in this case, regardless of the level of salary of the employee, cannot exceed 4.75 monthly minimum wages (at present CL$1.550.875; US$2,015).

Health and Safety in the Workplace

Companies or establishments with more than 25 employees are obliged to create a Permanent Safety, Hygiene and Risk Prevention Committee, responsible for the adoption of all measures necessary to avoid work-related accidents and for recommending the proper use of the safety gear available.

Managing COVID-19-Related Employee Issues

Medical leaves are permitted to cover sickness periods, including childcare in some cases. When an employee is under a medical leave certificate, the salary is covered by the social security system (capped amounts/rates apply). An employee cannot refuse to work, except if granted with a medical leave certificate. However, if an employee reasonably considers that the employer has not taken the necessary health protection measures, and believes to be at serious risk, the law allows the employee to leave the workplace (employers can challenge this action in court or before the Department of Labour). Employers must report to the health authority (or by means of the administrator of the labour accidents insurance) any accident or professional disease that occurred at the workplace; including COVID-19 infections.

COVID-19: Best Practices

- provide opportunities for working remotely, if possible;
- avoid in-person meetings;
- taking vacation in advance (by agreement or imposed by the employer and applicable to all employees);
- training on health prevention measures;
- travel restrictions, except in case of a business emergency;
- flexible working shifts to ensure social distancing;
- prohibition on the use of collective lunch areas or break rooms;
- mandatory use of masks and gloves and handwashing policies.

SOCIAL MEDIA AND DATA PRIVACY

Restrictions in the Workplace

There is no regulation in Chilean labour legislation that regulates the use of new technologies, much less social networks (e.g., Facebook, Twitter, Instagram or other platforms). Employers can nevertheless, regulate the use of technological tools provided for labour purposes.

Can the employer monitor, access, review the employee's electronic communications?

Employers can include a provision in the Internal Work Rules, wherein any email sent by an employee within the framework of the employment relationship and through company-devices, will be automatically copied to a supervisor or to a

server. However, the private communications of employees must be respected.

Employee's Use of Social Media to Disparage the Employer or Divulge Confidential Information

Employees using social media to divulge confidential information can be terminated for cause. Any particular situation must be considered on a case-by case-basis.

EMPLOYEE BENEFITS

Social Security

In 1980, the Chilean Social Security system transitioned from government-administrated pension and healthcare systems, to contributions made to funds administered by private entities, subject to overall government control. Old-age pensions are financed exclusively by the employees through contributions that are accumulated in individual accounts. For these purposes, employees must contribute 10% of their monthly remuneration up to a maximum of 80,2 UF (US$3,334). In addition, employees must contribute 7% of their monthly remuneration for medical care, also up to an 80,2 UF cap. Finally, employers must contribute between 1% and 1.5% of the employee's remuneration for disability and survival insurance (SIS). For purposes of labour and social security legislation, work may begin, as a general rule, at the age of 18 and retirement may occur at the age of 65 for men and at age 60 for women, with provisions for early retirement in certain cases. In Chile, retirement is not a legal cause for termination.

Healthcare and Insurances

The Social Security system covers all employees, including independent employees. The latter are legally obliged to contribute to a mandatory insurance that covers old age, disability and survivorship insurance. In the case of foreign employees, as a general rule, they must also pay social security contributions; although certain exemptions may apply. Insurance for accidents or professional illnesses provides for medical and dental attention, hospitalisation and medicine, as well as indemnities (depending on the type of disabilities suffered) and related expenses. Unemployment insurance is financed on a tripartite basis, as the contributions are paid by the employer, the employee (2.4% and 0.6% of the employees' taxable remuneration up to a maximum of 120 UF, respectively) and the government. This insurance is mandatory for every employee hired after 1 October 2002, whereas it is discretional for employees hired before said date. In the case of fixed-term contracts, the entire contribution (3%) is exclusively financed by the employer.

Holidays and Annual Leave

Employees who have worked for more than one year have the right to an annual paid vacation of 15 working days. The holiday must be continuous, but the excess over the 10 working days may be divided by mutual agreement. After working ten years, continuously or not, for the same or different employers, vacations are extended by one working day for every three years of service for his current employer. In case of employees who work in the 11th and 12th Regions of the country and the province of Palena, the basic vacation period is 20 days. Sundays and days legally established as holidays shall be non-working days, except for activities authorised by law to be performed on those days. Companies exempt from this prohibition must compensate their employees with a paid day off in exchange for worked Sundays or holidays. However, in certain activities, at least two rest days in the month must be granted on Sundays. When more than one paid day off is accumulated in one week, the parties may agree on a special distribution or on a special remuneration mechanism. In the latter case, remuneration for the compensated rest day has a surcharge that cannot be less than 50%.

Maternity and Paternity Leave

Female employees are entitled to six weeks leave before (prenatal leave) and twelve weeks after (postnatal leave) the birth of a child, on full pay. This payment is made by the Social Security system and not by the employer. In addition, women cannot be dismissed during pregnancy and for a period of one year as from the end of the postnatal leave, other than with prior authorisation of a labour court. Additionally, to the referred postnatal leave, exists a supplementary permit that as a general rule, provides a 12 weeks' permit after the end of the postnatal dispensation of the mother, on full pay. Nevertheless, the mother entitled to this benefit may choose to return to her job in a part time schedule, in which case the parental permit and subsidy is extended to 18 weeks. In this case, the subsidy granted by the Social Security System is reduced to 50% of its salary and the employer must pay, at least, 50% of the remuneration set

forth in the labour agreement and all variable remuneration to which she is entitled. Likewise, the mother may benefit the father of the child by granting him part of the parental leave. In this case, the subsidy will be paid according to the salary of the father. The employee who has been entrusted by a court of law with the personal care of a child less than one year old, as a protection measure, shall also be entitled to such leave and subsidy allowance. This right shall be extended to the spouse or civil partner. Establishments with 20 or more female employees, regardless of their age or marital status, must provide a nursery service for children under 2 years old. Employers may contribute to an external nursery school to provide such service. While the women are feeding their babies, they must be granted one hour a day for this purpose.

Sickness and Disability Leave

Chile provides a public and private medical system for employees including preventive and curative health care. The preventive medical service provides for periodic medical checks. When employees are found to suffer a specific illness, they are granted sick leave. During periods of sick leave the employer cannot terminate the labour contract without cause, but the medical system pays the salary starting on the fourth day of illness or the first day in case of leaves exceeding 10 days. A monthly cap applies. This system is funded through employees' contributions.

Other Forms of Leave

In the event of the death of a child, spouse or civil partner, every employee shall be entitled to 7 calendar days of paid permit, in addition to the legal vacations to which the employee is entitled to. In this case, the employee shall also be entitled to labour protection or immunity for one month, as from the date of death, thus entailing that said employee cannot be fired unless a labour court has previously authorised such dismissal. Regarding employees hired for a fixed-term or for a specific task or service, the labour privileges shall be afforded to them only during the effective term of the corresponding contract, if said term is less than one month, without requiring the court's authorisation. This allowance shall amount to 3 business days in the event of death of a child during pregnancy, and in the event of death of the employee's father or mother, albeit without granting the benefit of labour privileges or immunity. In case of marriage or civil union, every employee shall be entitled to 5 continuous working days of paid leave, in addition to the annual holiday, which may be used at the employee's option.

Pensions

Indemnities are granted in the form of a pension to the injured employee or to his/her spouse and dependent children in case of death of the employee. The Employees' Compensation Fund is funded through a base contribution (made by the employer) of 0.90% of the employee's salary (with a cap of 80,2 UF per base salary), plus an additional payment, which must be borne by the employer exclusively, depending on the activity and level of risk of the company (additional rate from 0% to 3.4%). Employers have no legal obligation to provide fringe benefits, other than benefits which may be voluntarily agreed in individual or collective contracts or agreements. Pension and sickness benefits are covered by the Social Security system. There is no legal obligation to provide catering facilities and meals.

V. ISSUES ARISING ON TERMINATION OF THE EMPLOYMENT RELATIONSHIP

TERMINATION OF EMPLOYMENT CONTRACTS

Grounds for Termination

The labour contract may only be terminated by agreement of both employer and employee, by the employee's resignation, by the death of the employee, by the expiry of the fixed-term agreed upon in the contract, by the completion of the work for which the employee was hired, by an act of God or circumstances beyond the control of the parties (force majeure) and upon dismissal by the employer. As a general rule, in Chile an employer cannot terminate a labour contract at will. Employers must ground terminations on a company-related business need.

Is Severance Pay Required?

If the employer dismisses the employee based on the general grounds of "company/business needs"

such as changes in economic conditions, downsising of the company, or in case of termination at will (when permitted by law), the following severance compensation will be awarded to the employee: i) severance compensation for years of services amounting to one month's remuneration for each year or fraction thereof in excess of six months spent in the service of the same employer, with a limit of 330 days' worth of remuneration; for the calculation purposes, the basic monthly remuneration cannot exceed a maximum of 90 UF (US$3,435), the parties may waive the capped amount; and ii) if the dismissal notice is not given 30 days in advance, the employee will be entitled to receive a severance compensation equivalent to one month's remuneration (same cap applies). If the employer does not pay the above severance to the employee, certain increases may apply, up to 150%. If the employee is dismissed for cause (serious breach of contract by the employee, material misconduct, etc.) the right to severance compensation shall not apply.

Whistleblower Laws

In Chile, the legislation for the protection of whistleblowers is very restricted in contrast to the advanced regulations on the subject in comparative law. In addition, it does not include forms of reparation or compensation to the complainant for the reprisals suffered, or other protections unrelated to the protection of his/her labour situation. Only under Law No. 20.393 of 2009 on establishing the criminal liability of legal entities for the crimes of money laundering, financing of terrorism and bribery – are certain companies required to introduce procedures for whistleblowers. In the commission of any such crimes, the employer may be liable for the criminal acts committed by employees and dependents within the scope of their duties.

Definition and Types of Restrictive Covenants

Any type of agreement in an employment contract or obligation that either restricts the employee from taking some action or which requires the employee to abstain from a specific action, falls under the definition of a restrictive covenant. Covenants that can be included in the employment agreement, during the labour relationship, and may be enforceable are: i) non-compete clauses; ii) non-solicitation of customers; and iii) non-solicitation of employees.

Use and Limitations of Garden Leave

An employee who is leaving a job, having resigned or otherwise had his employment terminated, is instructed to stay away from work during the notice period, while remaining on the payroll. Garden leave is not regulated in Chile. As a result, the parties could agree to such a scenario, but the employer however, cannot unilaterally impose it.

TRANSFER OF UNDERTAKINGS

Employees' Rights in Case of a Transfer of Undertaking

The Chilean Labour Code states that total or partial modifications relating to ownership and possession (actual, constructive or mere possession) of the company, will not affect the rights and obligations of employees arising from their individual contracts or collective agreements, which will maintain their continuity with the new employer.

Requirements for Predecessor and Successor Parties

No special requirements are necessary if the legal continuity principle applies.

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CHINA.

ZHONG LUN LAW FIRM

I. HIGHLIGHTS

- Employers must sign the employment contract with full-time employees or the employer shall pay double the monthly wage to the employees, for at least 11 to 12 months.
- Probation periods shall not be longer than what is permitted by law and one employee can only have one probation period, otherwise the employer shall pay compensation to the employee for the exceeded probation period or the second probation period performed by the employee.
- Amending an employment contract (e.g. job title) must be agreed by both employer and employee in written form.
- Internal rules which may affect employees' personal interests must fulfill the consultation process, or they will not take effect (e.g. they will not apply to the employees).
- In China, termination must be based on the grounds permitted by law. Otherwise, the labour relationship may be reinstated, even after termination (e.g. employers may be forced to re-hire terminated employees or pay double severance).
- Chinese severance pay practices are unique, in that a highly paid employee's severance is capped, which can result in a senior manager's severance being lower than that of a junior employee.
- Chinese employers cannot require employees to pay liquidated damages, except in limited situations involving non-competition and service-period duties.
- Employees are not entitled to organise labour strikes under Chinese law. However, employees will still engage in self-organised strikes; these strikes are not legally supported by trade unions.

II. INTRODUCTION

China, as one of the fastest-growing economies and most populous countries, plays a critical role in business, industry and politics. However, many outsiders encounter significant difficulty understanding Chinese labour law and find themselves in challenging and uncomfortable situations. This may be due to the law's specificity and scope, which forms a labyrinth of interconnected regulations and rules governing minutia ranging from severance to trade unions. Routine tasks in other jurisdictions can be much more dramatic affairs in China. This can be daunting, but our hope is that after reading this article, you will have the tools and foundation to successfully navigate Chinese labour law. Chinese labour law applies to all businesses, individual economic organisations, private non-profit entities, etc. in the People's Republic of China (the "PRC") and the individuals who have employment relationships with such entities and organisations. Employment relationships between government offices, public institutions and social groups and their employees are also governed by Chinese labour law.

III. ISSUES ARISING UPON HIRING INDIVIDUALS PRE-EMPLOYMENT CONSIDERATIONS

Limitations on Background Checks

The employer is entitled to know an employee's basic information, which directly relates to the employment contract and the employee is obligated to inform the employer of the said information truthfully. However, the background checks or application/interview questions shall not infringe

employees' privacy rights or equal employment rights; otherwise the employer could be liable to litigation. For any personal information obtained through background checks, employers shall fulfill the requirements of the Civil Code to process such information. Pursuant to the Civil Code, the processing of personal information shall respect the following principles with the aim to be legitimate, just, necessary and not excessive. Moreover, employers are required to obtain consent from individuals for collecting personal information. In practice, to avoid potential disputes, it is advisable for employers to obtain the job applicant's consent before implementing the background checks.

Restrictions on Application/Interview Questions

Issued by nine departments accorded top-level authority in China, the Circular Related to Further Action to Promote Employment for Women details the restrictions imposed on employers and human resource agents when engaging with female candidates during the recruitment process. When interviewing prospective female candidates, employers are explicitly restricted from raising questions about marital status or pregnancy status. The penalties for an employer's breach of this restrictive rule include a fine up to RMB 50,000.

AUTHORISATIONS FOR FOREIGN EMPLOYEES

Requirements for Foreign Employees to Work

Under PRC law, expatriates working in China must be in possession of a work permit and a residence permit (for employment purposes) otherwise their employment may be considered illegal. In cases of illegal employment, the employer and the foreign employee may be penalised by the authorities, and their relationship will not be protected by labour law. To obtain a work permit and residence permit for a foreign employee, an employer must apply to the government for the notification of a work permit for the foreigner. After obtaining the work visa, the foreigner should apply for a work permit within 15 days of entering or reentering China.

Work permits usually have a term of one year and never exceed five years even if certain conditions are satisfied. Residence permits usually have the same term as work permits. If the employer intends to continue to employ the foreigner after the expiration of the work permit and the residence permit, the employer must apply for a renewal of the permits at least 30 days before their expiration. The employment relationship automatically expires if the work permit or residence permit becomes invalid or is cancelled. In addition, foreigners who come to China to perform special tasks in the areas of technology, scientific research, management or guidance with Chinese business partners or other reasons and stay in China less than 90 days must apply to the relevant authorities for their approval letters, certificates of employment, invitation letters or confirmations of invitation and work visas.

Does a Foreign Employer need to Establish or Work through a Local Entity to Hire an Employee?

The PRC labour laws and regulations will not be applicable to the employment relationship established between a foreign-registered employer and its employees. However, if the foreign company plans to recruit and have employees work in China, in order to avoid the risk of permanent establishment, foreign companies are usually required to incorporate subsidiary company or representative office in China. The subsidiary company incorporated in China can directly hire employees or retain employees seconded from foreign parent companies. A representative office established by a foreign employer is only allowed to hire Chinese employees through a local HR agent in China.

EMPLOYMENT CONTRACTS

Minimum Requirements

A written employment contract is necessary to establish a full-time employment relationship. However, a part-time employee, who works no more than 24 cumulative hours per week and four hours, on average, per day, is subject to different requirements and may be employed under an oral contract. The employer must execute a written employment contract with the employee within the one-month grace period (commences upon the employee's first day of work), otherwise the employer will owe double wages to the employee for each month of employment after this grace period without a written contract, and such period shall not be longer than 11 or 12 months. If an employer fails to execute a written employment contract with a full-time employee for over a year, the employer and the employee shall be deemed to have executed an open-ended employment

contract. An employment contract can usually, only be modified in writing. However, a verbal modification may also be valid if the modification has actually been performed for longer than one month and does not violate any laws and the employee does not raise an objection within one month after the modification.

Fixed-term/Open-ended Contracts

Employment contracts in China can have three different types of terms: fixed, open-ended or terms that expire upon completion of an assignment. Under the Labour Contract Law, if an employer opts to enter into a fixed-term contract with an employee, after the completion of two fixed terms, that employer will be obligated to execute an open-ended contract upon the employee's request. Since open-ended contracts are inherently difficult to terminate, employers may want to use fixed-term contracts for new hires. This would give the employer a chance to evaluate its new employees. If the employee's performance is deemed unsatisfactory, a fixed-term contract provides the employer with the option of discontinuing the employment relationship at the end of the term.

Trial Period

In China, the employee trial period is also known as the probationary period. A probationary period is commonly included in employment contracts. However, Chinese labour law contains restrictions on the length of the probationary period. The employer may agree on a probationary period with the same employee only once. Probationary periods are not permitted for employment contracts that expire upon completion of an assignment or those with terms shorter than three months.

Notice Period

In China, an employee may unilaterally terminate his or her employment contract by giving a written notice 30 days in advance or 3 days in advance during the probationary period. On the other hand, an employer may unilaterally terminate an employment contract by giving a written notice 30 days in advance or providing one month's salary in lieu of notice in certain circumstances. In addition, if the employer intends to reduce its workforce by 20 persons or more or by a number that is less than 20 but accounts for 10% or more of the total number of its employees, the employer must explain the situation to the trade union or all employees 30 days in advance, provide relevant information regarding the employer's production and operational status, and make a formal report to the local labour authorities.

PAY EQUITY LAWS

Extent of Protection

General provisions on the principle of "equal pay for equal work" exist in different PRC laws. The state shall protect the rights and interests of women, implement equal pay for equal work by men and women, and train and select female officials. Wages shall be distributed according to contribution and equal pay for equal work shall be implemented. Equal pay for equal work is prescribed under the context of a labour dispatchment relationship, according to which, dispatched employees shall be entitled to receive the same pay as employees directly hired and working in the same positions. In addition, the same labour remuneration system shall be used for the dispatched employees and directly-hired employees, based on the principle of equal pay for equal work. In some areas in China, the people's courts have issued judicial opinions that provide further details to guide the hearings in cases involving equal pay.

According to the judicial opinions issued by the Shanghai High People's Court, "equal work" cannot be simply determined based on the employees working in the same position, but rather the court should comprehensively consider the factors, such as employees' work experience, work skills, work enthusiasm and other special circumstances, and employers are allowed to pay employees working in the same position according to different remuneration standards based on these factors.

Remedies

An employee may challenge equal pay practices by filing labour arbitration/litigation against the employer; the available remedy for such claims is to force the employer to make up the difference in salary. In addition to the judicial proceedings, employees may also apply to the trade union and request mediation for resolving the dispute with the employer regarding salary standards.

IV. ISSUES ARISING DURING THE EMPLOYMENT RELATIONSHIP

WORKING CONDITIONS

Minimum Standards

The employment relationship established under the PRC employment laws and regulations is highly regulated. Employers are under a legal obligation to provide the minimum working conditions in the following aspects: i) labour remuneration; ii) rest and holidays; iii) working hours; iv) compensation for overtime work; v) contribution for social insurance; vi) payment of statutory severance where applicable; and vii) provide for a safe and healthy working environment and measures for protection against occupational hazards.

Salary

Employers and employees should specify salaries in their employment contracts. Full-time employees should be paid their salary at least once a month. Employees' monthly salaries should not be less than the minimum monthly wage. Employers may arrange for their own compensation and bonus policies (e.g. performance bonuses, annual bonuses, stock options,…). Employees are responsible for individual income taxes and other taxes. Employers should withhold individual income taxes and the employee's portion of social insurance contributions from the employee's salary and pay said amounts to the government on behalf of their employees.

Health and Safety in the Workplace

An employer must establish a sound labour safety and hygiene system and strictly implement state rules and standards of labour safety and hygiene, conduct labour safety and hygiene education among its employees, prevent accidents and reduce occupational hazards. The so-called "Norms" define the employer's obligations regarding notification and warning of occupational hazards and remind employees to take appropriate protective measures.

Managing COVID-19-Related Employee Issues

For employees who are confirmed to be infected, an asymptomatic carrier, suspected of infection or having close contact with the COVID-19 virus, employers shall pay them their normal salary during their quarantine or medical observation period. After the end of quarantine, if the employee remains sick and fails to return to work, the medical treatment period-related regulations shall apply. The Beijing Municipal Government released a policy regarding paid parental leave, allowing one employee per family to work remotely in order to care for children under 18 years old, and requiring the employer to pay the salary based on their normal attendance during the remote work period. However, this policy was formulated when school openings had been postponed, and is likely outdated since schools began to gradually reopen in May. In the absence of any compulsory obligations imposed on employers as to how to handle such employment relations in this situation, it is advisable that employers negotiate with employees to reach an amicable solution, such as arranging for work from home, paid annual leaves, beneficiary leaves, or non-paid leaves.

In addition, according to a judicial opinion released by the Beijing High People's Court, where the employee fails to return to work for a relatively long period, the employer may pay the employee's basic living fees from the second salary payment cycle, normally, the second month. Under PRC Law on Control and Prevention Infectious Disease, if employers should identify an infected employee, they should report it to the relevant medical institution. However, employers shall not publicise or disseminate employees' personal data without authorisation, which may infringe the individual's legitimate interests as protected by the PRC Civil Code. Only the State Council, health administrative department at provincial level and government, at or above county level, have the right of publicise the relevant information.

COVID-19: Best Practices

In the first quarter of 2020, the Chinese government adopted policies to restrain social activities and advocated for employers to arrange for employees to work from home, for pandemic prevention purposes. Some employers attempted to permanently arrange for supportive employees to work at home afterwards, as they accumulated telework experience during this period. There are no official guidelines or mandatory rules to cope with employment under this scenario. In this regard, updating the company's internal policies

and procedures is essential in order to respond to potential legal risks.

First, the employer shall determine positions that will implement telework and address them as such in employee handbooks or the employment contracts. Second, the employer shall set up detailed management rules specifically for employees working from home, such as rules of timely reporting working hours and progress, rules of overtime application, etc. Third, employees' personal data and privacy protections as well as protections for the employers' trade secrets shall also be considered. It is therefore advisable that employers obtain written consent before collecting, storing or using employees' personal data and formulate a confidentiality policy for personal computer and mobile phone usage. This last procedure is highly controversial in that it entails the identification of an employee's work-related injury, while he/she is working at home, and whether employers may require employees to confirm the safety of their environment in writing, from time to time, and whether they may evaluate the same periodically.

SOCIAL MEDIA AND DATA PRIVACY

Restrictions in the Workplace

Employers in China may impose restrictions on employee's electronic communications. The restrictive requirements are usually phrased as i) the electronic communication systems including the computers, Internet systems, telephone, voice mail and email systems provided to employees by the employer, shall belong to the employer and only be used for work-related purposes; and ii) the employees shall not have a legitimate expectation of privacy protection in regard to the said electronic systems. Restrictive requirements are often documented in the employer's internal policies and become binding on the employees after undergoing the due procedures.

Can the employer monitor, access, review the employee's electronic communications?

If the employer's restriction on employees' use of electronic communications is a part of its internal policies, which have undergone the said Democratic Procedures and have been announced to all employees, or informed to a specific employee, or is incorporated in the employee's employment contract, it could be valid and enforceable. As employees' electronic communications may include personal information that can be identified under the PRC Civil Code, the employer shall also be aware of observing the PRC Civil Code when processing such information.

Employee's Use of Social Media to Disparage the Employer or Divulge Confidential Information

Similar to the restrictions on employees' usage of electronic communications, an employer may also formulate its social media policy to require its employees to refrain from making disparaging comments about the employer. The social media policy also needs to undergo the Democratic Procedures before it can (legally) be enforced. In a recent case decided by the Beijing No. 3 Intermediate Court, the Court determined that the employee's online articles were derogatory and aggressive and therefore it was legal for the employer to terminate the employment relationship pursuant to its employee handbook. However, the nature of the non-disparagement obligation conflicts with an employee's freedom of speech, to a certain extent. Sometimes, it is also difficult to objectively determine whether or not the employee's words are disparaging to the employer. Thus, employers in China are often advised to be cautious when disciplining employees for violating their non-disparagement obligation. In line with internal policies, employers may impose disciplinary measures on employees who use social media to disparage the employer or divulge confidential information.

EMPLOYEE BENEFITS

Social Security

The Chinese government has advanced the nation's social security systems to include the basic pension insurance, basic medical insurance, work-related injury insurance, unemployment insurance and maternity insurance to protect the basic rights of citizens. These systems enable participating individuals to obtain assistance from the state (according and subject to certain conditions and procedures) in special circumstances such as when they reach old age, suffer certain illnesses, suffer a work-related injury, become unemployed, undergo maternity, etc. Additionally, employers and employees both participate in a housing provident fund system in accordance with the law.

Generally, employers in China contribute social security premiums and housing provident funds for their employees pursuant to the law. Employees themselves also contribute their own social security premiums and housing provident funds pursuant to the law. Employers typically withhold a portion of their employees' monthly salaries to help them complete their social insurance and housing fund contributions. The employer's obligation to contribute to social security premiums and housing provident funds, cannot be exempted by mutual agreement with employees.

Healthcare and Insurances

Employers and employees must both contribute basic pension insurance premiums; basic medical insurance premiums; unemployment insurance premiums; and must contribute to the housing provident fund. The housing provident fund is used for employees to purchase, construct, renovate or rebuild personal dwellings. Employers (but not employees) are required to contribute work-related injury insurance premiums. Employers are required to contribute maternity insurance premiums, which cover the medical costs for childbirth and provide a maternity allowance. Most cities in China have combined the maternity insurance with the basic medical insurance for unified collection. Apart from the abovementioned mandatory insurances, employers are free to purchase supplementary commercial insurance for their employees at their own discretion.

Holidays and Annual Leave

In the beginning of each year, the State Council will announce a holiday schedule which indicates 11 national holidays, including 1 day for the New Year Holiday, 3 days for the Chinese New Year, 1 day for Tomb Sweeping Day, 1 day for Labour Day, 1 day for Dragon Boat Day, 1 day for Mid-Autumn Day and 3 days of leave for National Day. According to the Regulations on Paid Annual Leave of Employees, employees who have worked between one and ten cumulative years are entitled to five days of annual leave. Employees who have worked between ten and twenty cumulative years are entitled to ten days of annual leave. Employees who have worked for more than twenty cumulative years are entitled to fifteen days of annual leave. If the employer fails to arrange annual leave for employees due to business reasons, the employer must pay an encashment to employees for such accrued, but untaken annual leave. The encashment value should total 300% of an employee's daily normal salary for each accrued, but untaken day of annual leave (100% has been included in the monthly salary and therefore only 200% shall be paid additionally).

Maternity and Parental Leave

On 27 December 2015, the National People's Congress issued the new Population and Family Planning Law of the People's Republic of China (the "Family Planning Law") which formally abandoned China's decades-long one-child policy and allows all couples to have two children. Late marriage and late childbearing are no longer encouraged under the Family Planning Law, and maternity leave may be extended by local rules.

Sickness and Disability Leave

During an employee's sick leave period, his or her salary will be determined and paid based on the standard of sick pay and sick benefits during the medical treatment period according to state laws and local regulations. If an employee suffers from a non-work-related illness or injury and needs to stop working as a result of medical treatment, a medical treatment period between 3 and 24 months will be granted according to local regulations in the place where the employee works, and based on the employee's years of service with the current employer and all previous employers (e.g. the employee's entire employment history). Disability could be caused by a non-work-related injury or a work-related injury. If the employee's disability is caused by a non-work-related injury, the employee could enjoy the same benefits (sick pay, medical leave and medical treatment subsidies) as in the event of illness. If an employee needs to suspend his or her work in order to receive medical treatment for a work-related injury or an occupational disease, his or her original wage and welfare benefits shall remain unchanged during the suspension period; generally no longer than 12 months.

Other Forms of Leave

Marriage leave is stipulated by the local population and family planning regulation and its length ranges from 3 to 30 days, in different cities of China. When a member of the employee's immediate family (parents, spouse or children) passes away, the employee may be given 1 to 3 days of compassionate leave with the approval of the employer, under specific circumstances. Marriage and compassionate leave shall both be considered as paid leaves.

Pensions
Currently in China, mandatory and typically provided pensions only include the basic pension insurance; the employer's pension insurance contribution rate was reduced to lower the cost of private businesses; starting from 1 May 2019, if the employer's contribution rate for the basic pension insurance in any province (city, district) is higher than 16%, it can be reduced to 16%.

V. ISSUES ARISING ON TERMINATION OF THE EMPLOYMENT RELATIONSHIP

TERMINATION OF EMPLOYMENT CONTRACTS

Grounds for Termination
PRC labour law generally favours employees and therefore contains many statutory provisions on termination of employment contracts that protect employees' rights and interests. The statutory grounds for termination are: termination by mutual agreement; termination by employee; termination by employer; and automatic termination.

Is Severance Pay Required?
For mutual terminations proposed by the employer, unilateral terminations by the employer via notice under the three statutory circumstances, redundancy terminations for economic reasons, unilateral terminations by the employee for the employer's fault or constructive terminations due to the employer's reasons, the employer is required to pay severance based on the employee's years of service. Severance is calculated at a rate of one month's salary (the "Average Monthly Salary") for each full year of service, defined as the average monthly wage of the employee over the last 12 months prior to his/her termination date. The Average Monthly Salary for severance calculations is capped at three times (3x) the local average monthly salary and when this cap is reached, the compensable years for severance calculation shall not exceed 12 years.

Whistleblower Laws
The PRC Labour Law explicitly stipulates that if employers unreasonably obstruct the labour administrative authority, relevant authorities or their officials from exercising the right of supervision and inspection, and retaliate against the whistleblower, the labour administrative authority or relevant authorities may impose a fine on the employer. From the perspective of corporate governance and company's operation compliance, the Chinese legislation has not yet formulated an independent sector of laws to govern the rights and obligations of the whistleblower. Except for the above-mentioned provision, a similar concept on whistleblower protection can also be found in the PRC criminal laws and regulations, where criminal liability is to be pursued by the public prosecutor, and the identity of the whistleblower is kept undisclosed for avoidance of potential retaliation against the whistleblower and of impeding any ongoing investigation.

RESTRICTIVE COVENANTS

Definition and Types of Restrictive Covenants
The following restrictive covenants are recognised and may be enforceable under the law: i) non-compete clauses; ii) non-solicitation of customers; and iii) non-solicitation of employees. The maximum non-competition term is 24 months

Use and Limitations of Garden Leave
The concept of garden leave does not derive from the PRC employment laws and regulations, but it is widely used in daily HR practice in China. Garden leave refers to the period when the employee is relieved from all job duties, maintains his/her employment relationship with the employer and receives normal remuneration. Garden leave is often arranged in the situations where i) the employee is suspected of misconduct and under investigation; or ii) the employer expects the employee to break away with the confidential information or trade secrets, before the employee's departure from the company. The use of garden leave is unlimited in most cities in China. However, we have seen exceptional cases where the arrangement of garden leave is viewed as a deprivation of the employee's working conditions, which entitles the employee to terminate the employment and claim severance.

TRANSFER OF UNDERTAKINGS

Employees' Rights in Case of a Transfer of Undertaking

When an employer decides major company matters that directly implicate the interests of employees, the employer should discuss such matters with the employee representative congress or its entire staff. It should only make a decision after consulting with the trade union or employee representatives. The consultation procedure is designed to give the trade union and employees a chance to express their opinions, but the employer has the authority to make the final decision. Another scenario involves the acquisition of assets, which may be defined by the labour law as a material change in the objective conditions on which the employment contracts were based. Such change would usually result in a shift of employment relationships or redundancies. Accordingly, the acquisition of assets itself would not trigger the consultation obligation; but if the acquisition of assets results in mass redundancy of employees, then a similar consultation obligation is required to be performed by the employer.

Requirements for Predecessor and Successor Parties

Equity Deal – a change of shareholders and a merger would not affect the performance of employment contracts and therefore neither the transferor nor the acquiring party is obliged to pay severance to employees. However, in practice, employees often demand severance and even collectively oppose such transfer, because they misconstrue a change of shareholders as a termination of employment or they worry that their rights and interests will be impaired after the transfer. Therefore, to appease these employees, some acquiring parties may promise that they will not reduce employees' compensation or benefits after the transfer and may even undertake to refrain from collective layoffs for a certain period (such as two years) following the consummation of the transfer of undertaking.

Asset Deal – in the event of the acquisition of assets, the acquiring party is not legally obliged to employ the employees of the target company, unless both the acquiring party and the employee agree to establish an employment relationship. If both the acquiring party and the employee agree on the transfer of employment, they may enter into a tri-party agreement together with the transferor to stipulate that the transferor and the employee will terminate their employment contract and that the transferee and the employee will sign new employment contracts. This may raise the issue of severance. Any seniority of transferred employees may be carried over to the acquiring party after the acquisition and no severance is paid until the employee is actually terminated during the employment with the acquiring party. This option for the transferee to carry over the employees' seniority reduces immediate transaction costs for the transferor, and thus it is the more common practice.

When the employment contract between the acquiring party and the employee is finally terminated, the employee may be entitled to receive severance according to law. At that time, the continuous seniority with the transferee and the transferor will be combined together for severance calculation. However, employees may firmly request severance even when they agree to transfer their employment relationship to the acquiring party. If the employee does not want to transfer to the acquiring party or the acquiring party does not want to hire an employee, the transferor may terminate the employment contract with the employee by a mutual termination agreement. If the employee refuses to sign the mutual termination agreement, the transferor may offer to amend the employment contract for the reason that the objective situation has materially changed and then unilaterally terminate the employment contract, by giving the employee 30 days' prior written notice or one month's salary in lieu of notice.

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LÓPEZ & ASOCIADOS ABOGADOS

I. HIGHLIGHTS

- Employee-legislation in Colombia is divided (due to its importance) into a compilation of particular rules for each specialty: labour rules, social security, procedural rules and employment law.
- Even when employment contracts, as a general rule, are considered an indefinite term, Colombian labour law is flexible in comparison to other countries, as it provides the possibility to use flexible forms of employment without major restrictions.
- Colombian labour law provides high flexibility regarding dismissal. However, in recent years the case law has developed greater protection to prevent possible discriminatory situations.
- Foreigners are only allowed to work in Colombia through a work permit or with a residence permit if they are planning (or are currently) to stay permanently in the country.
- Constitutional actions ("Tutela") demanding immediate protection of fundamental rights is an important source for labour norms, as a result of the interpretation of the written labour rules.

II. INTRODUCTION

Colombian labour law is governed mainly by the Labour Code, which dates from 1950. The applicability of these rules is done (directly) through the law. Though collective labour law rules have not experienced any significant changes since 2008, there currently exists a segment of ´legal unity´ in Colombia, which is an important dynamic in the employment relations regarding trade unions. Colombian labour rules and principles are not only considered a public policy rule, but most of these principles also have a constitutional hierarchy, together with the International treaties or conventions that recognise human rights ratified by Colombia. The consequence of this situation is that employers cannot (even with the employee's approval) provide conditions worse than those recognised by the law, the constitution or an international treaty or convention, which recognises human rights ratified by Colombia. There have been three main reforms to the labour rules in order to add flexibility to the Colombian labour market to match globalised standards.

III. ISSUES ARISING UPON HIRING INDIVIDUALS

PRE-EMPLOYMENT CONSIDERATIONS

Limitations on Background Checks

Express prohibitions over background checks in the legislation include the following: HIV tests or conditions; pregnancy test; mandatory military service approval; unionised condition; diseases or disabilities; blacklists. In general, it must be said that any background check that might be considered discriminatory is prohibited, unless and objective justification is proven. Also, data protection legislation (the 1581 Act of 2012) provides certain restrictions over the information potential and former employers can publish about candidates and former employees.

Restrictions on Application/Interview Questions

Employers are prohibited from asking any question that may be considered discriminatory. Any question or restriction on the application of a candidate regarding his age, sexual orientation, civil

status, religious beliefs, political opinion, language, race, diseases, unionised condition or any other consideration that does not have any relation with the position to be performed, and might lead to a discriminatory ground, must be avoided. In particular, employers are forbidden from asking potential candidates to perform HIV and/or pregnancy tests as a condition for the application, unless this condition is proving to be incompatible with the position the person applied for.

AUTHORISATIONS FOR FOREIGN EMPLOYEES

Requirements for Foreign Employees to Work

Every foreign person needs a special permit or ´VISA´ to perform his services in Colombia. The requirements for a foreign employee to perform his services in Colombia was recently changed by the 6045 Resolution of 2017. To determine which category or special permit must be requested for the potential foreign employee, it is important to establish whether the service to be performed by the foreigner is temporary (short duration) or permanent (long duration). However, there are special considerations for foreign employees who have a proper resident VISA. A work permit for a foreign employee which was recognised for this sole purpose, only allows the employee to perform the services for the position, company and/or profession wherewith the VISA was authorised.

Does a Foreign Employer need to Establish or Work through a Local Entity to Hire an Employee?

In application to the principle of reality over the formalities, a local entity is not needed to consider the existence of an employment contract. A local entity may need to be established in Colombia to comply with certain obligations regarding contributions to the social security system.

EMPLOYMENT CONTRACTS

Minimum Requirements

In Colombia, employment contracts are deemed as such if they reunite three conditions: (i) services are provided by the person directly; (ii) subordination from the employee towards the alleged employer; (iii) a payment as a retribution of the service provided. If these three conditions are met the relationship will be considered as an employment contract, disregarding the name or agreement the parties signed. Employment contracts can be both verbal and in writing

Fixed-term/Open-ended Contracts

In addition to the requirements stated before, fixed-term contracts are obliged to be in writing to be considered as such. Fixed-term contracts can be signed with any employee, whether the service provided can be considered permanent or temporary within the organisation. The labour code establishes that the fixed-term contract length is free for the parties to determine, but it cannot exceed three (3) years. There is also no limitation for the possibility of successive fixed-term contracts or renewals. While the labour code does not establish the need to argue a cause to terminate the contract by the expiration date, the case law has prohibited the termination of the employment contract when the decision can be deemed to have resulted from discriminatory reasons or infringes upon a superior hierarchical right.

Trial Period

The trial period must be agreed in writing. Its length varies depending on the type of contract agreed by the parties, but cannot exceed in any case two (2) months. For fixed-term contracts or definite period ones (i.e. employment contracts for completing a specific task or the occurrence of a specific event) the trial period cannot exceed a one-fifth part (1/5) of the term initially agreed. When considering the existence of successive employment contracts, the parties cannot agree to trial periods, but for the first contract.

Notice Period

Colombian legislation only provides, in general, the need of a period of notice by the employer in the event to terminate a fixed-term contract by its expiration date. The employer is obliged to notify the employee of his decision to terminate the contract by its expiration date at least 30 days before the occurrence of the term agreed. In case the employer fails to comply with the period, the fixed-term contract will be renewed for the same term than the initially agreed. While the employee, according to the law, is also obliged to comply with a period of notice in the same terms than the employer, this rule is nowadays not enforceable.

PAY EQUITY LAWS

Extent of Protection

Colombia has a constitutional mandate for guaranteeing equal treatment and pay by protecting against unequal treatment based on gender, race, nationality, religion, opinion or political affiliation. The "equal remuneration for equal work" principle was first established in 1945, and was replaced with the "equal remuneration for work of equal value" principle. In addition, mechanisms to guarantee equal pay, labour integration between genders, and avoid any form of discrimination were also enacted. To comply with the regulation, every employer should follow the legal remuneration assessment factors when bargaining about salary with their employees and keep employee records with specific information such as job position, gender, duties, remuneration and type of agreement or contract.

Remedies

Regarding special remedies or penalties for violating the equal pay principles, the employment regulation allows employees to file a special charge before the Ministry of Labour or the courts, based on pay or compensation discrimination. If the unequal pay is proven to provoke the demotivation or resignation of the employee, this would constitute grounds for labour harassment claims. In addition, and even though the employment regulation does not establish a particular remedy for violation of the "equal pay remuneration for work of equal value" principle, through individual complaints before the Courts or even the Ministry of Labour, or by the collective bargaining process, employees could compel the employer to act in accordance with the equal pay principle. Moreover, if the employee could claim and prove a breach of obligation by the employer regarding the record keeping before the Ministry of Labour, the employer might be fined up to 150 monthly minimum wages. Finally, regarding special penalties for violating the equal pay regulation, the Colombian Criminal Code was modified to include the arbitrary limitation of any right based on racism or discrimination, as a new crime through Law 1482 of 2011, punishable by imprisonment for a term between 12 to 36 months, and a fine between 10 to 15 monthly minimum wages.

IV. ISSUES ARISING DURING THE EMPLOYMENT RELATIONSHIP

WORKING CONDITIONS

Minimum Standards

Owing to the public policy nature of labour standards and social norms, the parties cannot agree to terms that would circumvent, contradict or otherwise be in opposition to the rights guaranteed by such policies. Nor may an employee renounce a labour right granted by law, but the employer is allowed to provide the employee with benefits and rights that are more favourable than those established by law.

Salary

The statutory minimum wage for employees who work the maximum working time for 2018 is $781.242 COP with a mandatory transport allowance of $88.211 COP (mandatory for employees who earns up to 2 times the minimum wage). Compensation regarded as salary comprises not only the employee's agreed fixed and/or variable salary, but any payment which is recognised as a retribution for the services the employee provides to the employer. The salary can be either in kind or cash, but the salary in kind cannot exceed 30% of the total salary agreed. The salary can also be agreed on any legal currency. For employees who earn a salary equivalent to at least ten (10) times the minimum wage or more, an "integrated" salary can be agreed. An "Integrated" salary agreement must be in writing.

Health and Safety in the Workplace

The employer is expressly obliged to provide his employees with a safe workplace and the necessary and adequate elements and tools to prevent work accidents and professional diseases. Since 2014, every employer or contracting party must implement the "Safety and Health at Work Management System" to ensure the enforcement of all health and safety at work legislation, the improvement of the work environment and conditions, and the control of any hazard or danger in the workplace; includes the company's employees as well as its contractors and subcontractors.

Managing COVID-19-Related Employee Issues

Colombia's government has enacted the following (limited) measures to provide support with some of the most common COVID-19 related issues facing employers and employees:

- Colombian law recognises paid leave when the employee is unable to perform work as a result of a calamity that, for the employee, should be external, unforeseeable and unpredictable;
- the government included COVID-19 as a work-related disease exclusively for workers in the health sector. This classification essentially impacts the amount of the payment that the employee may receive in case of a medical-leave, or a disability support pension, as a consequence of the disease;
- one of the more difficult and common situations involves employees who are neither infected nor entirely healthy, but who, nevertheless, present symptoms of the COVID-19 virus. In such cases, even when they do not receive an incapacity (to work) certificate, employers will agree to pay the employee during their isolation period.

Considering the severity of the General Biosecurity Protocol that every employer needs to adopt prior to calling their employees back to work at their facilities, it is unlikely that employees would have a reasonable excuse or should otherwise fear returning. Therefore, any refusal could be a cause to initiate a disciplinary procedure. However, those employees categorised as vulnerable to contracting the virus, according to Resolution 666, are legally allowed to work remotely. The Colombian government requires health reports to be logged in a database and updated daily, exclusively to control and prevent the spread of COVID-19, requesting specific information concerning details about livelihood, location, health symptoms and results of any COVID-19 testing, among others. Therefore, certain mobile applications have been developed to easily track such valuable data (e.g. CORONAPP at a national level or GABO in Bogota), which everyone should download and keep current.

COVID-19: Best Practices

We recognise four principles that should be applied in any reactivation plan: graduality, reasonability, timeliness and clarity in the protocol to be implemented. Moreover, based on the UN recovery plan and the ILO four-pillar policy framework, the following general steps are recommended:

- First, companies should analyse each activity in the light of the General Biosecurity Protocol, with the aim of structuring their own reactivation plan accordingly.
- Second, having a suitable company-wide protocol in place will harmonise the employment and administrative arrangements for every employee. Such agreements could include the reduction of shift work, salaries, aids or allowances, the implementation of permanent teleworking measures or the organisation of worktime between the employees. Lastly, the parties to the contract of employment could also agree to its termination, providing for an expedited activation process that also avoids any anticipated claims. Whichever strategy is adopted, when the company is structuring any agreement with their employees, it is critical to foresee any eventual claim based on a lack of willingness to adhere to the agreement; therefore, a virtual signing protocol should be in place to guarantee that the employees are entering into the employment agreement freely and willingly.
- Third, in case the company should become aware of any economic impact due to the COVID-19 pandemic, it is highly recommendable to analyse the opportunities available to employers to apply for aid and relief measures, which the Colombian government has created in order to provide support to the formal sector.

All things considered, each measure should be analysed carefully and on a case-by-case basis. It is equally imperative that employers remain well-informed of the current regulations as well as any ongoing changes to the law, enacted to cope with the emergency.

SOCIAL MEDIA AND DATA PRIVACY

Restrictions in the Workplace

Restrictions on the use of electronic devices and the internet for personal purposes in the workplace are allowed, with the understanding that such faculty is under the scope of the subordination power of the employer. The Constitutional Court considers that the legislation and the case law allow the employer to not only limit the use of social media and electronic devices in the workplace, but also to exercise control to verify this situation, in accordance with the principle of reasonability and proportionality. In addition to this, the 1581 Act of

2012 establishes general restrictions for the use and administration of data bases including information regarding employees.

Can the employer restrict the employee's use of Internet and social media during working hours?
The employer can monitor and access the employee's electronic communications or any other application as long as they are related to the employee's position or the electronic mail and/or application is provided by the employer as a working tool. Any control on the employee's electronic communications must attend to the principle of reasonability and proportionality, in order to avoid a possible breach of the employee's intimacy.

Employee's use of social media to disparage the employer or divulge confidential information
There is also no specific provision in Colombia regarding this matter. However, the case law has understood that while social media is part of the employee's intimacy circle, and therefore cannot be monitored by the employer, there are some actions that may cause harm to the employer through social media. The use of social media to disparage the employer or to divulge confidential information about the company may cause damages to his public image and his interests, which then allows him to initiate disciplinary measures as a consequence of this situation. In any case, the divulgation of confidential information by the employee is considered by Colombian labour law as an express prohibition and can lead eventually to the possibility to terminate the employment contract by the employer, alleging a fair cause.

EMPLOYEE BENEFITS

Social Security
Employers and employees must make compulsory contributions to the Colombian Social Security System, which protects employees from certain social risks. Employer's contributions for the social security system average thirty percent (30%) of the employee's contributory base income. The contribution percentage to the labour risks subsystem varies according to the level of risk the employee faces (the level of risk, and the activities framed in each, is defined by the law). Employers who declare income tax in Colombia are entitled to an exoneration of their obligation to contribute to the social security subsystem in healthcare, family allowance and some other specific contributions, for their employees who earn up to 10 times the minimum wage. Such savings may lead to an employer's final contribution to the social security system as seventeen (17%) of the employee's contributory base income. As the social security system is managed by different companies, both private and public legal natures respectively, the employee has the right to choose the agency he wants to affiliate with for his healthcare and pension. The employer chooses the agencies in the subsystems of labour risks and family allowance, as the contribution is assumed entirely by the employer. The employer is responsible for withholding and delivering his and the employee's contributions.

Healthcare and Insurances
Healthcare is in general, guaranteed by the social security system contributions. The affiliates and contributors to this subsystem may access a bundle of services in money and in kind. The services in kind are defined in the Obligatory Plan of Healthcare. Despite the fact of the coverage of the healthcare subsystem, it is possible for employers to provide their employees (as a benefit) with private healthcare or to cover a proportion of its costs. This benefit does not exclude the obligation for the parties to contribute to the social security system.

Holidays and Annual Leave
Employees are entitled to be absent from work on the public holidays defined by the law and are entitled to their regular remuneration. While it is common for the municipalities to create other public holidays related to local festivities, private employers are not bound to such holidays. If, under any circumstance, the employer requires an employee to work on a public holiday, such work must be remunerated as if the employee worked on a Sunday or his weekly rest day. Every employee in Colombia, regardless of the type of employment contract or its length, is entitled to fifteen (15) working days of paid holidays for every period of 12 months of services. The employees in private companies who provide services to fight tuberculosis and the application of X-rays are entitled to fifteen (15) working days of paid holidays for every six months of services.

The employee may opt to enjoy his holidays in time or in money, without a paid leave, subject to limitations. As a common practice, holidays are arranged by agreement between the employee and the employer. However, according to the legislation, the employer can unilaterally determine the period of holidays for his employees, with a notice of fifteen (15) days before the start of the paid leave. Holidays can be accumulated for up to two (2) periods or four (4) periods in the case of trust employees, or foreigners whose family resides in a different place.

Maternity and Paternity Leave

Female employees are entitled to at least eighteen (18) weeks of maternity leave, fully paid, including an adopted child (the paid leave can be higher in case of multiple or preterm birth); at least one week of the maternity leave (and a maximum of 2 weeks) must be taken before the child's birth. This payment is entirely under the charge of the Healthcare subsystem, as a benefit in money for the mother. On the other hand, the father is entitled to eight (8) working days of paternity leave, fully paid, also entirely under the charge of the Healthcare subsystem. The father might subrogate the mother's maternity leave in case of her demise, abandonment of the mother (single parent) or sickness that makes her unable to take care of the child.

Sickness and Disability Leave

In the event of sickness and/or accident of the employee that causes a work incapacity, this situation must be certified by a licensed practitioner or the competent authority, normally chosen by the employee, establishing clearly, the days required for the employee's recovery and return to work. The remuneration during sickness depends on the origin of the disease or accident: i) professional sickness and/or work accident; ii) regular sickness and/or regular accident. Even though after the third day of sickness leave all benefits in money are assumed by the social security system, the law requires that the work incapacities between day 3 and day 180 must be paid by the employer, granting the faculty to the employer for a reimbursement from the social security system. These same rules also apply to disability leave.

Other Forms of Leave

Other forms of required leave include:

- Trade Union Leave: trade unions are normally entitled to special paid leaves assumed by the employer, for some of their members to perform activities related to the organisation and accomplishment of the trade union interests. This paid leave(s), its rules for recognition, length and other special requirements are normally defined in the collective bargaining agreement.
- Voting Leave: employees are entitled to paid leave for purposes of voting on public elections. In addition to this permit, a paid leave must be granted for the fact of voting (1/2 a day of paid leave) or elections, and mandatory jury duty (1 day of paid leave).
- Mourning Leave: a period of 5 days of paid leave must be granted to employees in case of the death of certain relatives as defined by law.
- Burial Leave: employers are obliged to grant the necessary leave for his employees to assist with the burial of their co-workers.
- Compassionate Leave: while Colombian labour law mandates the obligation for employers to grant his employees with a paid compassionate leave, it does not define its scope or length. Employers are recommended to analyse on a case-by-case basis, the conditions to grant, and the length of, a compassionate leave.

Other forms of leave that are typically provided include: i) Employment Contract Suspension: the employment contract can be suspended for specific causes, as defined by law. One such cause offers a general possibility for the parties to suspend the employment contract on mutual consent. This specific situation is commonly used by employers to grant his employees non-paid leave for personal reasons. ii) Garden Leave: this option is prohibited whenever the employee has to receive unilateral paid leave, per the employer's request, which may lead to discriminatory measures against the employee, or could potentially subject the employee to harassment.

Pensions

Pensions are recognised under three different circumstances: Old age, invalidity and survivorship. Its amount is normally recognised by the social security system prior to the achievement of some specific requirements by the affiliate. The labour risks subsystem only recognises pensions in circumstance wherein the origin of said benefit is related to a work-related accident or disease.

In addition to the monthly salary, the employer is mandated to recognise the following benefits in money for his employees: i) a 30 days' allowance paid annually (or pro rata) divided into two payments as follows: 15 days in June and 15 days before the 20th of December. ii) a 30 days' allowance (or pro rata) as a saving for the employee in case he is unemployed. This payment is not recognised directly to the employee, but to a specialised company which saves this amount and will only disburse it to the employee under circumstances defined in the law. iii) a 12% interest rate (or pro rata) over the allowance mentioned in the last paragraph. This interest is recognised directly to the employee. iv) a transport allowance paid monthly for employees who earn up to two (2) times the minimum wage. The amount of the allowance is defined, annually, by law. v) a pair of shoes and a working dress must be provided every 4 months for employees who earn up to two (2) times the minimum wage. The right to this benefit is only available to employees, under contract, after 3 months. vi) in addition, the law establishes special benefits for certain economic sectors (i.e. the oil and mining sector).

V. ISSUES ARISING ON TERMINATION OF THE EMPLOYMENT RELATIONSHIP

TERMINATION OF EMPLOYMENT CONTRACTS

Grounds for Termination

In Colombia, employment contracts may be terminated by any of the parties at any moment with immediate effects (as a period of notice is only needed for fixed-term contracts when ended by the expiration date) and without it being necessary to mention the reasons that led to the termination, unless a fair cause is alleged for the dismissal. Grounds for termination in Colombian legislation can be divided into three categories: (i) Legal grounds. (ii) Termination with a fair cause. (iii) Termination without a fair cause. The termination without a cause includes all situations that are not considered as a legal cause or a fair cause. Employees are also entitled to terminate the employment contract at any moment, for any reason, or alleging a fair cause.

Is Severance Pay Required?

Only for a dismissal without a cause. The amount of the severance payment differs in several factors such as seniority, type of contract and amount of the salary. The reference to calculate the severance payment must take into account the last fixed salary. In case of variable salary, the reference would be the average of the salaries earned in the last twelve months. Colombian legislation provides a fixed system of calculation for the severance payment. Nonetheless, employees can claim moral damages in addition to the severance payment provided by law.

Whistleblower Laws

Colombian labour law does not include any special provisions or protections for whistleblowers. However, employees who served as witnesses in a claim of harassment cannot be dismissed without a fair cause in the following six months after the formal complaint, as long as the claimant is effectively considered a victim of harassment.

RESTRICTIVE COVENANTS

Definition and Types of Restrictive Covenants

Provisions on restrictive covenants in Colombian labour law are scarce. The legislation only provides rules for non-compete clauses. Restrictive covenants are therefore allowed, under some general limitations: i) Non-compete clauses: Colombian Labour Code expressly allows for the possibility of the employer to agree with his personnel, on a general prohibition to provide services in determined activities or the employer´s competitors. This class of non-compete clauses are only allowed by law while the employment contract is ongoing. ii) Non-solicitation of customers: such a clause does not exist in Colombian labour law. However, restrictive covenants on non-solicitation of customers are often used for high-executive employees. iii) Non-solicitation of employees: these types of restrictive covenants are not normally used for employees in their employment contracts, but rather between companies in their commercial relationships to avoid possible acts of unfair competition.

Use and Limitations of Garden Leave

Garden leave practice is allowed in Colombian labour law. The employer can restrict his employees from attending to work, but the obligation to pay their salary, as if it was a unilateral paid leave, remains. However, this possibility finds a limitation whenever the request from the employer for the employee to receive the unilateral paid leave may lead to a discriminatory measure or possible conduct of harassment against the employee.

TRANSFER OF UNDERTAKINGS

Employees' Rights in Case of a Transfer of Undertaking

In case of a transfer of undertaking, the employment contract is not terminated, suspended or modified as long as there are no substantial changes in the activities of the new employer. Therefore, the employees have the right for their contract to remain with the same conditions, salary, working time, benefits and the seniority they were entitled to before the transfer took place. As the transferred is liable for all labour rights of the predecessor, the employee can claim the labour rights that he was entitled to before the transfer took place, from either his previous employer or the new one.

Requirements for Predecessor and Successor Parties

Colombian labour law does not provide any special requirement from a labour point of view, for a transfer of undertaking to take place. The parties of the transfer can agree to any modifications of their own relations, as long as these agreements do not affect the labour rights of the employees.

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DOMINICAN REPUBLIC.

SÁNCHEZ & SALEGNA

I. HIGHLIGHTS

- The labour laws of the Dominican Republic are pro-employee and seek to safeguard employees' rights. They establish norms that regulate working conditions and hours of work and demand compensation for dismissal without just cause.
- The jobs are at will, which means that either party can terminate the employment contract without cause, subject to prior mandatory notice and compensation, where applicable.
- The Labour Code assumes, as a general principle, that an employment contract has been executed for an indefinite period, unless the particular nature or type of service to be rendered requires an employment contract for a specific job or term.
- Among others, all workers have the following rights: freedom of association, social security, collective bargaining, respect for their physical capacity, and the right to privacy and personal dignity.
- Equal pay is guaranteed for work of equal value, without gender or other form of discrimination, and under the same conditions of capacity, efficiency and seniority.

II. INTRODUCTION

The labour laws of the Dominican Republic are of public order and, therefore, are mandatory. An employer can extend benefits beyond the established provisions. However, it is prohibited to include terms that are less favorable to an employee, nor can an employee waive any right set by the law, for his protection. Dominican Republic labour laws protect employees. Some basic principles provided by law will govern any employment relationship in the Dominican Republic. The most relevant principles are: i) prevalence of the facts: in determining the labour consequences, the pertinent facts surrounding an employment relationship will prevail over the official documents; ii) prohibition of harmful changes: employers are prevented from introducing changes in employment conditions that are harmful to employees, regardless of whether the employee has previously consented to the change; and iii) joint responsibility (a group of companies): companies that belong to a group of legal entities under the same control, direction or management are jointly responsible for the obligations of any company belonging to that group, concerning labour relations.

III. ISSUES ARISING UPON HIRING INDIVIDUALS

PRE-EMPLOYMENT CONSIDERATIONS

Limitations on Background Checks

Background checks on credit to access and/or remain in employment are prohibited. In the Dominican Republic, an employer cannot conduct a criminal background check on a candidate, either directly or through a vendor. Only the candidate can obtain the criminal record and then provide it to the employer. The criminal record shows if the applicant has been convicted of a felony. Under the current labour laws, it is forbidden to carry out medical examinations to determine if a candidate is pregnant or has HIV.

Restrictions on Application/Interview Questions

Employers cannot restrict applications in such a way that may lead to discrimination of any kind, based on sex, age, political or religious beliefs. The employer is free to ask a candidate whatever questions it deems appropriate in all stages of the

hiring process. There is almost no limitation to the scope of these questions from a legal point of view, except for the pregnancy status of working women or other information that may imply a discriminatory practice.

AUTHORISATIONS FOR FOREIGN EMPLOYEES

Requirements for Foreign Employees to Work

In principle, every non-EEA national working in Belgium must be in possession of a work permit, although some Provided that at least 80% of a company's workforce must be Dominican, the Labour Code allows for the employment of foreigners in the Dominican Republic. Apart from this limitation, foreign employers and employees receive the same treatment as Dominicans since their immigration status cannot be grounds for discrimination. However, under Dominican immigration law, employers who hire illegal immigrants can be penalised. The employer could also not fulfill its contribution obligation to the Social Security System on behalf of employees with immigration difficulties, since the system requires the correct identification of workers (e.g. legally obtained identity card).

Does a Foreign Employer need to Establish or Work through a Local Entity to Hire an Employee?

No, a foreign employer does not need to establish a local entity to hire workers. The foreign employer must present a local address to be registered in the Dominican Republic. Once the employer is registered, it will have the same rights and obligations as a local entity. The law of December 2008 recognises equality between foreign and local companies. Therefore, it will not require foreign entities to provide any type of surety bond or insurance when seeking legal action in local courts. In this sense, if a foreign company wishes to establish permanent operations in the Dominican Republic by creating a branch, it does not need to set up a Dominican company. Another benefit is that a foreign company can freely repatriate the Dominican Republic's net earnings without any restrictions.

EMPLOYMENT CONTRACTS

Minimum Requirements

Written employment agreements are not necessary for permanent employment contracts. Labour laws only charge the employer to list an employee in company workbooks and with tax authorities, pay Social Security, and report taxes on all wages paid to the employee. However, when the employment contract is in writing, any modifications must be made in the same way. The Dominican Constitution establishes that Spanish is the official language of the country. Therefore, all employment contracts must be written or translated into Spanish to be enforceable.

Fixed-term/Open-ended Contracts

The duration of an employment contract is considered indefinite, unless the nature of the services provided requires specific work or a fixed-term. If an employee works successively on defined terms for the same employer, this contract will be considered indefinite. The contract will also be considered indefinite if the employee continues to work for the employer after the termination of the services for which he was hired. For a fixed-term contract or a contract for specific work, a written employment agreement is required. It is necessary as well to duly justify the execution of a fixed-term contract or an agreement for a particular job. Finally, a temporary contract can be used when extraordinary and transitory demands or production needs are anticipated. However, a specific term cannot be foreseen for the termination of the contract. A fixed-term contract will also occur when the relationship begins and ends with the execution of the work or the specific service for which the employee was hired.

Trial Period

In the Dominican Republic, there is no specific trial period, but during the first three (3) months of employment, the contract can be terminated without imposing any obligations on the employer.

Notice Period

The party exercising the right of dismissal without cause must give advance notice to the other party. The employer has the option to omit advance notice, in which case it must pay compensation in lieu of notice, for the amounts owed. It is customary for employers to choose this option and pay compensation, rather than give advance notice. The employee must also give notice equal to that required by the employer, if the employee decides to terminate the contract without just cause.

PAY EQUITY LAWS

Extent of Protection

In the Dominican Republic, the Labour Code establishes the principle of equal pay for equal work. Also, the Dominican Republic has ratified Convention C. 100 of the International Labour Organisation on equal pay. Notwithstanding the preceding, the employer may establish different conditions when justified by objective parameters (seniority, responsibilities, tasks and performance). Equal pay is guaranteed for work of equal value, free of gender or any other form of discrimination, and under the same conditions of capacity, efficiency and seniority.

Remedies

If a company does not comply with the equal remuneration regulations, the company may be subject to: i) inspection by the Ministry of Labour, which may oblige the company to pay administrative and criminal sanctions; and ii) individual labour claims filed by employees or former employees, in which moral damages are claimed for discriminatory treatment and payment of salary differences.

IV. ISSUES ARISING DURING THE EMPLOYMENT RELATIONSHIP

WORKING CONDITIONS

Minimum Standards

Employees are entitled to a minimum wage regularly adjusted, taking into account the country's inflation rate. There are several minimum wages in the Dominican Republic, depending on the sector and the size of the company. In effect, the Dominican Republic's minimum wages are determined by the National Salary Committee. In the Dominican Republic, employees have the right to compulsory health insurance and a pension plan, financed through mandatory social security contributions from both the employer and the employee.

Salary

Employees are entitled to a thirteenth salary, payable no later than 20 December of each year. Salary must be paid in cash, by check, or by direct deposit to the employee's account at a bank or other financial institution and it can be paid for hours, days, weeks, fortnights or months. It is forbidden to pay the salary for periods exceeding one month. The law prohibits paying wages through the issuance and delivery of cards, vouchers, certificates, etc. Salary includes cash payments of wages, bonuses, commissions, benefits in kind and any other amount or benefit given to the worker for his work; it does not include profit-sharing payments. The employer may not, under any circumstances, charge interest for the employee's debts with the employer, nor may the employee's wages be embargoed, except for the payment of alimony to the spouse. Several minimum wages are regularly adjusted according to the size and sector of the company. The current minimum wages have been in effect since August 2019. There has been a 14% increase in the minimum wage in the private sector. This 14% rise represents an increase of 2,162.66 Dominican pesos for the higher minimum wage (large companies). For the other two wages, there was an increase of 1,486.80 Dominican pesos and 1,317.62 Dominican pesos, respectively.

Health and Safety in the Workplace

A system of procedures to protect employees from accidents during working hours has been established. The requirements at the national level of employers concerning: 1) the prevention of accidents and damage to health that occur or are related to work activity, or that arise during such activity; and 2) minimising the causes of hazards inherent in the work environment. Employers have to provide a healthy and safe workplace (both physical and psychological) following the labour authorities' instructions. Employers in specific industries must provide employees with work clothes, work tools and protective equipment and must take preventive measures to avoid accidents.

Managing COVID-19-Related Employee Issues

On 17 May 2020, the Ministry of the Presidency issued the General and Sector Protocol for Labour Reintegration. This document provides general and sectoral protocols to be followed by all companies nationwide. It also serves as a framework to guide each sector with planning its re-opening. The guide indicates that government authorities may modify the protocols according to the population's primary health indicators as they evolve. The High-Level Commission for the Prevention and Control of the Coronavirus will publicise all information related

to changes that arise in the protocols. Employers should immediately comply with such measures.

The first steps are to routinely clean and disinfect (at least every two hours) all surfaces frequently touched in the workplace, such as workstations, keyboards, telephones, handrails and doorknobs. It suggests increasing ventilation levels, avoiding low temperatures in offices and maintaining air conditioners (cleaning or changing the filter), by improving the percentage of outdoor air circulating in the system. Installing high-efficiency air purifiers in closed or air-conditioned spaces, disabling finger clocks, markers and fingerprint access systems in offices and processing lines will avoid cross-contamination. The protocol recommends checking the temperature of each employee or client, using digital infrared thermometers, before they gain entrance to the company's offices or premises. Employers should also ensure that the person(s) taking the temperature of individuals entering the facilities wear gloves, masks or respirators, and when finished, wash their hands and arms properly. Employees who present symptoms associated with COVID-19 must notify their supervisors. Moreover, they are required to stay at home, seek medical assistance immediately and are not to return to work until they meet the criteria to suspend isolation, following a negative PCR test result in consultation with healthcare providers. Employees who are negative for COVID-19, but who have a sick family member at home must notify their supervisor, remain at home and, if possible, work remotely or perform other tasks with similar characteristics that the company requires. They must eventually send their employer evidence showing that the member of their nuclear family is no longer affected by the virus. Employers must insist on the need for their employees not to stigmatise people who are ill or suspected of having COVID-19, since this virus can spread to anyone and without them knowing it. Consider using video conferencing or teleconferencing when possible for work-related meetings and encounters.

COVID-19: Best Practices

Due to COVID-19, companies that are currently operating from their worksite(s) must have a hygiene and safety protocol to ensure a healthy work environment for employees and to minimise the risk of transmitting / spreading the virus. Such protocols include, among other measures, conducting daily health checks, frequent cleaning and disinfection guidance, implementing policies and practices for social distancing, encouraging employees to wear cloth face coverings in the workplace and, where appropriate, improving the building's ventilation system and having a protocol in place for suspected or confirmed COVID-19 cases.

SOCIAL MEDIA AND DATA PRIVACY

Restrictions in the Workplace

The Labour Code prescribes that the employer must provide employees with the work tools necessary for the performance of their duties and further establishes that the employee cannot use the work tools for anything other than their intended use. The employer has the right to ensure that the employee uses the work tools provided by the employer, following the intended work purpose, and to prohibit the employee's access to social media. Regarding employees' personal devices, employers can restrict the use of the Internet or social media by employees during working hours. The employer can instruct them that it can only be used for work purposes, but that restriction has to be in writing and preferably included in the employment contract.

Can the employer monitor, access, review the employee's electronic communications?

In the Dominican Republic, employers may monitor and inspect only the electronic communications in the place of work, if the employee is notified in advance that the electronic communications will be for employment purposes. So, the employee should not have expectations of privacy. Employers are also allowed to install voice or image recording devices whenever necessary for the company to meet its business needs. Installing such devices in bathrooms or changing rooms is prohibited. Employers are authorised to control computers, telephones, and any other instrument that they provide to employees. Such control does not violate privacy and the legal rights that each person has. Information obtained through monitoring and surveillance cannot be shared and exported to related companies in other countries, unless the employee has previously given their consent in writing.

Employee's Use of Social Media to Disparage the Employer or Divulge Confidential Information

Employees have a duty of loyalty to the employer, which means that employees must refrain from taking actions that may damage the company's reputation, other employees, or the company in general. The opposite may be grounds for dismissal with cause. Employers may, at their sole discretion, stipulate their requirements for employment. One of those requirements could be the signing of a confidentiality agreement in addition to the employment agreement. The confidentiality agreement could include an obligation not to use, disclose, publish or otherwise divulge the employer's trade secrets or confidential information to its past, present or future clients.

EMPLOYEE BENEFITS

Social Security

In the Dominican Republic, in principle, all workers need to be covered by a national retirement pension plan funded by contributions from both the employer and the employee. The employee pays this through withholdings from his salary, and the employer through a percentage of the employee's salary. Employees are entitled to retirement and to receive the government pension, when they reach the retirement age (60 years) and have contributed a minimum of 360 months.

Healthcare and Insurances

The social security authority offers the following (primary) insurances to workers who have contributed to the system, depending on the number of contributions made and the amounts involved in each quote: i) death benefit; ii) accident allowance; and iii) health benefit. All employees have the right to be covered by social security. All employees must belong to the Social Security system, regardless of their income or work. A government institution administers occupational risk insurance; therefore, there will be no option in this regard. For family health insurance, the maximum salary contribution will be the equivalent of ten minimum wages. The financing for this insurance will be made gradually, from the employee's and employer's joint contributions.

Holidays and Annual Leave

National holidays must be observed, and the salary corresponding to twice the rate must be paid, provided that the services are effectively rendered during those days. Holidays change depending on which day they fall. There are a total of 12 holidays in 2021. Employees are entitled to a period of paid vacation annual leave. Employers must grant their employees a minimum of 14 working days of paid vacation per year. Employees acquire the right to take vacation after being employed, uninterruptedly, for one year.

After five years on the job, the employer must increase the paid leave to 18 business days. Vacation time cannot be taken for periods of less than one week. Vacations cannot be replaced by an additional payment or any other form of compensation. The employer must pay the salary corresponding to the vacation period, the day before the vacation begins. The parties can always agree to a more extended period than the one provided by law, but cannot agree to a shorter period.

Maternity and Paternity Leave

Employees who are pregnant or have recently given birth, enjoy superior protection under the Labour Code. Regarding maternity leave, the law establishes the mother's right to paid leave during the seven (7) weeks preceding the probable date of delivery, as well as the seven (7) weeks that follow. The employee also has the right to three rest periods of 20 minutes each, per working day, to breastfeed her child. During the employee's maternity leave, the company must pay the ordinary salary in full, and the TSS will return to the employer, the equivalent of three months of contributory salary. Regarding paternity leave, the Labour Code provides that the employee has the right to two (2) days of paid leave if his wife gives birth.

Sickness and Disability Leave

According to Dominican law, there is no difference between short-term sick leave and long-term sick leave. In any case, the Social Security Treasury must pay the employee a percentage of the worker's contribution, but only if the sick leave is for more than four (4) days. The worker will only receive medical attention and the compensation provided by the laws relating to accidents at work and Social Security, in case of illness. Suppose the employer does not register the worker in the Dominican Social Security or does not pay the corresponding contributions. In that case, the employer must pay

the entire corresponding salary during the worker's absence and the employee's expenses, due to illness or accident. If the disability lasts for more than one (1) year, the employer must pay financial assistance according to the time the company has employed the employee.

Other Forms of Leave
The Labour Code provides for leave for reasons of marriage (five days) and death of a close relative (three days). The applicable collective agreements usually provide for other leave or additional days of rest.

Pensions
There is no mandatory requirement for retirement in the Dominican Republic. The Social Security Law establishes that a 60-year-old person, who has been contributing to Social Security for at least 360 months, can obtain this benefit. The Dominican Social Security system establishes an obligation for employers to contribute 70% of the contributory plan's cost to finance old-age, disability and survival insurance, and family health insurance. In comparison, employees must contribute the remaining 30%.

V. ISSUES ARISING ON TERMINATION OF THE EMPLOYMENT RELATIONSHIP

TERMINATION OF EMPLOYMENT CONTRACTS

Grounds for Termination
The parties are exempt from their legal obligations in the event that termination occurs: i) by mutual consent, which we recommend executing before a notary; ii) by execution of the agreement (the contract for a particular job or work ends with the work's conclusion); and iii) with just cause. Dismissal for just cause requires the employer to establish that the dismissal was the result of an act committed by the employee and requires the employer to notify the Department of Labour of the termination, with the reasons included, within 48 hours from the dismissal. The employer's right to base the dismissal on a specific cause, will expire 15 days after the employee has committed the act alleged as the grounds for the termination.

Is Severance Pay Required?
In the event of termination of employment without just cause, the employer must pay the employee his/her severance pay, as provided by law, within ten days of notification of termination. Likewise, the party that exercises the right to dismissal without cause, must give prior notice to the other. Suppose the party exercising the dismissal without cause does not comply with this requirement. In that case, they must pay compensation in lieu of notice, for the amounts owed by way of the notification. It is common for employers to choose to pay this compensation instead of giving advance notice. Besides, the employer must pay the employee his/her acquired rights, whatever the reason for termination.

Whistleblower Laws
There is no specific protection for employees who alert or provide information about possible infractions of the law or good corporate governance policies, in the Dominican Republic. However, the employer can incorporate such protection in its internal code of conduct. Employers can use codes of conduct if they are part of the employment contract. Besides, the law establishes that employees should maintain appropriate behavior and strict discipline during the work shift.

RESTRICTIVE COVENANTS

Definition and Types of Restrictive Covenants
Restrictive covenants are entirely applicable as long as they are limited in time, geographic scope, clients and activity, products and services, and if compensation is paid in exchange. The following restrictive covenants are recognised and may be enforceable under the law: i) non-compete clauses; ii) non-solicitation of customers; and iii) non-solicitation of employees.

Use and Limitations of Garden Leave
Garden leave is the practice by which an employee, who leaves a job, is obliged to stay away from work for a period, while the employee is still on the payroll. This practice is frequently used to prevent an employee from using sensitive information when they leave their current employer, especially when they are very likely to join a competitor.

Garden leave in the Dominican Republic is not legally regulated, nor is it a common practice. Employers cannot force employees to take garden leave. Please consider however, that the employee can agree not to work for a certain time after the contract's termination, but he must receive reasonable compensation (e.g. salary and benefits in full as if he were working).

TRANSFER OF UNDERTAKINGS

Employees' Rights in Case of a Transfer of Undertaking

The transfer of a company, a branch or an agency thereof, or the transfer of another worker to another company, transmits all the privileges and obligations resulting from the employment contracts that apply to the employee assigned or transferred. The new employer is responsible, together with the precedent employer, for the obligations derived from the employment contracts and the rights arising before the date of the replacement. When a worker is transferred from one company to another, if the transfer is made for fraudulent purposes, both the predecessor and the successor are jointly responsible for compliance with the employee's labour obligations. Also, fraud is presumed, which means companies must prove that the employee's transfer was made according to applicable law.

In the case of a legal business transfer, employees are transferred by law. The employee's consent is not required, and notification is only needed in order to not be considered a fraudulent transfer. The new employer must maintain the employee's job category, benefits, rights, wages and seniority acquired with the previous employer. The employment conditions may be modified, but only to the employee's benefit. All obligations of the employees included are automatically transferred to the new employer. The working conditions for employees must not be reduced or adversely affected by a business transfer. Employers cannot make detrimental changes to the employment conditions of the employees, regardless of whether they have previously consented to the change. Due to the concept of labour succession, the new owner of a company or business will be held responsible for all labour rights and obligations.

Requirements for Predecessor and Successor Parties

Both the predecessor (former employer) and successor (new employer) will be responsible for the labour and social security debts derived from the employment relationship, before the transfer date. The new employer becomes solely responsible for the debts generated after the transfer. For the transfer not to be considered fraudulent, it must be reported to the Ministry of Labour, the union and also the workers. The first aspect that must be considered, is the main effect that results from the transfer of companies. The transfer of a company, branch, dependency, or the simple "transfer" of a worker to a new company, will transmit to the acquirer, all the prerogatives and obligations resulting from the contract of work originally agreed with the collaborator. In addition, past claims and pending judgments before a judicial authority will fall within the obligations. Similarly, the article is clear when determining that the transfer of the company will not extinguish the acquired rights of the workers.

The new employer will be jointly liable with the replaced employer regarding the obligations assumed with their workers, either by the employment contract or by law. Reference is primarily made to cases where the company's transfer is partial or total. Consequently, there has been a transfer of ownership of the company, which is why the predecessor and the successor become jointly and severally liable for the rights that correspond to the workers. When the worker is transferred from one company to another, both the predecessor and the successor are jointly and severally liable for compliance with labour obligations. Moreover, the law indicates that fraud will be presumed. As such, the worker will not have to prove it. In any case, the interested company may extinguish this presumption by providing evidence showing that no fraudulent omissions have been incurred, nor actions aimed at evading the obligations derived either from the law, the employment contract or the collective agreement.

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FRANCE.

FLICHY GRANGÉ AVOCATS

I. HIGHLIGHTS

- All non-EU citizens need a work permit to work.
- Employers and employees are free to negotiate the terms and conditions of their employment relationship. However, employees have various minimum rights under the law, regardless of any provision to the contrary in their employment contract.
- Usually, employees work 35 hours per week. Only hours worked at the request of the employee's superior will be regarded as overtime.
- Indefinite-term contracts: There must be real and serious grounds for dismissal (two types of valid grounds: personal grounds and economic grounds).
- Severance payments are only awarded if the employee has the minimum length of service and the relevant CBA provisions.

II. INTRODUCTION

In France, employment law affords employees a good level of protection. Nevertheless, this legal environment is constantly changing as a result of government reforms and case law evolution. Recent trends relate in particular to: (1) union representation and collective bargaining agreements; (2) working time; (3) mutual termination agreements; (4) senior management compensation; and (5) termination packages in listed companies. In France, choosing the wrong option may result in costly individual or collective litigation.

III. ISSUES ARISING UPON HIRING INDIVIDUALS

PRE-EMPLOYMENT CONSIDERATIONS

Limitations on Background Checks

Background checks in France are limited to the strictly necessary verifications of a candidate's qualifications, experiences, and references. Criminal background checks are limited to certain professions that entail security responsibilities or that involve working with children or sensitive information or materials. Credit background checks do not exist in France.

Restrictions on Application/Interview Questions

The employer can only collect information about candidates, which facilitates the assessment of their professional skills with regard to the position that is offered. These professional skills must be directly required for the position. This right to collect information should be balanced with the respect of the candidate's privacy. Employers should run candidate selection tools (i.e. "recruitment methods or techniques of job applicants") before the Works Council, for information. The employer may not ask questions pertaining to a candidate's private life, such as sexual orientation, religion, trade union activities, health issues, financial issues, etc. Social security enquiries about the applicant are generally prohibited, except if the applicant is not yet registered.

AUTHORISATIONS FOR FOREIGN EMPLOYEES

Requirements for Foreign Employees to Work

The employer must ensure that the employee to be hired is authorised to work in France:

- where the employee is already in France, the employer will have to check that the employee has a valid residence permit allowing him to work in France, and keep a copy thereof;
- where the employee is not yet established in France, the employer should undergo a three-step process "of introducing a foreign worker in France" – i) obtain from the French unemployment agency ("Pôle Emploi") a document certifying that there are no workers available to fill jobs in the country; ii) file to the labour authorities (i.e. the Territorial Unit of Direccte) an application package; and iii) inform the French Immigration Office (the Ofii) of the entry in France of an immigrant and pay the Ofii a fee.

An employer must ensure the validity of the work permit of the foreign employee he wants to hire (the work permit must be authenticated), by submitting a declaration of employment (by email or by post) to the Prefecture of the place of employment, at least 2 working days before the hire. Nationals of most countries of the European Union have the right to work freely in France, without a specific work permit. The only document required for their job is an identity card or passport to prove their nationality.

Does a Foreign Employer need to Establish or Work through a Local Entity to Hire an Employee?
It is not necessary to establish a local French entity in order to hire an employee. However, the foreign entity and the employee will have to be registered with the French social security office of Strasbourg, which is uniquely competent for such matters.

EMPLOYMENT CONTRACTS

Minimum Requirements
Employment contracts are generally not required to be written, but certain forms of employment contracts should be in writing (notably fixed-term contracts, part-time contracts and temporary employment contracts). The employer should provide the employee with a written statement of the essential terms governing the employment relationship. Oral fixed-term contracts are unequivocally deemed to be indefinite-term contracts and oral part-time contracts are deemed full-time contracts.

Fixed-term/Open-ended Contracts
The indefinite-term contract is the typical form of employment relationship. As a rule, the validity of an indefinite-term contract is not subject to conditions regarding the content and form of the agreement. In that respect, French case law has held that a pay slip may be sufficient to formalise an indefinite-term contract. A fixed-term employment contract is an employment contract entered into for a defined duration, set in advance by the parties. This kind of employment contract is very specific, notably as neither party may terminate it prior to its end, except in the event of an amicable separation, serious misconduct ("faute grave"), force majeure or if the employee finds alternative employment under an indefinite-term contract.

Trial Periods
Rather than entering into the contract immediately, parties to the employment contract may agree to provide for a probationary period, which can only be renewed once and under condition, during which either party may terminate the employment contract without any formality. If both parties are satisfied at the end of the probationary period, the employment contract becomes definitive. The probationary period is governed by statute.

Notice Periods
Except for specific exceptions (e.g. dismissals for serious or gross misconduct), the parties should observe and cannot waive the required notice periods before an indefinite-term contract is terminated. The length of the notice period is generally determined by the national CBA. Employees who are dismissed or made redundant are entitled to payment in lieu of notice if they are not required to perform their notice period.

PAY EQUITY LAWS

Extent of Protection
Whether it is a question of salary, qualification or classification, no employee may be the object of direct or indirect discriminatory measures because of age, sex, marital status, pregnancy, trade union or mutualist activities, political opinions, religious beliefs, origin, morals, sexual orientation, gender identity, genetic characteristics, particular vulnerability resulting from his or her apparent or known economic situation, physical appearance, his surname, place of residence, bank address, actual

or supposed membership or non-membership of an ethnic group, alleged race, nationality, state of health, loss of autonomy, handicap, ability to express himself in a language other than French or normal exercise of the right to strike. Union discrimination is also prohibited. In addition, there may be no discrimination against an employee who has suffered, or refused to suffer, sexual or moral harassment or who has reported or testified to one of these acts. However, this does not prevent differences in treatment that meet an essential and decisive professional requirement, provided that the objective is legitimate and the requirement is proportionate. Differences in treatment based on age are permitted as are measures taken in favour of disabled persons, persons residing in certain geographical areas or persons who are vulnerable because of their economic situation, when they are intended to promote equal treatment.

Remedies

The primary remedy is the payment of backpay. Any provision contained, in particular, in an employment contract or collective agreement which, for the same work or work of equal value, entails lower remuneration for one or more workers of either sex than for workers of the other sex, is null and void. The higher remuneration is then automatically granted to the injured employee. When discrimination is linked to one of the prohibited grounds, the employer is liable for a fine of up to EUR 45,000 and three years in prison. The fine may be increased to EUR 22,500 for legal entities. Failure to respect equal pay for men and women is punishable by a fine (5th class contravention), applied as many times as there are employees paid under illegal conditions. This fine is doubled in the event of a repeat offence within one year. If the action is brought on the basis of the general principle of professional equality between men and women, the employer is liable for a fine of EUR 3,750 and a maximum imprisonment of one year. Companies that have not (among others) implemented, as of 31 December of the year preceding the year the public-contract award procedure is launched, may not bid for public contracts.

IV. ISSUES ARISING DURING THE EMPLOYMENT RELATIONSHIP

WORKING CONDITIONS

Minimum Standards

Employers and employees are free to negotiate the terms and conditions of their employment relationship. However, employees have various minimum rights under the law, regardless of any contrary language in their employment agreement. These minimum working conditions are set forth in the French Labour Code and the applicable Collective Agreement, among other sources.

Salary

As of 1 January 2016, the minimum gross monthly wage is EUR 1,498.47 (about USD 1,753) for a 35-hour workweek. All employees who are employed under an ordinary employment contract (either indefinite or fixed-term) are entitled to the minimum wage. CBAs also frequently provide higher minimum wages.

Health and Safety in the Workplace

The employer's safety obligation is not limited to the prevention of occupational accidents and diseases. It is much broader and covers all risks to which the employee may be exposed at work, including psychosocial risks. This is an obligation of result. Professional risk prevention measures should be sought, employees should receive information and training about these risks, and the employer should be compliant with certain specific rules in the arrangement and use of premises to ensure the health and safety of the employee. The employer should assess potential risks in a document called a single document occupational risk assessment (DUERP), including: 1) the choice of manufacturing processes, work equipment, the chemical substances or preparations; 2) the development or redevelopment of workplaces or facilities; 3) defining workstations; and 4) the impact of inequalities between women and men. Mandatory for any business, this document includes: i) an inventory of the risks identified in each of the business units of work; ii) the classification of these risks; and iii) proposals for actions to be implemented. The DUERP should be updated once a year, at a minimum.

Managing COVID-19-Related Employee Issues

An employee sick with COVID-19 is put on standard French sick leave, where the State social security and company benefits are paid to the employee. The applicable collective bargaining agreement may provide for the maintaining of salary for several months. The special authorisations for absence due to childcare will be granted only to employees to whom the school or the town hall, can provide a certificate demonstrating that the school or daycare is closed or unable to welcome children. These employees will be counted as remaining on "short time work". However, parents who do not wish to send their children to school (despite being reopened) will have to find an arrangement with their employer: if it is not possible for them to balance childcare and remote work, then the days at home will have to be deducted from their vacation accrual. Employees who have unjustified fears should be reassured, but since they are bound by an employment contract they must submit to the order to return to work or face disciplinary action. The government has put in place guidelines for handling an employee displaying symptoms. Companies should however, formalise their own ad hoc protocols. The employee is to be isolated, put in contact with a doctor and then sent home. The occupational health services should be notified and contact tracing will be activated.

COVID-19: Best Practices

- Businesses should update their unique professional-risk evaluation document.
- There are important policies to update, in particular regarding health and safety measures in the workplace, working hours and remote work. It may be necessary to amend the company handbook/internal regulations accordingly.
- The staff representatives (works council) should be informed and consulted on measures and changes.

SOCIAL MEDIA AND DATA PRIVACY

Restrictions in the Workplace

Employers can set out the general conditions of use and restrict access to the Internet in the workplace, but they have to be cautious, as all employees have a right to privacy, even at the workplace during working time. For example, the employer may access the employees' professional emails under very restrictive conditions. Besides, employees benefit from the freedom of speech principle, within the company and outside of it, which can only be restricted for legitimate grounds.

Can the employer monitor, access, review the employee's electronic communications?

No specific French employment law provisions currently address issues raised by employees' social media use. However, a company's Works Council, if any, must be informed and consulted prior to the implementation of any means aimed at monitoring or controlling the employees' activities.

Employee's Use of Social Media to Disparage the Employer or Divulge Confidential Information

Employers may limit the use of social networks by requiring that employees do not disclose confidential information or trade secrets by implementing an obligation of confidentiality or codes of conduct. Concerning denigration, the French Supreme Court ruled that a comment on a social media platform may be considered private or public depending on the privacy settings of the relevant account. The more accessible a comment is, the more likely it will be deemed public and punishable, as the case may be.

EMPLOYEE BENEFITS

Social Security

French social protection is organised into four levels:

- Social Security provides coverage for: i) illness, maternity, paternity, disability and death; ii) occupational accidents and diseases; iii) old-age benefits; and iv) family allowances. It is composed of various schemes involving the insured according to their professional activities.
- Complementary Plans contribute supplementary coverage to the risks afforded by Social Security. Some are mandatory (supplementary pension for private sector employees) and others optional (mutual health organisations, insurance companies, pension funds).
- UNEDIC (National Employment Union Industry and Commerce) administers the unemployment insurance programme.
- State Welfare provides support to the poorest.

Social Security is mainly financed through: Social Security contributions; Generalised Social

Contribution (specialised tax); and various other taxes collected by Social Security (e.g. "forfait social" tax; gross VAT on tobacco, pharmaceuticals, alcohol, health products; tax on company cars and motor vehicles; tax on salaries; etc.).

Healthcare and Insurances

French law provides for a basic minimum indemnity and protection of employees. Quite often, collective bargaining agreements will offer additional protections or allowances.

Holidays and Annual Leave

Employees are entitled to a minimum of five weeks' paid holiday a year. In addition, there are approximately ten public holidays every year. The law and CBAs grant additional paid leave for employees who have reached a specific length of service and for family related events. Autonomous executives also benefit from additional days off. Every employee is entitled to paid vacations by his employer, regardless of his age, seniority or type of contract (indefinite-term or fixed-term). The duration of paid vacations varies according to the acquired rights (legally 2.5 days of paid vacation per month, unless more favourable collective bargaining agreement provisions apply). The vacation dates are subject to the agreement of the employer.

Maternity and Paternity Leave

The pregnant employee benefits from a maternity leave during the period, which is around the expected date of childbirth (there is a prenatal leave and postnatal leave). Its duration is variable, depending on the number of unborn children or already at charge (from 16 to 46 weeks). The Social Security Daily Allowance varies in function of the salary (from EUR 9.39 to EUR 86).

Sickness and Disability Leave

Where the employee is out of work for sickness, subject to compliance with certain formalities (notably for the employee to submit, within 48 hours, the sick slip to the Social Security office and the employer) and satisfies the requirements, he is entitled to receive a daily allowance during his leave, after a three-day waiting period; allowance will be directly paid to the employer in case of subrogation. The daily allowance paid for sick leave is 50% of the basic daily wage (on average, the Social Security Daily Indemnity is of EUR 43.40). After 30 days of sick leave, the daily allowance is increased to 66.66% of the basic daily wage (if employee has at least three children). After 3 months, the allowance will be re-evaluated. If an employee's work capacity and income have been reduced by at least 2/3, as a result of an accident or a non-occupational disease, the employee will be considered as an 'invalid' and she can obtain payment of a pension disability to compensate for lost wages, by filing a demand with CPAM (French Health Insurance); the amount will depend on the category determined for the employee (the category is not definitive and may evolve).

Pensions

The French retirement pension system of employees is structured into three components; the first two, the Basic retirement pension and the Complementary retirement pension are mandatory, hence, contributions are imposed on employees and employers, while the third, Additional pension (when implemented by the employee, it is primarily of savings products such as life insurance, the popular retirement savings plan (PERP) or "Madelin contracts" for non-salaried workers) is optional.

V. ISSUES ARISING ON TERMINATION OF THE EMPLOYMENT RELATIONSHIP

TERMINATION OF EMPLOYMENT CONTRACTS

Grounds for Termination

In the case of an indefinite-term employment contract, there should be real and serious grounds for dismissal. There are two types of valid grounds: personal grounds and economic grounds. Personal grounds can include: i) poor performance or unsatisfactory professional skills; ii) inability to perform the assigned tasks; iii) misconduct within the company; and iv) an employee's repeated absence or absence over a long period of time (which is not related to a work-related accident or illness) which, in certain circumstances, can also constitute valid grounds for dismissal. The Labour Code allows two main economic grounds for dismissal i) economic difficulties facing the relevant business sector at a group level in France;

and ii) technological changes. Furthermore, case law allows other economic grounds for dismissal, namely where it is necessary to safeguard the competitiveness of the relevant business sector at group level and in the case of cessation of business activity.

Is Severance Pay Required?

The employee made redundant will receive a dismissal indemnity calculated based on the employee's years of service, as well as any accrued and untaken paid vacation.

Whistleblower Laws

The new "Sapin II Law" puts in place new rules for whistleblowing in France and is applicable to corruption by French companies overseas and foreign companies that have a presence in France. Companies with over 500 employees and/or an annual turnover in excess of EUR 100m must put in place a framework to allow for accountability and puts in place eight mandatory measures for a corruption prevention program. The law further creates a new national anti-corruption agency called Agence Française Anticorruption (AFA). The law requires all companies with more than 50 employees to establish a whistleblower mechanism and provide protection against retaliation guaranteeing confidentiality. The system is different from its UK and US counterparts and only applies to disinterested parties. Whistleblowers receive immunity from criminal prosecution. Whistleblowers must first use the internal whistleblowing channels before blowing the whistle to the public authorities and the press.

RESTRICTIVE COVENANTS

Definition and Types of Restrictive Covenants

Post-termination restrictive covenants are fairly common in French employment contracts, especially for senior employees or those with access to confidential information, senior responsibilities or contact with the clientele. The following restrictive covenants are recognised and may be enforceable under the law: i) non-compete clauses; ii) non-solicitation of customers; and iii) non-solicitation of employees.

Use and Limitations of Garden Leave

The notion of "garden leave" as such does not exist under French law. Upon termination of employment, the employer may release the employee from working during all or part of the notice period and pay him an indemnity in lieu of notice, or alternatively require the employee to work until the end of the notice period. If the employee expressly requests to be released from his obligation to work during the notice period, and if the employer agrees to it, then the employer is not required to pay the employee and the employment contract may be terminated upon the employee effectively leaving the company. The French Supreme Court ruled that an employee, who is not subject to a non-compete clause and who is on garden leave, may work with a competing company during his notice period.

TRANSFER OF UNDERTAKINGS

Employees' Rights in Case of a Transfer of Undertaking

In France, an employee cannot object to a transfer of undertaking as the transfer is operated automatically. A refusal could constitute grounds for dismissal for disciplinary reasons. The automatic transfer concerns any kind of employment contract (fixed-term contracts, trial period contracts, suspended contracts for illness, etc.). Employees who enjoy a protected status (e.g. employee representatives) will also see their contracts automatically transferred, with their representative role intact; however, when the transfer concerns only part of a business (a partial activity transfer), their transfer should be authorised by the Labour Inspector. The contracts will be transferred in their totality (seniority, remuneration, position, non-competition, etc.), as well as unilateral commitments and practices, such as payment of a 13th month premium.

Employees will continue to benefit from any existing profit sharing agreement unless the change in legal status of the employer makes the implementation impossible for the transferee. In that event, open negotiations should be conducted in good faith to reach a profit sharing agreement, with an obligation to reach an agreement. Regarding pension rights, the transfer will have no impact on the social security system. However, the transfer of undertaking could require a harmonisation of the complementary system (managed by AGIRC/ARRCO pension funds). The rules of harmonisation depend on how the undertaking is transferred (merger, sale, etc.).

Requirements for Predecessor and Successor Parties

The employer who fails to respect this information obligation risks a fine of up to 2% of the amount of the sale. The successor has the obligation to maintain the transferred employees work contract and working relationship (i.e. company agreements, company benefits, etc.). Any modification will entail the agreement of the employee or a negotiation with the employee's representatives, as the case may be.

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GERMANY.

PUSCH WAHLIG WORKPLACE LAW

I. HIGHLIGHTS

- Employees who are not from the EU/EEA require a residence title for the purpose of taking up employment.
- A statutory minimum wage of 9.35 EUR (2020) / expected to be 9.50 EUR for 2021 per hour, currently applies to all employees in all sectors of business. Aside from the statutory minimum wage, there are special regulations and collective bargaining agreements within certain sectors.
- Trade union representatives support employees and works councils, but do not have participation rights within a company.
- Due to the high level of protection against dismissal, it is reasonably common for employment to be terminated by a separation agreement.

II. INTRODUCTION

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

III. ISSUES ARISING UPON HIRING INDIVIDUALS

PRE-EMPLOYMENT CONSIDERATIONS

Limitations on Background Checks

There are no specific statutory regulations on the legitimacy of background checks carried out by a private employer. However, there is complex case law on the question of which information an employer may legitimately request from a job applicant during the course of a job interview, which can be considered as a benchmark for the legitimacy of background checks, using other sources than the applicant. In essence, employers may only request such information that has a direct relation to the applicant's future tasks and responsibilities in the particular job in question. The protection of data privacy of the applicant is of special interest during the hiring process. Personal data may only be processed for employment-related purposes where necessary for hiring decisions or, after hiring, for carrying out or terminating the employment contract.

Restrictions on Application/Interview Questions

The employer has a significant interest in receiving as much information as possible about the future employee; however, the employer is only entitled to ask for information, which is necessary for entering into the employment relationship, e.g. qualifications that are required for employment. Questions concerning pregnancy, age, race/ethnic origin, sexual identity, religion, trade union affiliation or severe disability are generally not allowed in a job interview. The law to abolish unequal and unjustified treatment of employees based on certain criteria: race and ethnic origin, gender, religion or belief, disability, age or sexual orientation is of special significance during the hiring process; specifically as it restricts job advertisements and applicant selection (e.g.

an advertisement for a "young team member" might indicate discrimination based on age). To avoid possible discrimination issues the employer should always base the rejection of an applicant on objective hiring criteria, such as job profile and required qualifications rather than on personal characteristics of the applicant. During the period of claims for damages due to discrimination, the employer should be able to prove his selection process and therefore should keep all documents.

AUTHORISATIONS FOR FOREIGN EMPLOYEES

Requirements for Foreign Employees to Work

In principle, every employee who would like to work in Germany requires a residence title and a work permit before entering Germany. This does not apply to persons who are: 1) of German nationality; 2) a European Union national; 3) a national of a European Economic Area (EEA) member state (Iceland, Liechtenstein, Norway); or 4) a national of Switzerland. Since 1 March 2020, the general conditions for the immigration of skilled workers from third countries (countries outside the EU/EEA) have been pressed forward. As a result of the changes in the German Residence Act, the so called "job market test" is no longer required if an employment contract can be presented. In addition, skilled workers from third countries can now immigrate to Germany for a limited period of time to look for a job, provided they can prove they have the necessary German language skills and can secure their living.

Does a Foreign Employer need to Establish or Work through a Local Entity to Hire an Employee?

No. The employer will, however, be obliged under the statutory social security system to appoint a contact person in Germany, which can be an employee. Intra-group transfers have been facilitated; non-EU citizens may, under certain circumstances, be entitled to a new residence title "ICT-Card", which allows them to work for a German group entity for up to three years. This is possible if they have been posted by another group entity from outside the EU. Moreover, third-country nationals already residing and working in another EU member state, can apply for a "Mobile ICT-Card" if they need to be posted to Germany for a period longer than 90 days. In case of a short-term assignment (i.e. no more than 90 days within a 180-day period) no residence title will be necessary at all; the competent authority (i.e. the Federal Office for Migration and Refugees) just needs to be notified. Hence, third-country nationals can work in different EU member states under a single permit.

EMPLOYMENT CONTRACTS

Minimum Requirements

The employer has a statutory obligation to provide the main contractual terms in writing to the employee no later than one month after the commencement of employment. The terms and conditions of employment are regulated mainly by statutes, collective bargaining agreements and works council agreements. As a rule, the employment contract may not deviate from these provisions to the detriment of the employee. To avoid future disputes, a version of the employment contract should be drafted in German. However, this is not required by law.

Fixed-term/Open-ended Contracts

As a general rule, the employment contract is entered into for an unlimited period. A fixed-term contract is possible, provided the term is agreed upon in writing before the employment commences. A fixed-term contract ends automatically without written notice at the end of its term. A fixed-term employment relationship must be justified by objective grounds, some of which are set forth in statutory law (e.g. temporary increase in work volume, substitution of an employee during parental leave). If no objective grounds exist, fixed-term employment is limited to a maximum duration of two years. If the parties continue the employment after the expiration of the fixed-term contract, the agreement is deemed to be concluded for an indefinite period.

Trial Period

The employer and employee may agree upon a trial period, which is limited by law to a maximum duration of six months. The notice period within the trial period is two weeks (or otherwise agreed). The Dismissal Protection Act does not apply during the first six months of employment, regardless of whether the parties agreed to a trial period.

Notice Period

The length of the notice period for the employer depends on the employee's length of service, ranging from 4 weeks for employees with less than

2 years' seniority, to 7 months for employees with more than 20 years' seniority. Unless otherwise stated in the employment contract, the extended statutory notice periods are only applicable to terminations by the employer, whereas the employee may terminate the employment with a notice period of four weeks to the 15th or the end of a calendar month. Most employment contracts align the notice periods for employees with the extended periods applicable to employers. Collective agreements may specify longer or shorter notice periods, whereas individual contracts of employment may only specify longer notice periods.

PAY EQUITY LAWS

Extent of Protection

To support gender equality regarding remuneration, the statutory minimum wage applies to all employees in all sectors of business and therefore, provides minimum equal payment. Additionally, the Remuneration Transparency Act provides an individual right to information on remuneration. This right is granted to all employees working in establishments with more than 200 employees. However, the Act does not provide regulations on how to enforce claims for equal payment based on such information. In May 2020, the highest labour court in Germany ruled that freelancers may also have the right to information on remuneration, if the freelancer qualifies as an employee in accordance with aspects of equal treatment. Whether this is the case, must be assessed on the basis of the circumstances of each individual situation.

Remedies

The employee may, if necessary, challenge the remuneration based on the general principles of discrimination law and/or the general principle of equal treatment in order to have the perceived disadvantage reviewed in court and, if necessary, corrected. Moreover, the employee may also assert claims for damages or remuneration to compensate for the disadvantages sustained as a result of their unequal treatment. It is possible that the employee may rely on a presumption of proof due to the information received, on grounds of the Remuneration Transparency Act. Any employer who fails to comply with the applicable statutory minimum wage, may be fined pursuant to the German Minimum Wage Act.

IV. ISSUES ARISING DURING THE EMPLOYMENT RELATIONSHIP

WORKING CONDITIONS

Minimum Standards

The terms and conditions of employment (such as maximum working hours, minimum paid vacation and sick leave) are regulated by statutes, collective bargaining agreements and works council agreements. The individual employment agreement cannot deviate from these provisions to the detriment of the employee. The rights of employees who are only temporarily sent to work in Germany are generally determined by foreign employment law.

Salary

A statutory minimum wage of 9.35 EUR per hour applies to all employees in all sectors of business. Employees under 18, trainees and interns are exempted from the regulation. The current minimum wage of 9.35 EUR per hour will be subject to further increase within the next year. It is expected to increase to 9.50 EUR per hour from 1 January 2021. Due to the Covid-19 pandemic, the legislator decided to ease the access to short-time work benefits. Depending on the duration of the short-time work, the corresponding short-time work allowance increases continuously over months. At present, discussions are underway to extend the regulations beyond 31 December 2020. In addition, changes have been introduced for a limited period, until December 2020, to allow for secondary income while receiving short-time work benefits. An employee's additional income while receiving short-time work compensation, under certain circumstances, may not be taken into account. In particular, employees should be able to receive short-time work benefits for 24 months (instead of 12 months). Overtime pay is not expressly regulated by law, but is subject to the employment agreement, collective bargaining agreements and works council agreements.

Health and Safety in the Workplace

As the employer has the organisational control of its premises, and the employees are exposed to dangers of the workplace, the employer is

obliged to provide a healthy and safe workplace. The employer therefore is obliged to set up and maintain all rooms, devices and equipment and to organise the work in a way that the employees are protected against any possible harm. However, the regulations on a healthy and safe workplace depend on the type of industry sector and on the degree of danger faced in the specific workplace. Fulfillment of the applicable health and safety regulations are monitored by the administrative authorities.

During the Covid-19 pandemic, employers need to pay special attention to maintain a healthy and safe workplace as the recommendations from the authorities are subject to change. For example, new regulations (announced in April and September 2020) are intended to ensure the safety of all employees in the workplace during the pandemic and to minimise the spread of the virus. The regulations are only recommendations and therefore they are not legally binding. Nevertheless, the employer is obliged under public law to comply with occupational health and safety regulations and has a duty of protection and care towards his employees.

Managing COVID-19-Related Employee Issues

Regarding quarantine, the applicable rules mainly depend on whether the employee is actually ill during this period. If the employee is ill during quarantine, he is to be treated the same as any employee on regular sick leave and is entitled to continued remuneration for a period of up to six weeks. This continued remuneration is paid by the employer. If an employee is quarantined only as a precautionary measure, but is not actually ill, he is not on sick leave. The employer is still obligated to continue paying the employee, but may request compensation from the authorities under the German Protection against Infection Act. If the employee has the option of telework and is not ill during quarantine, he remains obligated to work.

Under a new provision in the German Protection against Infection Act, which was introduced in light of COVID-19, employees can apply for a state compensation payment in the amount of 67% of their lost net earnings (max €2,016 per month). This claim initially existed for a duration of 6 weeks, but was recently extended for up to 20 weeks. The employee can only refuse to work without breaching his contract, if it would be unreasonable for him to work. This requires a considerable, objective danger for the person concerned or at least serious objectively justified suspicions of danger to life or health. For example, the mere coughing of colleagues will probably not suffice.

The coronavirus is subject to the official obligation to notify the authorities in accordance with the German Protection against Infection Act. When a doctor suspects a case, he must immediately inform the responsible health authority, giving the personal data of the patient, as it has extensive authority to initiate measures to combat the disease, including in the employer's company. There is no obligation for the employer to inform authorities of an infection. This will not be necessary in any event as the doctor/lab carrying out the testing will notify authorities. For data protection reasons, the employer may in principle not disclose the name of infected employees to third parties/ the workforce. Instead, this would normally have to be anonymised. The authorities may however approach the employer to identify contact persons, which may then need to be disclosed in order to follow up on infection chains.

If authorities close down worksites because of the coronavirus, the employer must continue to pay its employees. This is because the employer bears the operational risk, whilst employees retain their remuneration entitlement even if they are unable to work. However, the employer may have a claim for reimbursement against the authority according to the German Protection against Infection Act. In addition, employers may have the option of applying to the Federal Employment Agency for short-time work benefits. Short-time work can be ordered for a maximum of one year. The amount of the short-time working allowance is in principle 67% of the salary with extended entitlements in 2020 for lengthy periods of short-time work. Companies and businesses must apply with their responsible employment agency for short-time work, if necessary.

COVID-19: Best Practices

If there is an agreement on the provision of work in the form of teleworking, which is to apply only for the period of impairment caused by COVID-19, the employer should reserve the right to withdraw the agreement. With regard to health and safety in case of teleworking, the employer should inform the employee comprehensively on occupational safety and should ask the employee to confirm

that their workplace at home complies with legal requirements. Compliance with occupational safety should be defined as a condition for teleworking. It should also be agreed that the employer is granted a right of access for possible inspection of the occupational safety, which, unless agreed upon, does not exist due to the fundamental protection of the home under the German Constitution.

SOCIAL MEDIA AND DATA PRIVACY

Restrictions in the Workplace

The employer is entitled to decide whether or not and to which extent the employees may use the company Internet, telephone or e-mail system for private matters, within or outside of the working hours. Without permission, the employee is generally not entitled to use the Internet for private matters. The Federal Labour Court held that even without an explicit prohibition, employees may not assume that the employer will tolerate private use. If the employee violates the prohibition of private use of work equipment, the employer is entitled to issue a warning and even to terminate the employment contract, depending on the circumstances. In practice many employers permit the private use of Internet to a reasonable extent. However, even in case of permission, the use of the Internet for private matters should be restricted regarding the content and the time of use. We strongly recommend prohibiting the private use of the employee´s company e-mail address, as otherwise monitoring or accessing the employee´s company e-mail account may be very difficult, or may be a criminal offence, even where the employer has a legitimate interest in such access (e.g. when the employee is off sick, on vacation, has left the company, etc.).

Can the employer monitor, access, review the employee's electronic communications?

The employer's rights in this respect depend greatly on whether private use is allowed or not. If the employer has prohibited the private use, the content of an employee's electronic communications can be subject to monitoring activities by the employer, unless such communications are obviously private. If the private use is allowed or tolerated, the employer may be qualified as a provider of telecommunication systems, such being subject to stricter laws, including criminal prosecution for accessing or ordering third parties to access employees' communications beyond what is necessary for security reasons. As long as this question has not been answered by a German court, we recommend not monitoring the use of an employee's electronic communications. To be able to control the usage, the private use of Internet and e-mail should be made subject to the consent of the employee. In case the private use has been prohibited, the employer may spot check whether this prohibition is being observed. The employees will have to be made aware of these controls, and certain procedures and steps have to be complied with.

The Federal Data Protection Act and the General Data Protection Regulation (GDPR) share a fundamental principle: processing of personal data is prohibited unless expressly permitted by law, a works agreement or a collective bargaining agreement. Furthermore, it is still possible for an employee to give his/her consent to the specific data processing. Consent given under prior law will only remain valid insofar as such consent meets the requirements of the current regulations. In particular, the consent has to be separate from other terms, and the employer has to inform the employee about the purpose of the data processing, as well as the right to revoke the consent with future effect, and must be done in text form. In general, employers have to make sure that no 24/7 monitoring will occur. Monitoring of the employees requires an overall balance of interest between the privacy rights of the employee and the business needs of the employer.

Employee's Use of Social Media to Disparage the Employer or Divulge Confidential Information

The employee is obligated not to violate the justified interests of the employer, even during their free time. This means that the employee is not entitled to disparage the employer towards any third person or on social media. Furthermore, the employee is obliged to settle any disputes with the employer internally, before leaking out internal information, especially to the media. In addition, under the law the employee is obliged to keep business and trade secrets confidential. Such confidentiality obligation has effect during the employment relation and also after its termination. If the employee violates this obligation, the employer is entitled to claim damages and, if appropriate, to terminate employment. Under certain circumstances violations may even be a criminal offence.

EMPLOYEE BENEFITS

Social Security

In Germany, employees belong to the national social security system by law. The statutory social security system is regulated in the Social Security Codes, which covers the following principal areas: health insurance, unemployment insurance, nursing care insurance, pension and accident insurance. All salary payments are subject to tax and social security contributions (pension, unemployment, health and nursing care insurance). These must be withheld from an employee's salary by the employer and paid to the respective institutions. In general, the employer and the employee each pay half of the social security contributions, and employers must pay their share in addition to the salary, based on the employee's gross salary with certain maximum amounts applying. Contributions to the employee accident insurance are made solely by employers.

Healthcare and Insurances

The employee can choose between different statutory health insurances. Only employees with an income exceeding the annual remuneration thresholds (62,550 EUR in 2020 / expected to be 64,350 EUR for 2021) are exempt. They can become members of private health insurances. In both cases, the contributions are shared equally by the employer and the employee.

Holidays and Annual Leave

The number of public holidays vary from one federal state to another across Germany; although the minimum is 10 (e.g. Berlin, Lower Saxony) there may be as many as 12 public holidays (Bavaria, Saarland). Every employee is entitled to annual leave of 20 days, based on a 5-day-week. This means that an employee can claim an annual leave of four weeks in a calendar year. However, most employers grant a longer annual leave; depending on the industrial sector, between 25 days and 30 days.

Maternity and Paternity Leave

Female employees are entitled to paid maternity leave, which is the time period 6 weeks before and 8 weeks after giving birth. The maternity leave after the birth has been extended to 12 weeks in case of multiple births, premature births and disabled children. Payments to the employee during this period are made partly by the statutory health insurance provider and partly by the employer. After the birth of a child, both male and female employees are entitled to a maximum of three years' parental leave per child. During this period, the employer is not obliged to make any payments to the employee. After expiry of the parental leave, the employee returns to their previous position. Under the Maternity Protection Act, pregnant employees as well as apprentices, interns and students undertaking a mandatory internship, enjoy special protection against dismissal during pregnancy and for four months after birth. The employer is obligated to carry out a risk assessment not only for work performed by pregnant employees, but for all work conducted within the company. Necessary measures to protect pregnant employees must be implemented immediately after the employer was made aware of a pregnancy, and the employee must be offered an opportunity to discuss (further) adjustments to her working conditions.

Sickness and Disability Leave

After four weeks of employment, the employee is entitled to continued payment by the employer in case of sickness, for a duration of six weeks. The regular payment, which the employee would have earned without sick leave, needs to be paid by the employer. In small companies with less than 30 employees, the employer may participate in an apportionment procedure, which allows for a repayment of sick pay. Generally, the statutory sickness allowances are paid in the amount of 70 % of the regular remuneration for a period of 78 weeks. After six months of employment, a severely disabled employee may claim an additional vacation of five days, based on a 5-day-week.

Other Forms of Leave

Any leave, other than the abovementioned statutory leaves (e.g. compassionate leaves, leave when moving) is subject to individual negotiations or is typically part of collective bargaining agreements/ works council agreements.

Pensions

The public retirement insurance system, company pension plans and private individual retirement investments are the three pillars of the German pension system. The public retirement insurance has always been "pay-as-you-go" with the current pensions of the retired paid from the current premiums of the not yet retired. In view of

demographic changes, pension payment levels are becoming difficult to maintain. Company pension plans have traditionally been designed to supplement statutory retirement insurance. Though company pension plans are not compulsory, they cover about three-fifths of the working population. The third pillar, individual retirement investments, is becoming more important and is subsidised by the government. Retirement used to begin at age 65, but is now gradually being increased to age 67.

Different types of bonus payments and other benefits exist, all of which have to be negotiated individually or are typically part of collective bargaining agreements/works council agreements, such as a company car, car allowances, gym memberships, group accident insurances, "job ticket", child care arrangements or allowances, or additional allowance for sick pay.

V. ISSUES ARISING ON TERMINATION OF THE EMPLOYMENT RELATIONSHIP

TERMINATION OF EMPLOYMENT CONTRACTS

Grounds for Termination

Under German law, the employment relationship can be terminated by mutual consent, by expiry of a fixed-term contract or by notice given by one of the two parties. As to the general protection, the freedom of the employer to dismiss an employee is substantially restricted by the Dismissal Protection Act ("DPA"), which applies if: 1) a business establishment has generally more than ten employees; and 2) the employee has worked in the same company or business establishment for six months without interruption.

Is Severance Pay Required?

Severance payments are paid at the end of employment in the following cases: 1) the employment agreement provides for a contractual severance payment (which is very unusual); 2) the parties agree upon a severance payment (in or out of court) to settle a termination dispute; 3) the court dissolves the employment against payment of severance if it finds that despite the invalidity of the termination, continued employment would be intolerable either for the employer or the employee; or 4) a social plan concluded with the works council in connection with a collective redundancy provides for severance payments.

Whistleblower Laws

There is no general legislation covering whistleblowing in Germany. In general, employees are obliged to report any kind of misconduct within the company as part of their ancillary employment duties (so called duties of good faith). In certain business sectors, special legal provisions exist, such as e.g. in the financial services sector. Furthermore, trade secrets will only be protected if the owner has taken "confidentiality measures appropriate for the circumstances". Whistleblowers do not enjoy any special protection against dismissals, but are subject to the (rather strict) general rules. Such cases shall be decided on the basis of the question of whether the whistleblowing was "proportionate" (i.e. employees should report misconduct internally, before going public or involving authorities).

RESTRICTIVE COVENANTS

Definition and Types of Restrictive Covenants

Under German law, the freedom to include restrictive covenants in an employment agreement is limited by statutory law. Therefore, the content of restrictive covenants must be drafted very carefully. The following restrictive covenants are recognised and may be enforceable under the law: i) non-compete clauses; ii) non-solicitation of customers; and iii) non-solicitation of employees (also called non-poaching covenants).

Use and Limitations of Garden Leave

The employee has a right to work for the employer and therefore cannot be released unilaterally by the employer without a justified reason (criminal acts of the employee, concerns of the employer regarding the protection of its business and trade secrets or any competing acts of the employee). In practice, employees are nevertheless often released from their duty to work after a termination notice until the end of the applicable notice period. During such release, the contractual remuneration of the employee needs to be paid. The employer is, however, entitled to offset any outstanding vacation against the release. Generally, during the

time of release the employee may not perform any competing activities as the employment relationship is still ongoing, and the statutory non-compete still applies. However, in case of an irrevocable release, the employer should explicitly state that the non-compete shall continue to exist. In theory, employees can challenge garden leave through an interim injunction (rarely occurs in practice).

TRANSFER OF UNDERTAKINGS

Employees' Rights in Case of a Transfer of Undertaking

All of the transferor's employees automatically transfer to the transferee, with the terms and conditions of their employment contracts and their seniority remaining intact. Prior to the transfer, each affected employee must be informed in writing about the transfer, its reasons, the background, the social and legal consequences and any further measures planned by the transferee. The employee is entitled to object to the transfer of employment within one month from receiving a correct and complete information letter, without giving reasons for their objection. If the information letter is not in line with legal requirements, the right to object may only forfeit years after the transfer. In case of an objection, the employment will continue with the transferor. If the transferor is no longer in the position to offer a job to the employee, a dismissal for operational reasons may be socially justified.

Requirements for Predecessor and Successor Parties

The transferee is bound by all rights and obligations resulting from the employment contracts in existence at the time of the transfer, and is also liable for pension commitments made by the transferor to the employees affected. However, the transferee is not obliged to treat the employees transferred and its other employees equally. A dismissal is invalid if the dismissal is based on the transfer.

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INDIA.

INDUSLAW

I. HIGHLIGHTS

- Labour and employment laws are listed under the Concurrent List in the Constitution, which means that the Union Parliament (federal legislature) and State Legislatures have co-equal powers to enact laws relating to all labour and employment matters. Typically, the Union Parliament enacts a Central law, while the States formulate rules thereunder. Additionally, States often enact standalone legislation as well.
- One of the central principles of Indian labour and employment law is that they distinguish between employees who are defined as 'workmen' and those who are in management / supervisory / administrative roles ('non-workmen'). Most of the legislation regulates the service conditions of workmen, which are subject to far greater statutory protections. The service conditions of non-workmen are typically governed by the terms of their contracts and the company's internal policies. Determining whether an employee is a workman (or not), must be evaluated on a case-by-case basis.
- India does not generally recognise employment-at-will. Further, in terms of the Indian Contract Act, 1872 which is the principal legislation governing contracts in India, agreements that restrain trade, business or one's profession are void – this could have an impact on employment bonds, and on non-compete and non-solicit covenants in employment contracts.
- Trade unions are typically restricted to the more traditional forms of business, such as the manufacturing sector; however, in recent times there has been some unionisation in the Information Technology sector as well. The Trade Unions Act, 1926 provides for registration of a trade union and the rights and liabilities of a registered trade union. It is also proposed to recognise certain trade unions both at the Central and State Government levels, which would then participate in policy-making.
- The Industrial Disputes Act, 1947 is the key statute that governs industrial relations; it aims at securing industrial peace and harmony by providing the process for settlement of industrial disputes arising between two or more employers; between employers and workmen; and disputes among workmen.
- The Equal Remuneration Act, 1976, mandates the payment of equal remuneration to male and female workers who undertake similar tasks. The Contract Labour (Regulation and Abolition) Act, 1970 is another major legislation that pertains to regulating contract labour in India.

II. INTRODUCTION

The Constitution of India ("Constitution") is the cornerstone of individual rights and liberties, and provides the basic framework within which all laws in India, including laws relating to labour and employment, must operate. The Constitution guarantees certain fundamental rights to individuals such as the right to life, privacy, equality before the law and prohibition of discrimination in public education and employment on the basis of religion, sect, gender and caste. The Constitution recognises the 'right to livelihood' as an integral part of the fundamental right to life. In addition to fundamental rights, the Constitution also envisages certain 'directive principles' which serve as a guide to the legislature towards fulfilling social and economic goals. Given India's history, social justice has always been at the forefront of a number of Indian regulations, specifically labour and employment laws. It is important to note that several labour laws in India have been designed from a worker emancipation perspective – including those relating to factories, mines, plantations, shops

and commercial establishments, as well as those relating to payment of wages, regulation of trade unions, provision of social security, industrial safety and hygiene. However, given changing economic requirements in recent times, especially in light of the ongoing COVID-19 pandemic, the Indian Government has been increasingly conscious of the needs of businesses as well. In the last 6 months, the Indian Government has already brought in certain significant changes in labour laws with the aim of improving the ease of doing business in India. Further, there are several other big-ticket reforms in the pipeline, which we hope will see the light of day in the near future.

III. ISSUES ARISING UPON HIRING INDIVIDUALS

PRE-EMPLOYMENT CONSIDERATIONS

Limitations on Background Checks

Employers are increasingly conducting background checks to guard against inaccurate resumés, overstated work experience and any employee behavioral issues. Typically, employers issue an offer letter, conduct background checks, and expressly state that the person's employment with the organisation is contingent upon his/her clearing the background checks, and vetting of educational and job qualifications; though the permission of the concerned employee would be required to conduct a background verification. Data protection in India concerns any company collecting, using, or disclosing any personal information of an employee/prospective employee (requires such person's consent). The employer's compliance requirements under the Personal Data Protection Bill, 2019 (likely to come into effect in 2021) will need to be examined for purposes of conducting background checks on employees.

Restrictions on Application/Interview Questions

Indian labour and employment laws are largely silent as to the process of selection and hiring of employees in the private sector. In any case, as market practice, most employers in India conduct at least basic (education, job history) background verification of prospective employees in accordance with the IT Rules and/or ask prospective candidates to disclose specific information as a condition precedent to the employment relationship.

AUTHORISATIONS FOR FOREIGN EMPLOYEES

Requirements for Foreign Employees to Work

Once foreign companies set up an entity in India, they often prefer to appoint employees from their home country or headquarters for the management and control of the Indian business. This is done mainly for the convenience of co-ordination with the parent company in terms of decision-making, financial management and other matters. This movement of employees could be undertaken by way of secondment or transfer. There are three broad considerations that must be kept in mind: income tax issues; social security contributions; and visa considerations.

Does a Foreign Employer need to Establish or Work through a Local Entity to Hire an Employee?

Foreign employers may often have requirements wherein they might need to engage a sales person, representative or agent in India, even though they may not have a place of business in India. Also, the foreign employer may not intend to immediately generate any revenue in India. In such a scenario, the foreign employer need not mandatorily set up a local entity in India. There are various methods through which the foreign employer may engage/ hire representatives or an agent in India depending on the exact business requirements.

EMPLOYMENT CONTRACTS

Minimum Requirements

While the current labour laws in India do not strictly require that an employment contract be in writing, it is predominant market practice (with very rare exceptions) to have all terms and conditions of employment agreed and signed by both parties. A few States however, have specific legislation that necessitate a written contract in order to establish an employer-employee relationship. From the perspective of certainty and enforceability, it is strongly recommended that all employment contracts be in writing, whether as a simple appointment letter or a fully detailed contract, setting out relevant terms and conditions agreed to between the employer and employee.

Fixed-term/Open-ended Contracts

Fixed-term employment contracts are permitted in India, as long as the employer is employing the person for a short-term requirement. The Government has recently stated that fixed-term contracts will be permitted across sectors; but in the past, they were expressly permitted only in the apparel manufacturing sector). It is unlikely that employers will be able to convert existing permanent positions into fixed-term employment positions.

Trial Period

The general market trend in India is to have a probation period between 3 and 6 months, especially in the technology and services sectors. During the probation period, the employer will usually have the right to terminate the employment without providing any notice (subject to certain conditions). Terms with respect to an employee's probation period should be adequately captured in his/her employment agreement/appointment letter.

Notice Period

Workmen who have undertaken at least 1 year of continuous service are entitled to a notice period of 1 month, or equivalent wages in lieu thereof. In addition, the employer would be required to pay 'retrenchment compensation' to the workman, which is calculated at the rate of 15 days' wages for every completed year of service. Given that India does not recognise the employment at-will doctrine, judicial precedents have held that termination of employment without providing any prior notice would render the contract of employment as an 'unconscionable bargain', and hence illegal.

PAY EQUITY LAWS

Extent of Protection

In India, the Equal Remuneration Act, 1976 or the ERA mandates the payment of equal remuneration to male and female workers undertaking similar tasks or work of a similar nature. The ERA also provides for the prevention of discrimination on grounds of sex against women in matters connected with respect to employment, such as recruitment, promotion, etc. This legislation not only provides women with a right to demand equal pay, but also holds employers accountable for any violation of the ERA. While the ERA extends protective provisions in favor of women, the Code on Wages has taken a gender-neutral approach and prohibits discrimination on the grounds of gender in matters relating to wages. The principle of 'equal pay for equal work' has also been enumerated under Article 39 (d) of the Indian Constitution, which requires the State to strive for securing equal pay for equal work, for both men and women.

Remedies

An employee has the right to file a complaint with the concerned labour authorities with respect to contravention of such provisions on the part of the employer, or for claims that arise out of non-payment of wages, at equal rates, to men and women. The appropriate labour authority, after verifying the merits of the case, may initiate an inquiry into this matter and take the appropriate action. Further, employers are required to maintain registers which should contain the particulars of the remuneration of its employees. The appointed inspector has the right, at any point in time, to inspect the register if there is any suspicion of a violation on the part of the employer, or if a complaint has been filed by an employee, alleging violations.

Over the years, the principle of equal pay for equal work has evolved through judicial precedents. Indian Courts have held that discrimination based on gender only arises when men and women perform the same work or work of a similar nature. For differences in educational qualifications or for those relating to responsibility, reliability or confidentiality, the principle of equal pay for equal work would not apply. The constitutional principle of 'equal pay for equal work' has been upheld by Indian Courts with respect to temporary employees' vis-à-vis permanent employees in the government sector, where temporary employees performing similar duties and functions as permanent employees, are entitled to draw wages at par with similarly placed permanent employees. The principle is required to be applied in all cases where the same work is being performed, irrespective of the class of employees.

IV. ISSUES ARISING DURING THE EMPLOYMENT RELATIONSHIP

WORKING CONDITIONS

Minimum Standards

Requirements in this regard are principally concerned with working hours, overtime, intervals of rest, provision of basic amenities such as drinking water, toilets, first aid facilities as well as work timings, leave, overtime and holidays, and also with respect to the health, safety and welfare of workers.

Salary

The term 'wages' is used under labour/employment laws to refer to any and all remuneration and emoluments earned by an employee (excluding certain allowances and bonuses) whereas the term 'salary' is used under income tax law to denote the total taxable income received by an employee. It is important to note that currently, different labour laws have dissimilar definitions of wages. However, the same is likely to be remedied under the Code of Wages, which provides for a uniform definition of wages, which would then have to be closely examined. Basic wages are defined as all payments which are earned by an employee in accordance with the terms of the employment contract, but does not include: i) the cash value of any food concession; ii) any dearness allowance (i.e. cash payments paid on account of a rise in the cost of living), house-rent allowance, overtime allowance, bonus, commission or any other similar allowance; and iii) any presents made by the employer.

Health and Safety in the Workplace

An employer's health and safety obligations towards its employees are far more extensive in the manufacturing sector and in certain other sectors such as mines and building and construction. The various State-specific S&E Acts have special provisions with respect to ensuring safety of women who work during night shifts. Employers in such cases are required to ensure that adequate security and transport facilities are provided (at their own cost) to female employees. Given changing economic requirements in recent times, especially in light of the ongoing COVID-19 pandemic, the Indian Government has been increasingly conscious of the needs of businesses as well. In the last 6 months, the Indian Government has already brought in certain significant changes in labour laws with the aim of improving the ease of doing business in India. Further, there are several other big-ticket reforms in the pipeline, which we hope will see the light of day in the near future.

Managing COVID-19-Related Employee Issues

From a general industry and legal perspective, with respect to the coronavirus, employees affected by COVID-19 will be considered to be on paid leave. There are also strict quarantine measures that have to be mandatorily adopted, as prescribed by various Government executive orders. There is however, no clarity as yet on whether an unfortunate condition such as COVID-19 would affect any other leave entitlements of employees. Given that the Central Government and respective State Governments have relaxed the lockdown restrictions, an employer that has been permitted to remain operational, has the right to take disciplinary actions (subject to the provisions of applicable laws, employment contracts of employees and the organisation's internal policies) against employees who refuse to report to work unless: (i) such employees have been infected with COVID-19; or (ii) such employees reside in designated containment zones; or (iii) it can be established that the employer itself is not enforcing adequate health and safety measures, as prescribed by the Government.

When one or a few employee(s) who share a room/close office space is/are found to be suffering from symptoms suggestive of COVID-19, the employer must immediately inform the nearest medical facility (hospital/clinic) or call the state or district helpline. While the suspect case(s), if assessed by health authorities as moderate to severe, will be treated as per health protocol in an appropriate health facility, necessary actions by employers for contact tracing and disinfection of the workplace will have to be undertaken as well. In such instances, employers must also abide by all other instructions issued by the appropriate public health authority. As a best market practice, employers may also consider disclosing to other employees if there are positive cases inside the workplace, without ever disclosing the employee's identity and other personal information.

COVID-19: Best Practices

In order to ensure continuity of operations and to safeguard the safety of their employees, it has become important for employers to update their internal policies and practices in line with applicable laws in light of the COVID-19 crisis. This has in several instances, compelled employers to also execute

work from home agreements. Till the time the pandemic is not considerably contained and to the extent possible, employers should allow employees to work remotely. However, internal policies of the organisation should be amended inter alia to ensure that the employees: i) are available during work hours to attend virtual meetings /discussions or calls; ii) do not travel without applying for the relevant leave as it may disrupt continuity of work; iii) employees are appropriately dressed for video conferences; iv) sanctity of company data is always maintained; and v) there is no conflict of interest in any manner. All business related travel should also be restricted unless it is urgently required for business purposes. Additionally, organisations may also consider modifying their leave and overtime policies to accommodate contemporary demands. Further, having a dedicated team that keeps track of government notifications, guidelines and standard operating procedures is also helpful for both the employer and the employees, to comply with the same.

SOCIAL MEDIA AND DATA PRIVACY

Restrictions in the Workplace

India is also in the process of framing a comprehensive legislation on data protection, which would certainly have an impact on the employer's right to monitor and review employees' electronic communications.

Can the employer monitor, access, review the employee's electronic communications?

The employer's rights in this respect depend greatly on whether private use is allowed or not. If the employer has In terms of the IT Rules, employers can access, review and monitor an employee's official electronic data (i.e. work-related data) subject to obtaining his/her consent, as clearly stipulated in the concerned employment contract / appointment letter and internal policy / employee's handbook. Employers would also have to formulate a privacy policy and upload the same on its website and the intranet. This privacy policy would detail all its obligations regarding collecting, storing, and processing of employees' personal information.

Employee's Use of Social Media to Disparage the Employer or Divulge Confidential Information

While there are no specific laws that govern employees' use of social media, any disparagement of employers and/or any divulging of confidential information would attract consequences under existing civil and criminal laws that govern defamation, breach of contract, divulging trade secrets and infringing intellectual property. Further, keeping in mind the rapidly evolving regulatory framework in relation to technology laws and data protection, employers are also defining policies that would affect their employees' participation on social media during work hours. Several companies, especially technology and outsourcing companies, have installed firewalls that prevent employees from accessing social media sites at the workplace, whereas several other companies have defined social media usage policies that educate employees on the implications of misuse of social media (especially given that employers could be held vicariously liable for any actions of employees in this regard).

In addition, employers can include strong provisions in their employment contracts / appointment letters for protection of confidential information, trade secrets, intellectual property, and other proprietary information. Indian Courts, typically, take claims of confidentiality breaches and disclosure of sensitive information very seriously; it is an established principle under Indian jurisprudence that an employer has full and exclusive ownership of the information that the employee comes in contact with during the course of employment, including any and all information contained in the employee's official email accounts. Also, employers can, subject to obtaining employee consent, monitor employees' activities on social media during work hours for the reasons outlined above.

EMPLOYEE BENEFITS

Social Security

The key legislation governing employees' benefits in India include:

Employees' State Insurance Act, 1948: benefits extend to establishments where 10 or more employees are engaged (subject to any State rules), and to all employees earning less than INR 21,000 (~USD 286) per month.

Employees' Provident Fund and Miscellaneous Provisions Act, 1952: benefits extend to establishments where there are 20 or more

employees. Employees earning less than INR 15,000 per month (~ USD 204) have to compulsorily contribute to schemes under this Act, whereas those earning above this limit may opt out, subject to certain conditions. In light of the COVID-19 crisis, the Government of India temporarily reduced the rate of contribution from 12% to 10% for the months of May, June and July 2020 (for both employer and employees), to decrease the financial liability of the employer and also to increase the take home salary of the employees.

Payment of Gratuity Act, 1972: this Act contemplates payment of gratuity to all employees (workmen and non-workmen alike) engaged in establishments (factories, shops and other commercial enterprises) in which 10 or more persons are employed; if he/she has rendered continuous service for not less than 5 years (except in the case of death or disability) under superannuation, retirement or resignation, or death or disablement due to accident or disease; the gratuity is calculated at 15 days' wages multiplied by the number of years of service).

Healthcare and Insurances

The main legislation applicable to the private sector contemplates medical benefits for employees in contingencies such as sickness, maternity, disablement, and death due to employment injury and provides medical care to insured persons and their families. Employers are further required to pay compensation in cases of death/disablement of employees owing to injuries sustained at the workplace. The Government also launched an ambitious universal health scheme to ensure that the poor and vulnerable populations are provided health insurance coverage up to INR 5 lakh (~ USD 6818) per family, per year, for secondary and tertiary hospitalisation. In addition, most large employers in the private sector provide medical insurance benefits to their employees and their immediate dependents, and bear the costs in this regard.

Holidays and Annual Leave

Across India, there are certain national holidays namely: Republic Day (26th January); Independence Day (15th August); and the birth anniversary of Mahatma Gandhi (2nd October). In addition to these, every employee would be entitled to other holidays, as may be declared by the concerned State Governments. In case an employee is required to work on any of these holidays, he/she will be entitled to twice the wages and also a compensatory off day. Establishments shall remain closed on at least 1 day of every week (this is typically Sunday). However, the S&E Acts of certain States (e.g., Maharashtra, Karnataka and Tamil Nadu) contemplate that some establishments may remain open on all days of the week, subject to them allowing every worker a weekly holiday of at least 24 consecutive hours (and other conditions being satisfied).

Maternity and Paternity Leave

With respect to maternity leave, female employees who have been in service for 80 days are entitled to paid maternity leave of 26 weeks. In case of a miscarriage or medical termination of pregnancy, female employees are entitled to leave with wages for a period of 6 weeks, immediately following the day of the miscarriage or medical termination of pregnancy. Leave requirements are also specified for women having undergone tubectomy operations, or in case of any illness arising out of pregnancy, premature birth, delivery, miscarriage or medical termination of pregnancy. There is no separate category of paternity leave recognised under Indian law, though a bill has been introduced in this regard seeking paternity leave of 15 days across all sectors. Currently however, some corporate and public sector departments provide paternity leave to their employees, as prescribed in the concerned leave policy/rules.

Sickness and Disability Leave

Typically, sick leave cannot be carried forward or encashed and is not subject to any minimum service requirements. However, in certain States (e.g. Gujarat, Andhra Pradesh, Telangana) employees could be eligible to encash their sick leave at the time of their discharge from employment. No specific category of disability leave is recognised in India.

Other Forms of Leave

Casual leave can be availed by employees in unforeseen situations, subject to the approval of an organisation. This category of leave is also not typically carried forward or encashed.

Pensions

Employees who fall within the purview of the Employees Provident Fund and Miscellaneous Provisions Act, 1952 will be entitled to a monthly

pension, as per the rules of the Pension Scheme. Other than that, employees in the public sector will be entitled to such pension(s) as prescribed in their service rules. In addition to the above, various employers provide other benefits to employees (which also have certain tax benefits) such as food coupons, a conveyance allowance and reimbursement of mobile phone and Internet expenses. There are also specific benefit programs and labour welfare funds prescribed for certain sectors.

V. ISSUES ARISING ON TERMINATION OF THE EMPLOYMENT RELATIONSHIP

TERMINATION OF EMPLOYMENT CONTRACTS

Grounds for Termination

India recognises the following modes of employment termination: expiry of a fixed-term contract/mutual separation; resignation by an employee; retirement or superannuation; layoffs (termination due to transfer of business/closure of an undertaking/ organisational restructuring; and termination by employer for 'cause'. A collective dismissal is only permitted in certain circumstances. For workmen: retrenchment is defined as termination of services for any reason whatsoever, other than as punishment inflicted by way of disciplinary action; layoff is defined as the failure, refusal or inability of an employer to employ workmen, on account of shortage of power, raw materials, break-down of machinery, natural calamity or any other reason beyond an employer's control.

Any dismissal of an individual workman would also be considered 'retrenchment' requiring the employer to provide prior notice of termination of either 1 month or 3 months, or equivalent wages in lieu thereof. In addition, 'retrenchment compensation' would have to be paid at the rate of 15 days' wages for every completed year of service. However, employees dismissed for misconduct (provided the employer conducts an inquiry beforehand) no prior notice of termination or retrenchment compensation would be required.

For employees other than workmen, as India does not recognise at-will employment, termination of employment without providing any prior notice (or equivalent pay) would typically render the employment contract as an illegal, 'unconscionable bargain'.

Is Severance Pay Required?

Yes, a severance payment would have to be made by the employer; the quantum of the amount and procedures to be followed would be different (e.g. voluntary resignation versus termination initiated by employer).

Whistleblower Laws

Currently, legislation in India concerning whistleblowers mainly pertains to listed companies and the public sector. Companies listed on a recognised stock exchange in India have to devise an effective whistleblowing mechanism that enables stakeholders, including individual employees and their representative bodies, to freely communicate their concerns about illegal or unethical practices. Certain categories of companies are also required to constitute a 'vigil mechanism' for their directors and employees to report genuine concerns or grievances.

The Whistleblowers Protection Act, 2014 (which has not yet seen the light of day, with further controversial amendments being proposed) mainly governs alleged corruption and misuse of power by public servants and seeks to protect persons who expose alleged wrongdoings in government bodies, projects and offices. It is also important to note that the giving of a bribe by any person (including the private sector) to a public servant for an improper performance of public duty, has now been made an offence (penalties extend to fines and imprisonment), whereas previously, only the receipt of a bribe by a public servant was covered.

RESTRICTIVE COVENANTS

Definition and Types of Restrictive Covenants

Companies in the 'knowledge industry' place high value on their intellectual and human capital. Key employees who develop the intellectual property of the company, and those who have close interactions with customers and suppliers (such as sales staff), are critical to the growth and development of the company, and on many occasions, the company

may be reliant on the personal attributes and market knowledge of such employees in order to improve its market base. Therefore, companies look to protect their business interests by prescribing certain restrictions. The following restrictive covenants are recognised and may be enforceable under the law: i) non-compete clauses; ii) non-solicitation of customers and suppliers; and iii) non-solicitation of employees.

Use and Limitations of Garden Leave

The concept of 'garden leave' is becoming common in India. Typically, garden leave involves a situation wherein an employee gives notice or is given notice of termination, and during such notice period is directed to stay away from work and/or the office premises, whilst continuing to receive his normal remuneration. Courts have held that while it is not possible to stop an employee from leaving, he can be restricted from joining a competitor during the term of employment (i.e. during the garden leave period). However, the garden leave provision should not be unreasonable and should typically not extend to inappropriately long periods of time.

TRANSFER OF UNDERTAKINGS

Employees' Rights in Case of a Transfer of Undertaking

There are specific provisions that protect 'workmen' in cases of transfer of business undertakings. These however do not extend to non-workmen; in such cases, the terms of the employment contract and/or the internal policies of the company would have to be examined. Where the ownership or management of an undertaking is transferred, whether by agreement or by operation of law, every workman who has been in continuous service with that undertaking for not less than 1 year, would be entitled to one month's notice, or payment in lieu thereof, and to compensation calculated at the rate of 15 days' wages for every completed year of service.

Requirements for Predecessor and Successor Parties

The requirements mentioned above relate to the obligations of the old employer (i.e. one whose business undertaking is being transferred). However, if for instance, the services of the employee are not 'interrupted' on account of the transfer or alternatively, the employees resign and join the new employer, then the successor entity would have to ensure that the salary and benefits that the employees were entitled to under the old employer (such as provident fund, employee state insurance, gratuity) will continue to be paid. Specifically, the liability of the successor entity will apply, where the predecessor has defaulted in remitting provident fund and state insurance contributions, prior to the date of the transfer of the undertaking.

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ITALY.

LABLAW

I. HIGHLIGHTS

- Each industry has a National Collective Bargaining Agreement that regulates the employment relationship.
- Companies with more than 15 employees come under the umbrella of the Workers' Statute.
- Italian labour laws and National Collective Bargaining Agreement provisions may only be amended by employers in a more favorable way for the employees.
- The collective dismissal procedure shall be followed when at least 5 dismissals for economic reasons will be served within 120 days by a company with more than 15 employees. Executives are included in the calculation that triggers a collective dismissal.
- The obligation to give a reason for entering into a fixed-term contract has been re-introduced for such agreements, if exceeding 12 months.
- Reinstatement is no longer the sole remedy for unfair dismissal.

II. INTRODUCTION

Italian employment laws have always been employee-friendly, reflecting the principles of the Italian Constitution. However, the global economic downturn has forced Italian lawmakers to look at ways to enhance flexibility within the Italian job market. The most recent Italian reform on labour law, the so called Jobs Act, has granted more flexibility to the employers through: i) a "gradual" protections against unfair dismissals, directly linked to the length of service; ii) the possibility under certain conditions, to downgrade employees; and iii) the possibility, under certain conditions, to utilise for disciplinary purposes, the content of company mobile devices granted to the employees, to stimulate new hires and attract new foreign investment into Italy. Italy is going through important political, social and legal changes at the moment and employment lawyers are witnessing first-hand how this impacts businesses and the Italian workforce. Italian employment law is still a work in progress and the end product will hopefully be worthy of the prestigious label: "Made in Italy".

III. ISSUES ARISING UPON HIRING INDIVIDUALS

PRE-EMPLOYMENT CONSIDERATIONS

Limitations on Background Checks

Prior to hiring and during the employment relationship, the employer may not carry out any checks or investigations, even through third parties, regarding the employee's political opinions, religious beliefs, union membership, or on any matters which do not strictly relate to the employee's professional skills. Therefore, any such investigation is always prohibited, as is any investigation of facts that cannot be objectively used to demonstrate the employee's skills, competence, experience and compatibility with the specific duties to be assigned to him/her. This rule also applies to checks carried out through social networks (now common among HR departments and head-hunters).

Restrictions on Application/Interview Questions
The questions shall be held within the limits of the investigation and of course should avoid any kind of discrimination. For example, employers are prohibited from asking a female candidate if she is planning a pregnancy or intends to have more children, as well any questions regarding sexual orientation, gender identity, etc.

AUTHORISATIONS FOR FOREIGN EMPLOYEES

Requirements for Foreign Employees to Work
There are no specific rules related to the employment of European Union citizens as they can move and work in every EU Country, free of restrictions. On the other hand, limitations are provided by the law with respect to non-EU citizens. Visas and different work permits are necessary in the following situations: i) Hiring of non-EU citizens: their employment can start only after a specific immigration procedure is completed, which includes complying with the limitation of the annual quotas. After the annual quotas are established, a non-EU citizen must request a work visa, assuming that they have been offered employment in Italy. ii) Secondment in Italy of non-EU citizens: this is not subject to annual quota limitations, but should be activated on the basis of a special and more simplified procedure, strictly related to the purposes of the secondment in Italy.

Does a Foreign Employer need to Establish or Work through a Local Entity to Hire an Employee?
No, it does not. The foreign employer needs to file for an Italian tax number and elect a domicile in Italy. The situation should of course be evaluated having regard to the activities to be performed. More specifically, should the foreign employer be active in the trade sector, with the employee having to perform bargaining activities, the risk of the constitution of a stable organisation would be high and would have an impact under a tax perspective.

EMPLOYMENT CONTRACTS

Minimum Requirements
European Union Directive No. 533/91 has been implemented in Italy; it requires that information on the main terms and conditions of employment relationships, be evidenced in writing in the employment contract and provided to the employee within 30 days of hiring.

Fixed-term/Open-ended Contracts
An employment contract normally has an unlimited duration. However, the August (2020) Decree, enacted in response to the Covid-19 pandemic, temporarily eliminates the need for conditions, allowing employers to renew and extend fixed-term contracts, for a maximum period of 12 months and only once without giving reasons. All this until 31 December 2020; thereafter it will return to the previous regulations. It should be noted that both the extension and renewal of fixed-term contracts are allowed within the time limits provided by law. As the duration can only be extended up to 24 months, it will therefore not be possible to exceed, in total, the allotted 24-month period. For each renewal of fixed-term contracts (also stipulated in the context of supply of work), the additional contribution equal to 1.4% is increased by 0.5%, to be paid by the employer.

The August Decree (Law Decree n. 104) temporarily eliminates the need for conditions, allowing employers to renew and extend fixed-term contracts, for a maximum period of 12 months and only once without giving reasons. All this until 31 December 2020; thereafter it will return to the previous regulations. It should be noted that both the extension and renewal of fixed-term contracts are allowed within the time limits provided by law. As the duration can only be extended up to 24 months, it will therefore not be possible to exceed, in total, the allotted 24-month period.

Trial Period
Employment contracts can provide for a trial period. During this period each party is free to terminate the contract without notice and without the payment of any indemnity in lieu of such notice. The law requires that the trial period be written in the employment contract and must be entered into on the first day of the employment at the latest. Failing to meet this requirement renders the trial period null and void and the employment is considered fully effective as of the beginning.

Notice Period
Upon termination of an open-ended employment contract, unless the contract is terminated for "just cause" (a reason that does not allow the

continuation of the employment relationship) both the employer and the employee are entitled to a notice period. In case of termination due to a decision of the employer, it can exempt the employee from working during the notice period while paying a corresponding payment in lieu of notice. In case of termination due to a decision of the employee, if he/she resigns without giving the notice period provided by the applicable collective agreement (with the exception of resignation for "just cause", where the notice is not due by the employee) the employer has the right to withhold the amount of the payment in lieu of notice from the payments that the employee is entitled to receive as a consequence of the termination of the employment relationship.

PAY EQUITY LAWS

Extent of Protection

There is no general principle of 'equal pay for equal work' in Italy that is not specifically linked to discriminatory grounds; meaning that employees can receive different salaries even if they perform the same duties, as long as the basis for the pay difference is not discriminatory. In fact, there is a general non-discrimination principle under which any act or agreement is null and void if it directly or indirectly provides for different treatment on the basis of factors such as race, ethnicity, language or gender. However, there is a regulation on gender pay equality that prohibits the unequal treatment of employees based on their gender, including in relation to remuneration. In particular, Art. 28 of Legislative Decree 198/2006 ('prohibition on wage discrimination'), entitled the 'code of equal opportunities between men and women' (hereinafter, the 'Code'), prohibits all direct and indirect discrimination relating to any aspect or condition of remuneration in relation to the same job or a job considered as having the same status. The law further prohibits any discrimination based on gender with regard to the assignment of a job level, tasks or career development or advancement. There is also a regulation relating to the obligation to report gender pay differences.

Remedies

Public and private companies employing over 100 people are required to draw up a report at least every two years, containing information on male and female employees with specific reference to their working conditions and especially their overall remuneration. The report must be shared with union representatives and with the competent public authorities, which will then process the data collected and transmit it to the Ministry of Labour. However, in Italy employers are not directly required to draw up an action strategy for reducing gender pay gaps revealed by this report (if any). Nevertheless, if discrimination is found, the company can be required to produce an action strategy aimed at reducing the gender pay gap within a maximum of 120 days.

Please note that Italian law provides for administrative penalties for companies that do not comply with their reporting duty or where discrimination is found. Furthermore, the burden of proof that there is no discrimination is placed on the employer if the employee cites factual elements (including those deriving from statistical data and relating to remuneration) capable of establishing grounds for the presumption of the existence of gender discrimination. In view of this rule, even if the results of a report do not in themselves directly give employees grounds for filing a claim, employees could use them as evidence of discrimination. Therefore, particular care should be taken when drafting this type of report.

IV. ISSUES ARISING DURING THE EMPLOYMENT RELATIONSHIP

WORKING CONDITIONS

Minimum Standards

In Italy, the most important provisions included in an employment contract are provided by the law and by the applicable NCBA, in particular, the terms and conditions of employment: categories and related job descriptions; duties and obligations; minimum wages; job retention rights during absences due to illness; salary increases due to length of service; termination, resignation, criteria for calculation of the severance pay; night work; maternity leaves; holidays.

Salary

Italian law explicitly provides that the salary paid to employees must be stated in a pay slip

(produced by the employer or by a third party on the employer's behalf) specifying the period of service which the salary refers to, the amount and the value of any overtime, together with all the elements that constitute the amount paid, as well as all withholdings made in accordance with Italian law. Moreover, Italian law provides for an annual 13th payment, paid once a year on the occasion of the Christmas holidays that usually corresponds to one month's remuneration. In addition, NCBA or even individual contracts may provide for the payment of the 14th payment, usually paid in July.

Health and Safety in the Workplace

When managing and operating its business, the employer is required to adopt all measures that—in light of the specific type of work performed, past experience, and techniques used—are required to protect the psychological and physical wellbeing of the employees. In addition to these general principles, there are some specific duties that the employer must fulfill: i) evaluation of risks; ii) identification of protective and preventative measures; and iii) preparation of the plan for the improvement of safety at the workplace, amongst others.

In response to the Covid-19 pandemic, the Cura Italia Decree (Law Decree 18/2020) introduced a ban on individual terminations for economic reasons and collective dismissals. The ban, entered into force on 17 March 2020, was extended until 31 December 2020 and the Italian Government has recently announced that it will further extend the ban on dismissals until 31 March 2021. Any termination in breach of the ban is considered null and void. It is therefore possible to dismiss only for just cause and/or during the trial period. The 'Relaunch Decree 2' (Law Decree n. 104 released on 14 August 2020) specified that the extension of the dismissal ban applies to employers who have not fully benefited from the Wage Fund or exemption from social security contributions, for both collective and individual dismissal procedures initiated after 23 February 2020. The only exemptions to the dismissal ban include: i) Definitive termination of the production activity; ii) Mutual termination of the employment relationship with the employee in cases where the company's collective agreement provides an incentive to leave; and iii) If the definitive termination of the company is ordered and there is no possibility to carry out a temporary exercise, it is possible to dismiss the employees for bankruptcy of the company itself.

Managing COVID-19-Related Employee Issues

As provided for in Article 26, paragraph 1, of Law Decree no. 18/2020, the quarantine period with active surveillance or the period of fiduciary home stay with active surveillance of private sector employees, shall be treated as an illness for the purposes of the economic treatment provided for under the law, and cannot be counted for the purposes of the grace period. There are no official guidelines on this. If the employer has implemented all the necessary safety measures, while always prioritising the use of smart working in all cases where it is compatible with the tasks carried out by the employee, a refusal not motivated, for example by proven health reasons, could lead to disciplinary action for insubordination. However, it is always advisable to consider, with caution, the need for the employee to be onsite when there are equally satisfactory alternatives. If an employee is found to be infected, it will be necessary to isolate him/her from the other employees, to inform the competent Local Health Authority, and await their instructions on how to handle the employee's situation, accordingly, thus allowing doctors to trace any contacts and define the contagion dynamics. The data must be processed in compliance with the GDPR.

COVID-19: Best Practices

- Implement protocols and update policies, including the DVR (risk evaluation document);
- Inform and train employees;
- Institute smart working policies; and
- Limit business trips.

SOCIAL MEDIA AND DATA PRIVACY

Restrictions in the Workplace

With reference to the company devices granted to the employees for work purposes, the employer is entitled to block Internet access, or access to certain websites only and/or social networks, for the entire working day or during certain times.

Can the employer monitor, access, review the employee's electronic communications?

The employer has no control over employees' personal devices. However, should the employee use his/her personal device during working time

and/or in violation of the relevant company policy, this may trigger disciplinary action.

Employee's Use of Social Media to Disparage the Employer or Divulge Confidential Information

According to the specific circumstances of the case in question, the employee's utilisation of social media to disparage the employer or divulge confidential information may trigger disciplinary action (even dismissal) and may constitute a crime as well. On 1 August 2014, the Tribunal of Milan upheld a disciplinary dismissal as valid, based on the fact that the employee posted on Facebook a picture showing him and other colleagues, along with offensive comment against the company. According to the Judge, such behavior is considered as clearly breaching the fundamental duty of diligence, honesty and loyalty required by the employees, therefore the disciplinary dismissal was lawful and justified.

EMPLOYEE BENEFITS

Social Security

In Italy, pensions are operated by INPS and fed by salary-based contributions paid by both the employer and the employee. For employees who started working after 1 January 1996, the amount of salary to be taken into account for the purposes of calculating the pension contributions is capped at an annually determined amount depending on cost of living increases. Receipt of pension benefits is contingent upon payment of the social security contributions provided for by the law. For employees, the pension is linked to the amount of contributions paid as a percentage of the employee's global salary during an entire working life. In certain specific cases provided for by law (e.g. periods of leave), as to allow the employee to reach the minimum pension requirements; contribution is paid directly by the government. In cases such as the interruption or the termination of work (from lack of work during one's working life or retirement before retirement age); the contribution due can be paid by the employee.

Healthcare and Insurances

Protection of workers who suffer accidents or occupational illness is primarily controlled by the INAIL (National Institution for Insurance Against Work Related Accidents).

Holidays and Annual Leave

Under Italian law, employees are entitled to annual holidays. The minimum length of annual holidays is four weeks per year, but the applicable NCBA may provide for a longer term. The four-week period must be used for at least two consecutive weeks during the same year, if requested by the employee, and the remainder of the weeks must be used within 18 months of the end of the accrual year. Except in the case of the termination of employment, an employer cannot replace the right of the employees to benefit from the minimum annual holiday entitlement with payment in lieu thereof. On the other hand, it is possible for the employer to pay the indemnity in lieu only with regard to the annual holidays exceeding the above-mentioned minimum period of four weeks. There are approximately 11 public holidays in Italy and an additional four days that used to be public holidays, but are now working days on which workers are paid double time.

Maternity and Parental Leave

Female employees cannot work during the 2 months prior to the planned birth of the child (3 months in case of dangerous jobs, listed by the Minister), and during the 3 months following the birth. Upon permission released by the competent doctor, the maternity leave can start 1 month before the planned birth and finish 4 months later. During the maternity leave, the employee is entitled to 80% of her regular salary, which is paid by the employer who then claws back such amounts from INPS. At the end of the maternity leave, the mother has the right to come back to the same job position she left and at the same/better conditions, and until the child is one year old, entitled to work in the same office or at least, in the same city. The father is entitled to paternity leave, on the same terms and conditions as in the case where the mother is seriously mentally injured, and for the residual duration if the mother dies or abandons the child.

During the first 12 years of the child, each parent is entitled to a period of absent from work of 6 months. If both parents take the parental leave, then they are entitled to a maximum period of 10 months combined. If there is only one parent, he/she is entitled to a parental leave of 10 months. If the parental leave is taken during the first 6 years of age of the child, INPS provides an indemnity equal to 30% of the regular salary for a maximum period

of 6 months of parental leave, combined between both parents. During the first year of age of the child, the mother is entitled to 2 paid hours a day to feed the child (1 paid hour a day if the working day lasts less than 6 hours). Such time off is granted to the father if: the child is in his care, the mother does not take them, the mother does not work, the mother is dead or is seriously mentally injured; said rights are also granted for adoption.

Sickness and Disability Leave

In case of sickness and disability, the employee is entitled to a period of sick leave and during this time, the employee cannot be dismissed, unless for just cause or closure of the company. At the end of the leave, the employee is entitled to come back to the same job position he/she left and on the same/better conditions.

Pensions

In 2010, the Italian pension system introduced the "floating window" which means that effective as from 1 January 2011, the government will start paying the pension to a retired employee only 12 months after the date on which such individual achieved the requirement for retirement eligibility and actually elects to retire. In 2011, another reform to the pension system was enacted.

For individuals working prior to 1 January 1996:

- termination of employment (possibility to work as self-employed); attainment of age 65 and 7 months for women or 66 and 7 months for men (from 1 January 2016); and a minimum period of contributions paid over 20 years.
- Law No. 214/2011 changed the requirement for length of contributions with the pensions system to achieve the pensione di anzianità, providing a minimum contribution of 41 years and 10 months for women and 42 years and 10 months for men.

For individuals who started work on or after 1 January 1996:

- termination of employment; attainment of age 66 and 7 months for men or 65 and 7 months for women, along with a minimum contribution term of 20 years; or attainment of age 70 and 7 months for both women and men, along with a minimum effective contribution term of 5 years.
- a minimum contribution of 41 years and 10 months for women and 42 years and 10 months for men; or attainment of age 63 and 7 months for both women and men, along with a contribution term of 20 years.

V. ISSUES ARISING ON TERMINATION OF THE EMPLOYMENT RELATIONSHIP

TERMINATION OF EMPLOYMENT CONTRACTS

Grounds for Termination

Under Italian law, any termination of employment must be justified. The reasons to terminate an employment contract can be divided in three main categories: Objective justified reasons - which are related to the abolition of a job position due to a company's economic situation regarding production, work organisation, or proper functioning; Subjective justified reasons - which occur when the employee commits a breach of his/her contractual obligations or is guilty of negligence in the performance of his/her duties, but the behavior is not so serious as to constitute a dismissal for just cause; or Just cause – that indicates any serious misconduct or breach that renders the continuation of the employment impossible, including, theft, riot, serious insubordination, and any other behavior that seriously undermines the fiduciary relationship with the employer.

Is Severance Pay Required?

Italian law provides for the payment of a deferred form of remuneration, otherwise known as the severance payment (TFR). Along with other minor statutory termination amounts, the TFR must be paid to employees whenever an employment contract is terminated, irrespective of the cause of termination. The amount of the TFR varies depending on the employee's salary and length of service (it is approximately equal to 8% of the yearly gross salary per each year of employment).

Whistleblower Laws

In Italy, the law requires that companies ensure the confidentiality of a whistleblower's identity to the extent permitted by Italian law. However, anonymous whistleblower complaints are not entertained. According to mandatory law, formal whistleblower channels must be available to i) directors, managers or other subjects acting on behalf of the company or one of its organisational units; and ii) persons subject to the direction or supervision of those in part i) above. As such, whistleblower programs need not be available to self-employed contractors, external consultants, or others, though from a practical point of view there may be good reasons to include such persons within the scope of a whistleblower program.

RESTRICTIVE COVENANTS

Definition and Types of Restrictive Covenants

The following restrictive covenants are recognised and may be enforceable under the law: i) non-compete clauses; ii) non-solicitation of customers; and iii) non-solicitation of employees.

Use and Limitations of Garden Leave

Garden leave as such, does not exist under Italian law. Indeed, an employee has a right to work, even during the notice period. Therefore, to continue paying the salary to the employee during the notice period without him/her working is only permitted with the consent of the employee. In the absence of such consent, in order to prevent (for a limited period of time) the employee from working for other employers, the employer has two options, namely i) agree to a non-compete covenant or ii) let the employee work his/her notice period.

TRANSFER OF UNDERTAKINGS

Employees' Rights in Case of a Transfer of Undertaking

The employment relationships of the selling company's employees carry on with the buyer company, on the same conditions. The employees are transferred automatically. However they may challenge the transfer if, for instance, they were not part of the undertaking transferred. The transfer of undertaking itself does not represent a reason to dismiss employees. The employees transferred keep all the rights they have accrued with the selling company. Should the employment relationship of the transferred employees be subject, within 3 months following the transfer, to significant changes because of the transfer of undertaking, the employees may resign for just cause. In this case, the employees may claim indemnity in lieu of notice. For managers (dirigenti) a similar protection is provided by the applicable collective agreement.

Requirements for Predecessor and Successor Parties

As per buyer and seller companies' obligations, the law provides that seller and buyer companies are jointly and severally liable for all the credits accrued by the transferred employees with the selling company at the moment of the transfer, and that the buying company shall apply terms and conditions provided by the National Collective Bargaining Agreement applied by the selling company, unless replaced by more favorable terms and conditions. Also, in case of transfer of undertaking within companies with more than 15 employees, the law obliges both seller and buyer companies to implement a Union procedure before the transfer.

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JAPAN.

ATSUMI & SAKAI

I. HIGHLIGHTS

- Japanese employment laws mainly cover employer-employee relationships. Board members and independent contractors are, in principle, not categorised as employees.
- There is no "at will" employment in Japan. Japanese law requires that termination of regular employment shall be considered objectively, deemed reasonable, and appropriate upon social convention, which is read rigidly in light of Japanese judicial precedent.
- Regulation concerning overtime work has been strengthened with the recent legislative amendments. Work on statutory public holidays and late-night work requires extra allowance on top of the normal wage.
- Japanese law provides various protections against discriminative treatments not only by reason of nationality, creed, social status or gender, but also due to the association with union activities, or taking child care or nursing care leave. There is also a prohibition against unreasonable differences between full-time permanent employees and non-regular employees. Furthermore, an employer's obligation to prevent harassment has been strengthened in light of the recent legislative amendments.
- Dominant majority unions in Japan are deemed as enterprise unions. The unionisation rate in Japan has been considerably and continuously declining.

II. INTRODUCTION

Japanese employment laws mainly cover employer-employee relationships. These laws apply to all employees working in Japan regardless of their nationality. However, board members as defined under the Company Act (2005) as well as independent contractors are not categorised as employees subject to Japanese employment laws, in principle, and therefore are not protected under Japanese employment laws.

III. ISSUES ARISING UPON HIRING INDIVIDUALS

PRE-EMPLOYMENT CONSIDERATIONS

Limitations on Background Checks

There is no statutory limitation on background checks in Japan. However, due to the sensitive nature of data gathered, certain information requires careful handling. Further, sensitive personal information such as race, creed, social status, medical history, criminal record, and the fact of having suffered damage by a crime must not be collected, in principle, unless an applicant's consent is obtained. Also, an employer is prohibited from acquiring information which may become a cause for social discrimination, including (but not limited to) information pertaining to race, ethnic group, social status, family origin, domicile or birthplace, creed, personal beliefs, or history of union membership. In practice, for the purpose of lawfully searching an individual's background, informed consent from each individual employee or prospective employee, and specifying the purpose of and the items subject to said background check, is typically utilised; also customary to ask for criminal records and require a medical examination.

Restrictions on Application/Interview Questions

Employers should refrain from asking questions or requesting information which would lead to social discrimination.

AUTHORISATIONS FOR FOREIGN EMPLOYEES

Requirements for Foreign Employees to Work

Foreign employees who wish to apply for a long-term visa should first obtain a Certificate of Eligibility ('COE'). A COE is a document issued by the Ministry of Justice in Japan. In order to obtain the COE, a sponsor in Japan is required. Sponsors can be employers, schools or relatives. The sponsor in Japan must contact the appropriate local immigration office in order to apply for the COE. Once the COE has been issued, the foreign employee is then able to apply for a visa before the Japanese embassy or consulate in the country where the foreign employee resides. The COE should be submitted to an immigration inspector with a valid visa for landing permission at the port of entry, within three months from the date of issue. Once living in Japan, the foreign employee must notify the local city ward office of his/her place of residence. Long-term visas can be provided for any type of work visa designated by Japanese law, for which the permitted standard period of stay in Japan is five years, three years, one year, or three months. A foreign employee who is currently working for an organisation outside Japan and will subsequently be transferred to that organisation's Japanese office for a limited period, may be eligible for a work visa as an intra-company transferee. A foreign employee is prohibited from engaging in activity outside the scope permitted in their work visa; performing activities beyond this scope is permissible, subject to approval from the Minister of Justice.

Does a Foreign Employer need to Establish or Work through a Local Entity to Hire an Employee?

A foreign employer does not need to work through a local entity in order to hire an employee in Japan, as far as the service engaged by the representative office to which the employee belongs, is limited to certain preparatory and auxiliary activities (e.g. market survey, information gathering, purchase of goods and advertisements). If a foreign employer commences any direct business or operation, which could be subject to taxation in Japan (e.g. contract execution or sales activities), the foreign employer will need to establish a local entity. Otherwise, the representative office would likely be considered as a permanent establishment. Regardless of whether or not a local entity is established in Japan, a foreign employer is obliged to provide its employees, hired and working in Japan, with social insurance and employment insurance.

EMPLOYMENT CONTRACTS

Minimum Requirements

While an employment contract may be in written or verbal form, when concluding an employment contract, the following conditions must be clearly provided in written form: term of employment; place of employment and job description; start and finish time, overtime work, rest period, days off, leave and change in shifts; determination, calculation and payment of wages (except retirement allowances and special wages); and resignation and exit policies and procedures (including grounds for dismissal).

Fixed-term/Open-ended Contracts

Generally, the maximum duration of a fixed-term employment contract is three years. However, there is an exception for employees who possess expert knowledge, skills or experience, or who are 60 years of age or older, in which case the maximum term of the employment contract is five years. A similar exception exists for employees who possess expert knowledge, skills or experience, or who are continuously employed after the mandatory retirement age, subject to approval by a Director General of the relevant Labour Bureau. In the situation where a fixed-term employment contract with the same employer has been repeatedly renewed, and its total contract term exceeds five years, the employee is entitled to apply for conversion of his fixed-term employment into an indefinite term.

Trial Period

In Japan, it is common practice to set a probationary period of three to six months for new hires, effective from the hiring date. While there are no legal requirements regarding the length of the probationary period, a probationary period is presumed void if it is unreasonably long, as this goes against public order and morals. The probationary period may also be further unilaterally extended in accordance with the work rules and/or the employment contract. In practice, however, probationary periods are transient in nature, temporarily allowing employers to review an employee's qualities and abilities before the

employee is able to transition into a regular employment.

An employer is expected to decide whether to accept or reject the employee as a regular employee after the probationary period has concluded. An extension of the probationary period is only permitted if there is a reasonable and compelling need for the employer to continue to evaluate an employee's qualities and abilities. An employer will face a significantly greater hurdle when he tries to terminate an employee's employment during the extended probationary period, compared to waiting until after the initial probation period has expired.

Notice Period

Advance notice of termination must be provided at least 30 days prior to dismissal. An employer may also provide a payment in lieu of such notice, which corresponds to 30 days or more of the salary amount. Notice periods can also be shortened by the number of days for which the payment in lieu of notice has been made. The advance notice period is not applicable when the employer dismisses an employee under the probationary period, within fourteen days after the date of the commencement of the probationary period.

PAY EQUITY LAWS

Extent of Protection

The Reform Act amended the Part-Time/Fixed-Term Employment Act and the Worker Dispatch Act, which came into effect in April 2020, has introduced the requirement for workers to receive fair and equal treatment, irrespective of their job status. Furthermore, the Act prohibits any irrational disparity between 'regular' and 'non-regular' employees. As regards part-time/fixed-term employees, an employer is prohibited from differentiating the base salary, bonus and other benefits, in such a manner that there exists an unreasonable difference between part-time/fixed-term employees and regular employees. In regard to dispatch employees, the dispatching company is obliged to ensure the equal or balanced treatment of dispatched workers, wherein the non-dispatched workers are treated equally or as a result of satisfying the requisite conditions, affording fair and equal treatment protections, in accordance with the provisions established under a labour-management agreement. The guidelines corresponding to the amended Act, set out the basic criteria for salaries and benefits, education, training and welfare entitlements, together with concrete examples of reasonable and unreasonable treatment, differentiating between regular and non-regular employees.

Remedies

A non-regular employee may bring a claim against the employer by filing a civil lawsuit before the appropriate court, or through a petition for proceedings before the appropriate labour tribunal. The amended Act developed administrative Alternative Dispute Resolution (administrative ADR) mechanisms to cover situations of equal treatment of non-regular employees (part-time/fixed-term employees and dispatch employees), in order to provide assistance to non-regular employees to settle disputes in a prompt and efficient manner, and without the involvement of court proceedings. The amended Act does not impose statutory sanctions or penalties with regards to non-compliance of equal treatment of non-regular employees; it merely offers administrative recommendations.

IV. ISSUES ARISING DURING THE EMPLOYMENT RELATIONSHIP

WORKING CONDITIONS

Minimum Standards

An employer who regularly employs 10 or more employees per workplace is required to prepare the work rules in accordance with the Labour Standards Act. The work rules must contain pertinent details relating directly and significantly to the working conditions. The employer's work rules are to be submitted to the competent Labour Standards Inspection Office. An employment contract stipulating any working conditions that fail to meet the standards established by the work rules will be deemed invalid, and the conventional directives will supplant the nullified elements of the agreement. Employers may not change the work rules in any way that would disadvantage its employees, without obtaining the employees' prior consent, unless the modifications are considered reasonable.

Salary

The term 'wages' refers to any kind of payment made from an employer to its employees as remuneration for their work (e.g. wage, salary, allowance and bonus). Wages must be paid in full directly to the employee and in the appropriately designated currency. An employee's wages, other than extraordinary wages and bonuses, are paid periodically (at least once a month on a specifically designated date). In addition to the normal wage, work performed on statutory holidays and late-night work (between 10 p.m. and 5 a.m.) requires an extra allowance; the statutory holiday allowance must be at least 35% of the normal hourly wage, while the late-night work allowance must be at least 25% of the normal hourly wage.

Health and Safety in the Workplace

Employers have an obligation to take necessary care to ensure the physical and mental health and safety of its employees in the workplace, as well as to facilitate the establishment of a comfortable working environment, by promoting comprehensive and systematic countermeasures concerning the prevention of industrial accidents, implementing measures for the establishment of standards for hazard prevention, clarifying the safety and health management responsibility, and the promotion of voluntary activities with a view to averting industrial accidents. The employer is also required to appoint a General Safety and Health Manager, who is ultimately responsible for such matters, and should assign officers to support the Health Manager accordingly, e.g. an industrial doctor, a safety and health committee (if there are 50 or more regular employees) and an operation chief (if the employees engage in work requiring prevention-control measures for industrial accidents).

Managing COVID-19-Related Employee Issues

No specific rights or obligations arise out COVID-19. If an employee is too sick to work in general, they should and would be asked to take sick leave. There is no statutory obligation to pay salary for sick leave. However, if an employee is "able to continue working" but the employer orders the employee to take a leave of absence based on its own judgment and in light of its obligations to provide a safe working environment (including the situation where the employee is infected or suspected of being infected, or has had close contact with an infected person but is not yet reasonably suspected of being infected), the case is considered as furlough, where the payment referred to in section VI part a. (below) is obliged. There is no statutory right to paid or unpaid leave or to look after school-age children affected by COVID-19. The government offered special benefits to employers providing extra paid leave for parents, who have children affected by school closures related to the COVID-19 crisis (27 February – 30 June 2020).

An employee may not refuse to attend to their place of work unless ordered to do so by the employer, regardless of any actual or perceived risk of infection. The employee could also take paid annual leave, but the employer must not coerce the employee to do so. The company's works rules should set out the procedures for requesting and granting leave. Employers need to be particularly careful that they do not inadvertently disclose an employee's medical condition without the employee's consent, e.g. by having them work from home where it could be deduced by others that the employee is infected with COVID-19.

An exception for a data folder (an employer or medical professional in respect of an employee's health data) could be applied for the purpose of preventing the spread of COVID-19, if the acquisition or transfer is considered to be necessary for the protection of the life, health, or property of an individual and it is difficult to obtain the consent of the data subject, or as required by a state agency or a local government to perform their legal duties, or by an individual or a business operator entrusted by either of them for that purpose, and obtaining the consent of the data subject is likely to impede the performance of those duties. The Japanese government has banned foreigners from entry into Japan (including those with work permits, and those with spousal visas or permanent residency who left Japan on or after 3 April 2020) if within the 14 days before entry, they have been in any of the 111 countries and regions on a list issued by the Ministry of Justice; these countries include the US, the UK and most EU nations. These rules are subject to change.

COVID-19: Best Practices

In Japan, each employer is strongly expected to maintain employment. Terminating employees in Japan is generally a difficult process and it is advisable to seek the advice of local counsel or a specialist employment law advisor before doing so.

While no enforceable directives with restrictions have been enacted to combat the COVID-19 pandemic, an employer has a statutory duty to take appropriate measures to ensure a physically safe environment at their place of work, in accordance with guidance and recommendations provided by the government as well as business associations. In practice, each business association is preparing guidelines setting out measures to combat COVID-19 in accordance with the type of business, respectively.

SOCIAL MEDIA AND DATA PRIVACY

Restrictions in the Workplace

Given that employees are obliged to devote themselves fully to their duties at the workplace, during working hours, an employer can restrict the employee's use of Internet and/or social media in the workplace.

Can the employer monitor, access, review the employee's electronic communications?

Work email accounts and computer systems in the workplace belong to the employer and may therefore be monitored, accessed and reviewed by the employer under Japanese law. The monitoring shall be subject to an audit in order to confirm that it is properly implemented as monitoring, accessing and reviewing the employees' electronic communications would be regarded as an acquisition of the employees' personal information.

Employee's Use of Social Media to Disparage the Employer or Divulge Confidential Information

When an employee disparages the employer or divulges confidential information via social media, the possible remedies available to the employer include a request to the employee or the website administrator, to have the content removed as expeditiously as possible; and then consider whether to take legal and/or disciplinary action(s) against the employee for such conduct.

EMPLOYEE BENEFITS

Social Security

There are two separate systems concerning social security in Japan: (i) the social insurance schemes (i.e. the employee pension insurance and the employee health insurance); and (ii) the labour insurance schemes (i.e. the workers' accident compensation insurance and the unemployment insurance).

Healthcare and Insurances

Social insurance schemes are designed to secure the life of workers by paying income-based contributions in the case of old age, disability or death. An employer that is a corporation, or one that is a sole proprietor hiring five or more employees, has a legal obligation to provide its employees with the employee pension insurance and the employee health insurance. Furthermore, all employers are obliged to provide employees with the workers' accident compensation insurance and the unemployment insurance. The benefits of the social insurance and labour insurance schemes are covered by the mandatory contributions paid by workers and employers. A worker employed in Japan will be insured, regardless of whether or not the worker is a Japanese national.

Holidays and Annual Leave

While the statutory holidays must be granted once every week or four times every four weeks, it is common practice to provide holidays in addition thereto (e.g. Saturdays, Sundays, national public holidays). Employers must grant paid annual leave to employees who have been employed continuously for 6 months or more. The employee must have attended work for at least 80% of the scheduled working days in the previous fiscal year to receive the paid annual leave.

The statutory minimum number of days of paid annual leave depends on the employee's length of continuous service. The unused paid annual leave can be carried forward to the next year. Generally, paid annual leave may be taken in full day units. However, employers may allow the employees to take leave in half day units. It is also allowed to grant paid annual leave on an hourly basis by executing the labour-management agreement with such a provision. However, the total amount of days of such paid annual leave is limited to no more than 5 days. Furthermore, employers are obliged to ensure the use by their employees of at least 5 days of paid annual leave per year.

Maternity and Paternity Leave

A pregnant employee can take up to six weeks (or 14 weeks in the case of multiple fetuses) of maternity leave before childbirth, and eight weeks after childbirth. Furthermore, employers shall not

have a woman work within 8 weeks after childbirth. However, in the case where such a woman has so requested to work; provided, that 6 weeks have passed since childbirth, and the work activities to be performed are such that a doctor has approved as having no adverse effect on her, then there is nothing preventing an employer from having the woman return to work.

Sickness and Disability Leave

While there is no legislation concerning sick or disability leave arising from employment, many employers implement their own rules regarding sick leave and/or payment during periods of sickness. The employer may settle the term of sick leave where an employee is suspended. Furthermore, this may become a cause for automatic termination if the employee does not recover before the term of sick leave expires. As to employee's injury, sickness and disability due to employment, the Industrial Accident Compensation Insurance Act covers a large part of the compensation.

Other Forms of Leave

In addition, an employee (regardless of gender) who has been employed for at least one year or more, is entitled to take child care leave for a child aged less than one year (or until the child becomes one year and two months old, one and a half years old, or two years old). This is subject to certain conditions respectively, and does not include certain employees, such as those with fixed-term employment that would not continue after the child turns one and a half years old. Also, the employer is not obliged to pay the employee during maternity leave and child care leave.

An employee who has been employed for at least one year or more and is nursing a family member who requires nursing, is entitled to take nursing care leave for 93 days in total per family member. This does not include certain employees, such as those under fixed-term employment arrangements, whose employment would come to end within 6 months and 93 days after the scheduled commencement date of nursing care leave. Furthermore, the employer is not obliged to pay the employee during nursing care leave.

Pensions

There are no mandatory pensions provided to employees in Japan. However, in practice, a number of companies have voluntarily structured a variety of pension schemes including, but not limited to (i) defined payment plans, (ii) defined contribution plans, and (iii) decrease/eliminate existing pension plans. Furthermore, there are no statutory benefits available to employees in Japan. However, in practice, a number of companies have started adopting a variety of incentive plans including, but not limited to, performance bonuses, share options, profit sharing schemes and employee stock ownership plans.

V. ISSUES ARISING ON TERMINATION OF THE EMPLOYMENT RELATIONSHIP

TERMINATION OF EMPLOYMENT CONTRACTS

Grounds for Termination

Typical grounds for termination include the following: (i) an employee's inability to provide labour due to injury, disability, illness or permanent damage, significantly poor performance, or loss of the trust relationship due to material fraud in an application for employment; (ii) breach of work responsibilities and duties, orders, or workplace disciplines, policies and internal rules; and (iii) loss of job responsibility, redundancy due to business downsising, economic reasons, or corporate dissolution. All grounds for dismissal shall be set out in the work rules or in the employment contract. Termination due to economic reasons such as redundancies is rigorously restricted in Japan.

With respect to an employment contract with an indefinite term, the termination due to redundancy is considered to be a last resort under Japanese labour law, and is only permitted where employers have no choice but to terminate the employment of their employees. With regards to fixed-term employment contracts, an employer may not dismiss employees until the expiration of the employment term thereof, without "unavoidable reasons", which are read narrowly. An employer shall not dismiss an employee during a period of absence from work for medical treatment with respect to work-related injuries or illnesses (nor within 30 days thereafter). Similarly, female

employees are protected from dismissal before and after childbirth (and within 30 days thereafter).

Is Severance Pay Required?
There is no statutory obligation to pay severance upon termination, except when such payment is in lieu of notice.

Whistleblower Laws
Japanese law protects whistleblowers who come forward with information regarding criminal activity in the workplace relevant to life, body, property, and other interests of citizens, that has occurred or is about to occur. Consequently, employers are required to appoint an appropriate point of contact within the company, who is to be located either within the premises of a particular workplace, or at an outside location where the relevant administrative organ of the company operates, to receive and respond to any of the abovementioned concerns as may be raised by an employee whose intentions are lawful and trustworthy. An employer is prohibited from any detrimental treatment of the whistleblower on the basis of whistleblowing, and a dismissal of the whistleblower on such grounds will be declared null and void.

RESTRICTIVE COVENANTS

Definition and Types of Restrictive Covenants
Restrictive covenants are not legally defined under Japanese law. However, such covenants are allowed as concomitant obligations under the principle of good faith arising from the employment contract during the term of employment, and even after termination of the employment contract. Generally, restrictive covenants have to be valid to the extent necessary and reasonable, as provided for in the work rules and regulations or the specific employment contract. During the term of employment, an employee is prohibited from competing with his/her employer. It is possible to compel an employee to refrain from soliciting customers and former employees after termination of the employment contract, by providing such a clause in the work rules or the specific agreement.

Use and Limitations of Garden Leave
Garden leave is a tool by which an employer can prevent departing employees from performing their regular duties. Typically, the employee will be prevented from attending the workplace, but will still receive full pay. This has the effect of restricting the employee's access to customers, clients, staff and information, and hampers their ability to work for a competitor. If an employer wishes to put an employee on garden leave there must, in most circumstances, be an express clause in the employment contract permitting the employer to do so. Otherwise, the employer could be violating the employee's implied right to work and therefore be in breach of contract.

TRANSFER OF UNDERTAKINGS

Employees' Rights in Case of a Transfer of Undertaking
In a share transfer, there will be no change in the employment conditions and status; therefore, no transfer of employees' rights and obligations will take place. In a merger, regardless of whether it occurs through absorption or consolidation, any rights and obligations under the employment contracts subject to the merger, will be automatically and comprehensively transferred to the post-merger entity. In a corporate split, regardless of whether it occurs through absorption or incorporation, the employees mainly subject to the transferred business and defined as such in the corporate split plan or agreement, will be automatically transferred. Therefore, any rights and obligations thereunder will be automatically and comprehensively transferred.

An employee who is mainly subject to the transferred business, but is not defined in the corporate split plan or agreement, has the right to raise an objection, with the result that the employee will be subsequently transferred. Adversely, an employee who is not mainly subject to the transferred business, however defined in the corporate split plan or agreement, has a right to raise an objection, with the result that the employee will not be subsequently transferred. Any contracts that are not transferred to the successor, remain with the predecessor, and the general rules on collective dismissals apply.

Requirements for Predecessor and Successor Parties
In a business transfer, through an asset transfer, employees will not be automatically transferred. Although the buyer and the seller may agree to include employment contracts in the business to be

sold, if however, an employee refuses to consent to the transfer of her employment contract, the employment contract will not be transferred; contracts not transferred will remain with the predecessor and the general rules on collective dismissals apply.

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LUXEMBOURG.

KLEYR | GRASSO

I. HIGHLIGHTS

- The Labour Code came into effect on 1 September 2006 and groups all existing employment rules.
- Termination of contracts is strictly regulated by the Labour Code with specified notice periods depending on the length of service with the same employer.
- Right of workers to strike is implicitly guaranteed by the Constitution under the freedom of association, but is only possible under specific circumstances. A peace obligation exists in the frame of a collective labour agreement. Moreover, in order to be legal, every strike or lockout movement must first be referred to the National Office of Conciliation (ONC).
- Key institutions include the Labour Ministry, the National Employment Administration (Administration pour le développement de l'emploi) which, notably, is in charge of assisting unemployed persons and the Labour and Mines Inspectorate (Inspection du Travail et des Mines), which is responsible for controlling standards of health and safety at work, compliance with employment legislation and supervising working conditions.

II. INTRODUCTION

In Luxembourg, the labour market is characterised by the number of commuters from France, Belgium and Germany, which represents almost 50% of the labour force. In Luxembourg, the social peace is of utmost importance and usually secured by regular dialogue between social partners. Due to the recent codification of employment laws and with recent employment laws voted during the past few years, the Luxembourg labour code is increasing in volume. For example, we can highlight: i) the simplification act dated 23 July 2015 reforming the staff representatives in Luxembourg; ii) the law of 8 April 2018 which made numerous amendments to the Labour Code, in particular to better protect employees' rights and improve the effectiveness of employment measures; iii) the law of 10 August 2018 relating to the benefits employees are entitled to in case of incapacity to work; and iv) the entry into force of the GDPR and its impact on monitoring employees.

III. ISSUES ARISING UPON HIRING INDIVIDUALS

PRE-EMPLOYMENT CONSIDERATIONS

Limitations on Background Checks

The employer is allowed to ask the candidate to submit a criminal record certificate no. 3. This request must already be indicated in the job offer; has to be submitted in writing; and has to be expressly motivated by the specific needs of the proposed position. The employer can only retain the certificate for 1 month after the conclusion of the employment agreement. If the candidate is not hired, the certificate has to be destroyed immediately.

Restrictions on Application/Interview Questions

In Luxembourg, before recruiting an employee and drawing up an employment contract, employers must first register the vacant position to the National Employment Administration. The employer is also required to inform the Luxembourg Social Security Services within 8 days of the recruitment

and register the employee. During the recruitment process, the employer may use different techniques such as a job interview or a selection test.

AUTHORISATIONS FOR FOREIGN EMPLOYEES

Requirements for Foreign Employees to Work

EEA Nationals: EU citizens are entitled to reside in Luxembourg for more than 3 months if they meet one of the following conditions: i) they work as an employee or are self-employed; ii) they have the resources required to ensure that they or their family members are not dependent on the social welfare system and also have medical insurance; iii) they are registered with an approved public or private education institution in Luxembourg, and are attending a full-time educational course or, in this context, a professional training course. Within 8 days of their arrival in Luxembourg, EU citizens must make a declaration of arrival at the administration of the municipality where they intend to establish residence. EU citizens must also complete a registration form in the same municipality within three months of their arrival in Luxembourg. A secondary activity of less than 10 hours per week is not sufficient to receive an authorisation to stay for a salaried worker.

In response to Brexit, the re-worked law on the free movement of persons and immigration provides that British nationals and their family members, who fall within the scope of the Withdrawal Agreement have the same rights as EU citizens and their family members and they keep these rights, even after the end of the transition period. The right of residence is subject to the same conditions as were available to British nationals while they were still citizens of the European Union. After a five-year stay, British nationals have a right to permanent residence in their country of residence (Luxembourg), which can only be withdrawn for serious reasons of public security.

Non-EEA Nationals: a third-country national who wishes to work in Luxemburg must have a stay permit (serving as work permit). Applicants must send their application to the Immigration Directorate of the Ministry of Foreign and European Affairs. They must state their identity and the exact address in their country of residence and add several documents depending on the type of permit they are applying for: i) work permit for an occupation of less than three months; ii) work permit for an ancillary occupation for people who have obtained a residence permit for private reasons; iii) work permit for an ancillary occupation for a third-country national family member of a third-country national; and iv) work permit for a highly qualified employee for an occupation of more than three months.

Does a Foreign Employer need to Establish or Work through a Local Entity to Hire an Employee?

No. In Luxembourg, an employer has to pay social security contributions when hiring employees. In order to be able to pay these contributions, the employer has to file an operating declaration with the Joint Social Security Center (CCSS) in order to register as an employer. This may also be done by a foreign entity. The employer has to submit an operating declaration within 8 days of the date of entry of the first employee.

EMPLOYMENT CONTRACTS

Minimum Requirements

Employment contracts are individual-specific (an agreement in which one person agrees to work for another in return for payment) and must exist in writing from the beginning of the employment period. There must be two copies of the signed contract: one for the employer and one for the employee. Only the employee has the right to establish, by any means, the existence of the contract in the event no written employment contract exists. Employment contracts concluded orally are automatically deemed permanent employment contracts.

Fixed-term/Open-ended Contracts

The standard contract in Luxembourg is the open-ended contract. A fixed-term contract is prohibited for permanent work. It is permitted only in order to carry out a specific type of work over a defined period of time, such as: temporary replacement; seasonal work; performance of work in several specified sectors of activity or occasional and time-defined work; contracts concluded between an employer and a student or a pupil; or urgent and necessary works to prevent a negative impact on the business. By principle, fixed-term contracts cannot exceed a duration of 24 months including the possibility of two renewals. If a compulsory

element is not included in the agreement, the fixed-term contract will be deemed an indefinite employment contract.

Trial Period

An agreed trial period may be written and signed before the employee starts working in both indefinite and fixed-term contracts. The general principle is that the trial period cannot be shorter than 2 weeks and longer than 6 months, depending on the qualifications of the employee. A contract can contain a trial period of 12 months, if the salary reaches a certain amount (fixed by a grand-ducal regulation). A trial period that does not exceed 1 month must be specified in weeks, whereas trial periods of over 1 month must be specified in months. Neither party to the employment contract may extend or renew the trial period. If employment is suspended for sick leave, the trial period is automatically extended accordingly, although by no more than 1 month.

Notice Period

Employment cannot be terminated by any party during the first 2 weeks of the trial period. In the event of dismissal during the trial period, the employer is not subject to the same notice periods as after the end of the trial period. The duration of the notice period depends on the length of the initially stipulated trial period. The reasons for dismissal are not required. If the trial period is expressed in months, the notice to be given is 4 days per month, with a minimum of 15 days and a maximum of 1 month.

PAY EQUITY LAWS

Extent of Protection

In Luxembourg, the principle of equal pay is only expressly provided in the context of equality between genders, with the provision that every employer ensures equal pay for men and women for the same work or for work of equal value. In addition to these specific provisions regarding unjustified difference in salary between genders, the general anti-discrimination laws also apply in matters of salary. Therefore, unjustified differences in salary or professional advancement based on other discriminatory grounds such as religion, conviction or belief, disability, age, sexual orientation, real or assumed belonging to an ethnic group, nationality or union membership, can also be considered discriminatory actions. It is however important to note that in Luxembourg, there is no general rule of "equal work = equal pay" meaning that except for discriminatory reasons, the employer remains free to negotiate salaries individually with each employee.

Remedies

With regards to equal pay among genders, the Labour Code provides that any provision appearing, in particular, in an employment contract, a collective labour agreement or a company's internal regulations and which, for one or more employees of one of the two sexes, a lower salary than that of employees of the other sex for the same work or work of equal value, is automatically null and void. The higher salary from which these latter employees benefit is automatically substituted for that which was included in the nullified provision. An employer who does not comply with these obligations is punishable with a fine ranging from €251 – €25,000. However, in the event of a repeat offense within a two-year period, the penalties may be increased to double the aforementioned maximum.

IV. ISSUES ARISING DURING THE EMPLOYMENT RELATIONSHIP

WORKING CONDITIONS

Minimum Standards

The Labour Code provides for minimum working standards. Both parties to the employment contract may only deviate from the Labour Code by being more favourable for the employee. Senior executives are excluded from the application of certain rules (for instance, the rules on working time).

Salary

The last increase to Luxembourg's minimum wage occurred at the beginning of 2020. The current minimum wage of €2.141,99, however, is expected to rise by 20% for those classed as 'skilled workers' and will decrease by 20-25% for those classed as 'adolescent workers'. This means a skilled worker aged 18 or older must be paid 20% more than the standard minimum wage, totaling €2.570,39.

Workers aged 17 or 18 face a 20% deduction from the standard rate and must be paid at least €1.713,60, while those aged 15 to 17 face a 25% deduction and a minimum wage of €1.606,50. Even workers who earn above the minimum wage are affected by the national indexation of salaries, a barometer by which employers must adjust the wages they pay in line with the cost of living in Luxembourg. If the consumer price index rises or falls by 2.5% during a period, Luxembourg salaries must be adjusted by this percentage.

Health and Safety in the Workplace

The employer must ensure the health and safety of employees in all aspects related to his work. He must care for both the physical and mental health of his employees; stress and burnout must also be taken into account. The Covid-19 crisis has brought important temporary amendments to labour and social security law during 2020, regarding a range of aspects such as health and safety, sickness, work time of health professionals, cross-border workers, teleworking, unemployment, short-time working, dismissals, etc. During the Covid-19 pandemic, it was naturally understood that the employer's obligations regarding safety and health were extended to include the implementation of all Covid-19 related measures (e.g. wearing face masks, ensuring physical distance of at least 1,5 meters between people, disinfecting regularly, etc.).

Managing COVID-19-Related Employee Issues

Employees who are infected with COVID-19 and/or need to be quarantined, need to contact a medical professional by phone, and through a "teleconsultation", the medical professional will issue a sick leave certificate for the employee. With regard to employment law, this situation is treated like any other sick leave. In the context of the measures adopted by the Government to contain the spread of the COVID-19 coronavirus, a specific procedure has been set up to allow parents to take leave for family reasons if they do not have any solution to look after their child(ren) under 4 years old, or aged from 4 up to 13 if it has not been possible to find them a place in a childcare structure for the period from 25 May to 15 July 2020. This special leave is treated as sick leave and the employer is reimbursed 100% by the National Health Fund. If the employee is not sick, it is always possible to ask him/her not to come to the office. If telework is not possible the employer would have to grant to this employee extraordinary leave.

Employees may not refuse coming to work out of fear, provided the employer has implemented all required health and safety measures. (Article L. 312-1 of the Labour Code). However, according to Grand-Ducal regulation from 17 April 2020, in the event of a serious, immediate and unavoidable danger, an employee may leave his/her workstation or the dangerous area without being sanctioned. Any termination on those grounds will be deemed abusive. Such behaviour from the employee may however in our view only be acceptable if the employer has not taken the necessary measures in relation with the COVID-19 epidemic to protect the employees and/or if due to specific circumstances the employee was indeed be in a "serious, immediate and unavoidable danger" (for example a business trip in a high risk zone). Possible disciplinary measures may thus only be considered on a case-by-case basis.

Employers are not required to notify authorities. In fact, the CNPD, the national commission for the protection of data in Luxembourg, considers that employers must refrain from collecting in a systematic and generalised manner, or through individual inquiries and requests, information relating to possible symptoms or health information presented by an external person or an employee as well as their relatives. The CNPD's guidelines concerning COVID-19 can be found here (in English): https://cnpd.public.lu/en/actualites/national/2020/03/coronavirus.html

COVID-19: Best Practices

In order to optimise the working condition of employees when returning to work after the confinement, we recommend the following:

- In open space structures, we highly recommend a gradual return to work scheme, such as alternating working groups (groups alternating between office time and teleworking).
- Providing all necessary health and safety material.
- Placing partitions between work areas, wherever a distance of 2 meters cannot be ensured.
- Enabling employees who are vulnerable to work from home as much as possible.

- While the employer may not prohibit employees from travelling internationally, we would advise to provide health and safety recommendations and information and encourage employees to carefully consider them.

SOCIAL MEDIA AND DATA PRIVACY

Restrictions in the Workplace

Employers must inform the employees within which limits they tolerate the use of computer tools as well as the devices put in place for personal purposes and the monitoring procedures of these tools. The employer can restrict the employee's use of Internet and social media during working hours (ideally by including such a provision in the employment contract or an internal regulation). The employer may take disciplinary action should an employee not comply with the internal regulation. Consequently, for security reasons, the employer is authorised to impose browser configurations and to prohibit or restrict access to certain sites, the downloading of certain files or the connection to discussion forums ("chat").

Can the employer monitor, access, review the employee's electronic communications?

Surveillance of the employee's use of Internet is strictly regulated by law. If the employer has any indication of an Internet use that is detrimental to the company by identifying an unusually long period of Internet consultation or mentioning of addresses of suspicious websites, he may subsequently take the appropriate control measures and pass, in a second stage, this on to an individualised supervision. Usually, each employee is assigned an e-mail address for his/her professional activity by the employer. This e-mail address and the corresponding mailbox are, as the emails are supposed to be sent and received in the name of the employer, the property of the latter. However, this is a simple presumption and the email can have the character of a private correspondence by inserting "Private/Personal" in the subject field. Anything not identified as "Private/Personal" is deemed professional and thus the employer is allowed to access it.

Employee's Use of Social Media to Disparage the Employer or Divulge Confidential Information

By disparaging the employer, the employee violates his/her loyalty obligation and the employer may, as the case may be, take disciplinary action. Anonymous reports should however not be encouraged and should only be accepted by an employer in exceptional circumstances. To avoid abuses, employees are encouraged to use the normal reporting line.

EMPLOYEE BENEFITS

Social Security

The Luxembourg social security system has been codified into a single unified system. The rates of contributions apply to compensation and earnings up to a maximum of 5 times the minimum reference social wage. The employee's and employer's contributions are the same (about 3,05% for sickness and maternity leave and 8% for retirement).

Healthcare and Insurances

The healthcare insurance organises the reimbursement of medical costs and compensation for sick leave, maternity leave, adoption leave, leave for family reasons and also dependence. The pension insurance has the main task to allocate statutory pensions to its affiliates and to grant loans for construction or renovation. Invalidity pensions are also envisaged in Luxembourg law. Accident insurance is financed by employer's contributions.

Holidays and Annual Leave

Each employee benefits from a minimum of 26 days of paid leave per year (the law of 25 April 2019 having added one day), with some CBA's providing for more holidays (e.g., banking and insurance). Employees are entitled to take paid leave for the first time only after having worked with the same employer for an uninterrupted period of three months. Paid leave must be taken during the calendar year to which it applies, but can exceptionally be postponed to the following year, in which case it must be taken before 31 March. There are 11 statutory public holidays established by the Labour Code. A public holiday falling on a non-working day is replaced by a compensatory day off to be taken within a period of 3 months. In addition, the Labour Code provides for several extraordinary leave types for family reasons or other specified events.

Maternity and Parental Leave

Maternity benefits are paid during antenatal and

postnatal leave. In principle, maternity benefits amount to the highest salary received during the 3 months prior to the maternity leave for employees or the contribution base in force at the time the maternity leave is taken for a self-employed worker. Financial maternity benefits must be between 1 and 5 times the social minimum wage maximum. Parental leave is taken by parents of a child who is less than 6 years old. The objective is to take a break in their professional career or to reduce their work hours to fully devote themselves to the education of their child. The key changes in the parental leave legislation concern the duration of the parental leave and the introduction of divisible parental leave for people working full-time. The new parental leave allows both parents to stop working during 4 or 6 months on a full time basis; or 8 or 12 months on a part-time basis (with the employer consent). The law also provides the possibility of split parental leave: with reduction of the working hours by 20% per week for a period of 20 months; or over 4 one-month periods for a maximum period of 20 months. The reform introduces a real replacement income. The employee receives a real salary compensation, calculated in view of the loss of salary during the parental leave, with a maximum limit of €3,200.

Sickness and Disability Leave

In the event of absence from work due to illness duly notified by informing the employer on the first day of absence and providing them with a medical certificate at the latest on the 3rd day of their absence, all employees under the age of 68 are entitled to statutory sickness pay for a period of up to 78 weeks within a reference period of 104 weeks as from 1 January 2019. The employer must continue to pay the employee's salary and receives reimbursement of 80% of the costs from the Luxembourg Mutual Insurance Scheme. From the month following the month during which the employee reaches an absence of 77 days, the employee is paid directly by the Social Security authorities. The payment of Social Security premiums is compulsory and allows to finance the statutory sickness pay. Employees on sickness leave are protected against dismissal for the first 26 consecutive weeks of their absence. If an employee is still unable to work after the end of the statutory sickness pay, they may apply for an invalidity pension. As from 1 January 2019, the contract lapses with immediate effect after a period of 78 weeks of absence for illness, compared to 52 weeks previously.

Pensions

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

V. ISSUES ARISING ON TERMINATION OF THE EMPLOYMENT RELATIONSHIP

TERMINATION OF EMPLOYMENT CONTRACTS

Grounds for Termination

Grounds for termination of employment contracts include mutual agreement; resignation with notice by the employee; resignation by the employee due to gross misconduct by the employer; dismissal during the trial period; dismissal with notice for real and serious cause based on the employee's attitude; dismissal of employee for gross misconduct; redundancy; closure of business; retirement; employee's incapacity to work; and death of one party.

Is Severance Pay Required?

Employers must pay a legal severance indemnity to any employee dismissed with notice with at least 5 years of service in the company. Entitlement to severance pay depends on the employee's length of continuous service with the same employer. The severance pay for employees who have received a notice of dismissal can amount to a maximum of one year's salary. This payment becomes due when the notice period expires. The severance pay is not applicable in case of termination for gross misconduct. Businesses employing less than 20 employees may pay a severance indemnity or extend the notice period of the dismissed employee.

Whistleblower Laws

Luxembourg's laws provide protection for employees who report acts of corruption of which they are victims and/or of which they are aware. In case of corruption, protection is only due in case of an alert to their "superior" or the "competent authorities". To encourage employees to report the facts of which they are aware, the legislator has provided for a lighter burden of proof: the employee simply advances the facts and it is up to the employer to demonstrate that the facts have not been proven. If the employee is dismissed following his/her denunciation, he/she can appeal to the labour court to be reinstated. Pursuant to the new "Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019, on the protection of persons who report breaches of European Union law" and the Member States shall transpose the provisions into national law by 17 December 2021 or by 17 December 2023, respectively. Directive 2019/1937 aims to make certain that disclosure, information and communication channels will be instituted for reporting within companies; to provide better protection to whistleblowers; and enforce obligations to follow up on disclosures.

RESTRICTIVE COVENANTS

Definition and Types of Restrictive Covenants

The following restrictive covenants are recognised and may be enforceable under the law: i) non-compete clauses; ii) non-solicitation of customers; and iii) non-solicitation of employees.

Use and Limitations of Garden Leave

An employer can exempt an employee from work during the notice. There is no statutory right to pay in lieu of notice, but during the exemption the employee must be remunerated with the same salary and benefits as if he/she were working.

TRANSFER OF UNDERTAKINGS

Employees' Rights in Case of a Transfer of Undertaking

In case of a business transfer, all employees, rights and duties arising from an employment relationship with the seller that already existed on the date of the transfer are automatically transferred to the buyer. After a transfer of undertaking, employees are, as the case may be, protected against the termination or the unilateral modification of their employment contracts for economic reasons during a period of 2 years (such protection could be provided for in a collective bargaining agreement).

Requirements for Predecessor and Successor Parties

The buyer assumes all rights and obligations arising under the employment relationship with the seller. In addition, if a collective agreement remains applicable, the terms of employment can only be modified after the collective agreement expires. If no collective agreement applies, it is possible to harmonise the transferred employees' terms of employment with those of the buyer's other employees, provided that this harmonisation is mutually agreed on between the buyer and each individual employee.

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MEXICO.

DE LA VEGA & MARTÍNEZ ROJAS, S.C.

I. HIGHLIGHTS

- Employers dealing with operations in Mexico should be aware that labour relations are highly regulated in our country and that Mexican employees generally have greater rights than their American counterparts.
- Job stability principle. Any individual employment relationship is subject to the principle of 'job stability', that is, subject to the employee's right to keep his job as long as the employment relationship so requires. If the employment relationship is for an indefinite term, the employee cannot be laid off without cause. In other words, there is no employment-at-will in Mexico.
- Duration of the employment contract. The Mexican Federal Labour Law assumes, as a general principle, that an employment agreement has been executed for an indefinite term, unless the nature or the particular type of service to be provided calls for an employment agreement for a specific job or term, or if the parties agree to execute an employment agreement for initial training or subject to a probationary period.
- Restrictive Covenants or Non-Competes. In the strictest sense, non-compete agreements are void under Mexican law; specifically, under Article 5 of the Mexican Constitution. Notwithstanding the foregoing, pursuant to an opinion issued by a Circuit Court, Covenants not to compete are fully enforceable provided they are limited in time, geographical scope, clients and activity, products and services, and consideration is paid in exchange.
- Outsourcing. Although strictly ruled, the FLL currently allows for the subcontracting of specialised services or 'outsourcing'. This type of work must comply with the following conditions: (a) It cannot cover the totality of the activities, whether equal or similar in whole, undertaken at the work centre; (b) It is justified due to its specialised character; (c) It cannot include tasks equal or similar to the ones carried out by the customer's workers. If any or all of these conditions are not met, the customer will be deemed to be the employer for purposes and effects under the Law, including as it applies to obligations related to social security. It is important to mention that on 12 November 2020, AMLO issued an amendment proposal for the FLL, to entirely prohibit the subcontracting of services or 'outsourcing'. This proposal to eliminate outsourcing is now pending the approval and ratification of the Mexican Congress. It is very likely that the amendment will enter into force before the end of 2021, and those who continue subcontracting employees could face an imputation for tax fraud.

II. INTRODUCTION

Mexican Labour Law grew out of an armed revolution that concluded with the adoption of the current Federal Constitution in 1917. Article 123 of the Federal Constitution, entitled "Labour and Social Welfare", expressly recognises and protects the basic inalienable rights of employees. Thereafter, in 1931, the first Federal Labour Law was enacted to regulate employer-employee relations nationwide, later replaced by the 1970 Federal Labour Law, which improved working conditions for employees. The reform to the Mexican Federal Labour Law (herein after the "FLL"), came into effect on 1 May 2019. The amendment did include pro-employees and pro-union provisions in order to create a better system. It is important to mention that this amendment arose as part of Mexico's obligations after the signing of the United States Mexico Canada Agreement (USMCA) that came into effect on 1 July 2020. In this sense, there was a necessity to make substantial changes in labour and union matters in order to adapt to the terms of the agreement. The three main pillars of the 2019 amendment to the FLL are:

- A new Labour Justice system: the parties are now obliged to attend the Conciliation Centre before filing for trial; if no agreement is reached the Labour Justice will now be provided by labour courts belonging to the Federal or Local Judicial Branch. The new procedure is governed by the principles of orality, immediacy, continuity, concentration and publicity.
- Union democracy: a new democratic procedure came into effect to guarantee the unionised employees their right to a personal, free, secret and direct vote for choosing their union leaders, as well as knowing about and approving their collective bargaining agreements.
- The kick off for the Federal Conciliation and Labour Registry Centre: beside the conciliation part, this Centre will keep the records of unions and collective agreements at the national level. Moreover, it will ensure that union rights and the collective interests of employees are respected, through free and democratic processes.

III. ISSUES ARISING UPON HIRING INDIVIDUALS

PRE-EMPLOYMENT CONSIDERATIONS

Limitations on Background Checks

There is no express impediment or restriction for employers to request a criminal record certificate or carry out background checks (i.e. credit) under Mexican legislation. On the other hand, the Mexican "Data Privacy Law" governs the legitimate, controlled and informed treatment of personal data to guarantee the individual's privacy and their entitlement to decide who, why and for which purposes their personal data may be processed (informational self-determination). Criminal and financial/economic data is considered confidential information; financial/economic data is deemed 'sensitive data' and requires express consent from the 'data owner' (employee).

Restrictions on Application/Interview Questions

In general terms, the employer has the freedom to ask the questions it considers convenient to a candidate in all phases of the recruitment process; in other words, there is almost no limitation to the scope of such questions from a legal standpoint. However, company policy and international guidelines might require global corporations to adhere to stricter procedures in the recruitment, interview and screening processes.

AUTHORISATIONS FOR FOREIGN EMPLOYEES

Requirements for Foreign Employees to Work

For any employer, at least 90% of its employees must be Mexican nationals. In addition, all technical and professional employees must be Mexican nationals, unless there are no Mexican nationals qualified in a particular specialised field, in which case the employer is allowed to temporarily employ technical and professional foreign nationals, but in a proportion not exceeding 10% of those working in the relevant field of specialisation. There are two additional conditions: (1) employers and foreign workers have a joint obligation to train Mexican workers in the specialty of the foreign workers; and (2) physicians working in enterprises must be Mexicans. These provisions do not apply to directors, administrators, or general managers of enterprises. Also, all physicians, railway employees and employees on a Mexican-flagged ship must be Mexican nationals, Mexican civil aviation crews must be Mexican by birth. The recruiting, screening and hiring process is the same as for nationals; however, foreign employees must have a valid work permit before being hired. Foreign nationals are also subject to the requirements of the Migration Law.

Does a Foreign Employer need to Establish or Work through a Local Entity to Hire an Employee?

Foreign employers that do not have a presence in Mexico must be aware of the applicable legislative and regulatory requirements before hiring an employee to perform in Mexico, including the rights, obligations protection of employees; tax implications; and the importance of accurately identifying the specific activities that the individual will carry out during his/her stay in Mexico in order to determine the appropriate visa.

EMPLOYMENT CONTRACTS

Minimum Requirements

Written employment agreements in Mexico are mandatory. Every employee must enter into an individual employment agreement with the employer and set out the terms and conditions of

the employment. There is no 'employment-at-will' in Mexico. Every employment agreement contains an implied relationship of mutual trust and confidence. Furthermore, employment agreements cannot contain an employee's acceptance to waive the necessary legal grounds for justified dismissal on the part of the employer and the minimum mandatory benefits prescribed by Federal Labour Law.

Fixed-term/Open-ended Contracts

Any individual employment relationship is subject to the principle of 'job stability', that is, subject to the employee's right to keep his job as long as the employment relationship so requires. The FLL assumes, as a general principle, that an employment agreement has been executed for an indefinite term, unless the nature or the particular type of service to be provided calls for an employment agreement for a specific job or term, or if the parties agree to execute an employment agreement for initial training or subject to a probationary period. The FLL provides that employment agreements for an indefinite term are for continuous work, but the parties may agree that the services be provided for a fixed term and for periodic work with a discontinuous character in cases where the services are required to be provided during a season, or are not required for an entire week, month or year.

Trial Period

The initial training employment relationship is the relationship whereby the employee agrees to provide his subordinated personal services, under the control and supervision of the employer, in order to acquire the necessary knowledge and skills to perform the services for which he is hired. This agreement must establish a training period of 3 months, as a general rule, and 6 months, for executive positions. Employment agreements executed for an indefinite term or for a specific job or term of more than 180 days, may be subject to a probationary period of 30 days, or up to 180 days for executive positions, in order to verify that the employee has the necessary knowledge and skills to perform the services for which he has been hired.

Notice Period

There is no notice period under the FLL. However, the employer must notify the worker in writing of the cause or causes for dismissal. Failure to execute a dismissal within one month after the employer knew about the event that gave rise to the cause for dismissal will invalidate the action.

PAY EQUITY LAWS

Extent of Protection

The main protection given to employees regarding equal pay is provided by the Mexican Constitution: i) applicable to all non-governmental employees, it establishes that for equal work, an equal pay must be paid, without taking into account either gender or nationality; ii) applicable for governmental employees, it provides that equal pay must be paid for equal work, without taking into account the gender of the employee. When two employees carry on the same job and have the same category, working day and conditions, equal pay is due. It is also important to highlight that the Mexican Constitution states that all forms of discrimination are prohibited, especially if based on ethnic origin, nationality, gender, age, disabilities, social status, health conditions, religion, opinions, sexual preferences, marital status or any other attacks on human dignity, which has the objective to cancel or undermine human rights and freedoms. This perspective is adopted by article 3 of the Federal Labour Law, with one exception, that is when the difference or preference is based on the particular requirements demanded by a specific labour.

In view of the above, there are certain exceptions to the general rule when employees may receive a different wage even though they develop the same activities. For example, when two employees have the same position and develop the same activities, but work in a different category of ship or plane, or when the routes are different; when employees who work on railway or bus lines that have different levels of importance; when the employees are professional sportsmen, athletes, actors or singers; and when employees work at universities and have different academic credentials.

Remedies

An employee who discovers that he has received a lower pay, despite performing the same work, under similar conditions and with comparable results, can initiate a litigation seeking an "income equalisation". These cases will be carried out in the local or Federal Labour Courts, depending on the company's objects and activities. It is important to mention that as from 18 November 2020, the

Labour Amendment will start to be applied in several states (others in October 2021 and all of them by May 2022); therefore, the employee will have to participate in a mandatory conciliation before a trial is started. This will give the employee an opportunity to have a dialogue with the company's representatives in order to solve the issue prior to litigation.

IV. ISSUES ARISING DURING THE EMPLOYMENT RELATIONSHIP

WORKING CONDITIONS

Minimum Standards

The FLL provides for the following minimum benefits, which may not be waived whatsoever: Social Security Benefits: all employees must be registered with and contribute; Profit Sharing: employees are entitled to share in the employer's profits, currently fixed at 10% of the company's gross, pre-tax income; Paid Mandatory Holidays: employees must be paid for government holidays; Vacation Premium: employees are paid an extra 25% of the salary to which they are entitled during their vacation period; and Christmas Bonus: employees have the right to a bonus of at least fifteen days of their daily base salary, which must be paid by no later than 20 December of each year.

Salary

As of January 2020, the minimum general salary in the Northern Border Zone is MXN $185.56 (approximately US $9.04) per day, and the minimum general salary in the rest of the country is MXN $123.33 (approximately US $6.19 per day). Salary includes cash payments for wages, plus bonuses, housing provided by the employer, premiums, commissions, in-kind benefits, and "any other amount or benefit that is given to the worker for his work" – it does not include profit-sharing payments.

Health and Safety in the Workplace

Employers have the obligation to set up enterprises in accordance with the principles of worker safety and health, and to take necessary actions to ensure that contaminants do not exceed the maximum levels allowable under the regulations and instructions issued by competent authorities. Employers, when required by the authorities, must make physical modifications in facilities to accommodate the safety and health of workers. Companies with over 100 workers are required to have a preventive program for safety and hygiene, and ensure workers' safety and keep them informed of risks in the workplace; this obligation also applies to the transportation of primary materials and hazardous materials (biohazards) and safety in the agricultural sector, and rules concerning labour by pregnant women and minors. From 23 October 2020, all employers are obliged to prevent work-related stress by constantly evaluating the organisational environment and applying control measures (e.g. medical examinations and records).

Managing COVID-19-Related Employee Issues

Due to the suspension of activities ordered by the Federal Government, many companies in Mexico have decided to grant unpaid leave to those workers who do not want to work (even if they are considered as part of an essential activity) or for any other personal reason related to COVID-19. Mexican legislation does not contemplate childcare and medical leave for employees "affected" by COVID-19, unless the employee is infected. Once the employer reopens facilities, the employee has the obligation to return to her work. If the employee refuses to work, she can be sanctioned according to the Internal Regulations (Reglamento Interior de Trabajo), which, in order to be mandatory, should be duly registered before the Labour Board.

Moreover, the employer is entitled to terminate the labour relationship without responsibility, if the employee is absent more than three times / four days in a period of thirty days, without the permission of the employer or justified cause. According to the Technical Guidelines for Health and Safety in the Work Environment issued by the Ministry of Labour and Social Welfare, the employer shall implement measures to ensure that employees who are infected or have symptoms, shall be located in an isolated place in order to be checked by a doctor. The Guidelines also established that the employer shall provide mechanisms for non-discrimination, in regard to employees who are, or were, infected.

COVID-19: Best Practices

- Pay the respective severance payment in the case of dismissal without cause;

- Negotiate the payment schemes, work shifts, benefits, etc. with the trade unions;
- Update internal policies;
- Follow the recommendations issued by the government;
- Implement Home Office schemes.

SOCIAL MEDIA AND DATA PRIVACY

Restrictions in the Workplace

All processing of personal data must observe the principles of legality, consent, information, data quality, purpose specification, loyalty, proportionality and accountability. Despite major reform in 2012, the FLL does not specifically address access to or use of the Internet and social media. According to the FLL, the employer has the obligation to provide employees with the work tools necessary for the performance of their duties. The FLL further states that the employee may not use work tools for anything other than their intended use. Electronic equipment and devices such as computers, mobile phones, and laptops are similarly provided to the employee during employment to assist the employee in the performance of his duties and responsibilities in the workplace. Considering the obligations established in the FLL and in the Data Privacy Law and its regulations, the employer has the right to ensure that the employee is using the work tools in accordance with the intended work purpose and, therefore, to forbid the employee's access to social media, using these devices and equipment for non-work-related purposes.

Can the employer monitor, access, review the employee's electronic communications?

Employees should be committed to perform their jobs with the utmost diligence and efficiency, as well as to safeguard those working tools provided by the employer to ease the accomplishment of their duties, which are not intended for personal use. Thus, employees may have access to social media if the employer so allows, either during their work shift or out of it. Breach of the foregoing may lead to justified termination of employment. Depending on the nature of the job, access to social media may be necessary. The employer may have access to the employees' communications by these means with supervision purposes and only if agreed in writing with the employees. According to the most recent opinions issued by the Supreme Court of Justice, the right to privacy of private communications includes social media.

Employee's Use of Social Media to Disparage the Employer or Divulge Confidential Information

Employees have a duty of loyalty towards the employer, which means that employees must refrain from carrying out actions that may harm company's reputation, other employees, or the company in general. The contrary may give grounds for termination with cause.

EMPLOYEE BENEFITS

Social Security

The social security system in Mexico is governed by the Social Security Law (LSS). The Mexican Social Security Institute (IMSS) (a quasi-official entity, under tripartite (government-worker-employer) management, whose executive director is appointed by the President of the Republic) is responsible for administering social security programs. In general, social security coverage is compulsory for all workers, including members of production cooperatives, worker-run and joint worker-management-run companies, traditional agrarian communities of common ownership, joint property communities, small farmers, small property owners organised in groups, and local societies or credit unions covered by the Agricultural Credit Law.

The social security system is financed from contributions by workers, employers, and the government. The contributions are based on salary levels. Within the minimum/maximum range, employee contributions are 2.00 per cent of earnings for retirement benefits, plus 3.15 per cent of earnings for disability and survivor benefits. For employers, the contribution rate is 5.15 per cent of covered payroll for retirement benefits. Government contributions amount to 7.43 per cent of covered earnings, plus an average flat rate of MXN$4.07 (depending on salary range) for each day a worker contributes for retirement benefits, and .125 per cent of covered earnings for disability and survivor benefits.

Healthcare and Insurances

The social security system protects workers in the following matters: 1) Occupational Accidents and Illnesses, including: old-age, retirement, and survivor pensions; disability; sickness; medical

benefits; maternity; and day care for children of insured workers; and 2) Social Services.

Holidays and Annual Leave

The FLL provides for 9 mandatory holidays. Workers who are required to work on a mandatory holiday are entitled to double pay in addition to their regular pay. Workers are entitled to 6 vacation days after being employed for one year, and to 2 additional days for each subsequent year, up to a maximum of 12 days. As of the fifth year, the worker is entitled to 14 workdays' vacation; for each additional group of five years, two more vacation days are added. Employers must pay workers a vacation premium equivalent to 25 per cent of the salary earned during the vacation days. Vacations must be taken on the date indicated by the employer, within 6 months following the worker's anniversary with the employer.

Maternity and Paternity Leave

Working mothers are entitled to forty-two days after childbirth as maternity leave, with the IMSS paying them 100% of their registered salary. Statutory maternity leave may be extended as necessary if work is not possible because of the pregnancy or the delivery. During the maternity leave, the employee receives her regular salary. During the nursing period of 6 months, the new mother is entitled to two additional thirty-minute rest periods per day to feed the child, in an adequate and hygienic place set aside by the employer. When returning from maternity leave, the employee is entitled to reinstatement, provided that not more than one year has passed since the date of delivery. Maternity leave is included in the length of service. Moreover, working mothers may request the employer transfer up to four weeks of pregnancy leave in order to enjoy them after childbirth. Male employees are entitled to enjoy a paid paternity leave of five days when the child is born or in case of adoption, as of the placement of the child.

Sickness and Disability Leave

An employee is entitled to sick leave depending on the type of illness and degree of disability. The IMSS, not the employer, pays the employee's income during the leave. There is no mandatory unpaid medical leave of absence in Mexico. If the employee needs an unpaid medical leave of absence due to a condition not recognised by the IMSS, then the employer has the discretion to grant the leave. The FLL provides leave due to: i) Occupational Injuries; ii) Industrial Accident; or iii) Occupational Diseases.

Pensions

For disability benefits, the IMSS retains responsibility for the management and collection of contributions, but private insurance companies provide benefits. Workers who were first covered by the social security system prior to 1 July 1997 are eligible for a disability pension if they are assessed with a permanent 50 per cent reduction in normal earning capacity and have at least 150 weeks of contributions. Other workers are eligible for a disability pension if they are assessed with a permanent loss of at least 75 per cent of normal earning capacity and have at least 150 weeks of social security contributions, or if they are assessed with a loss of 50–74 per cent of normal earning capacity and have a least 250 weeks of contributions. Disability pension benefits are equal to 35 per cent of the worker's average adjusted earnings during the last 500 weeks of contributions. In addition, 15 per cent of the worker's pension is paid for a wife or partner, and 10 per cent is paid for each child younger than age 16 (age 25 if a student, no age limit if disabled). If there is no wife, partner, or child, 10 per cent is paid for each dependent parent.

A worker who requires the constant attendance of others to perform daily functions, is also eligible to receive a constant attendance allowance of up to 20 per cent of the pension amount. As regards retirement benefits, the current pension system in Mexico is a fully funded defined contribution system based on three pillars: i) a minimum guaranteed pension for low-income workers; ii) mandatory individual savings accounts with competitive mutual fund management; and iii) voluntary savings. Normal retirement benefits are available to both men and women who have reached age 65 and who have at least 1,250 weeks of social security contributions. An early retirement benefit is available at age 60.

Survivor benefits are payable provided that the deceased worker was a pensioner and made at least 150 weeks of contributions at the time of death. Survivor benefits are payable to a surviving widow or a permanently and totally disabled widower in an amount equal to 50 per cent of the pension that would have been paid to the worker. Each surviving child under age 16 receives a benefit

equal to 20 per cent of the worker's pension, or 30 per cent if the child is an orphan. If there is no eligible spouse or child, a benefit equal to 20 per cent of the worker's pension is paid to each person. Survivor benefits may not exceed 100 per cent of the pension that would have been paid to the worker. Upon the death of a covered worker, the social security system pays a funeral benefit to the family equal to two months of the worker's salary.

V. ISSUES ARISING ON TERMINATION OF THE EMPLOYMENT RELATIONSHIP

TERMINATION OF EMPLOYMENT CONTRACTS

Grounds for Termination

An employer may dismiss an employee only where the latter gives cause for dismissal. There must be a legally permitted cause of termination that substantiates the collective dismissal. The first step is to determine whether the company has unionised workers and confidential employees. If it does, the working conditions of the union workers are governed by the CBA. As such, both the termination of the union workers and the CBA must be negotiated with the union. In practice, some labour unions claim the payment of a four-month indemnity plus twenty days of aggregate daily salary for each year of services rendered; arguing termination of employment is a consequence of new working procedures (by the parent company). Conversely, the union claims an additional premium for the closing of industrial operations that may represent. Under Mexican labour law, "integrity at work" is mandatory for employees; an employee is deemed to act with integrity when the work is carried out with intense effort, care and attention, in the agreed-upon time, place and manner. "Lack of integrity" is a generic cause for dismissal.

Is Severance Pay Required?

The termination payment is calculated depending upon the cause of termination: Voluntary resignation: employer must pay all benefits due, including sales incentives, on a prorated basis up to the termination date. If the employee has at least 15 years of seniority, he is also entitled to a seniority premium of twelve days' salary for each year of service, capped at twice the minimum daily salary in force. Termination with cause: employer must pay all benefits due, including commissions, on a prorated basis until the date of termination, and the seniority premium of twelve days of salary for each year of service (but with a cap of twice the minimum daily salary). Termination without cause: employees are entitled to the following lump sum severance: (1) three months of the employee's daily aggregate salary, plus: (2) twenty days of the employee's daily aggregate salary for each year of service; (3) a seniority premium of twelve days' salary for each year of service (but with a cap of twice the minimum daily salary); (4) benefits due.

Whistleblower Laws

In Mexico, there is no specific statutory protection for employees who alert or provide information about possible breaches of the law or good corporate governance policies.

RESTRICTIVE COVENANTS

Definition and Types of Restrictive Covenants

Although Mexican legislation does not provide for a specific concept of restrictive covenants, they may be defined as any contract, covenant, or agreement having as scope the restriction, loss or irrevocable sacrifice of the personal freedom. The following restrictive covenants are recognised and may be enforceable under the law: i) non-compete clauses; ii) non-solicitation of customers; and iii) non-solicitation of employees.

Use and Limitations of Garden Leave

Mexican legislation does not provide for garden leave.

TRANSFER OF UNDERTAKINGS

Employees' Rights in Case of a Transfer of Undertaking

In connection with the sale of a business or transfer of undertaking, the FLL generally requires the acquiring entity to retain the selling entity's workers, as well as to assume existing benefit liabilities, regardless of whether the benefits are privately sponsored (e.g., company-sponsored medical insurance) or legally mandated (e.g., paid vacation and vacation premium). This is known as

a substitution of employer. As a corollary of this retention obligation, the acquiring entity must recognise the workers' length of service, so as to ensure that changes in the legal structure or the ownership of the employer do not undermine the workers' vested rights. If the sale of a business in Mexico is structured as a stock purchase or a merger agreement that does not affect the seller's corporate entity, a substitution of employer does not come into play. In these cases, the buyer automatically becomes the employer of the seller's workers.

When the buyer or substitute employer, assumes the workers' terms and conditions of employment in effect prior to the substitution, the FLL does not require consent from, or consultation with, the workers. For a substitution of employer to apply, pre-substitution terms and conditions of employment – as established in the individual employment contract or collective agreement – must remain unaltered. If the substitute employer unilaterally implements detrimental changes to existing employment conditions, the employee can rescind the employment relationship and demand statutory severance. During the first six months following an employer substitution, both employers remain jointly liable for labour claims.

Requirements for Predecessor and Successor Parties

in order to consummate the transfer of workers through an employer substitution and properly allocate responsibility for labour liabilities associated with the asset sale transaction, both the seller and the buyer are required to comply with important procedural formalities and a host of administrative tasks.

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NETHERLANDS.

PALTHE OBERMAN

I. HIGHLIGHTS

- Employment law is not consolidated into a single code.
- Employees have a strong legal position.
- Preventive dismissal assessment.
- Relatively long period of salary payment during illness.
- New Dutch employment law as from 1 January 2020: the Balanced Labour Market Act.

II. INTRODUCTION

Dutch employment law is elaborate and relatively complex. It is divided into individual and collective law and is closely related to social security law. The employment relationship under Dutch law is governed by the compulsory statutory regulations laid down in (for example) the Dutch Civil Code. The relationship can furthermore be governed by (among other things) the conditions laid down in a Collective Labour Agreement (if applicable), internal regulations (if applicable) and the individual employment contract. Judicial precedent is an important part of the legal framework because many employment matters are influenced by case law.

III. ISSUES ARISING UPON HIRING INDIVIDUALS

PRE-EMPLOYMENT CONSIDERATIONS

Limitations on Background Checks

During the pre-employment phase, only personal data specifically required for the position that the applicant applied for, can be screened. Standard screening procedures are normally not allowed in the Netherlands. In the pre-employment phase no extraordinary personal data of the candidates may be screened. This is only allowed if there are exceptional requirements for the vacancy that make this type of screening necessary.

Restrictions on Application/Interview Questions

The Recruitment Code of the Dutch Association for Personnel Management and Organisational Development contains basic rules that employers should observe during the recruitment and selection process. For instance, the employer can only ask about an applicant's health situation if a medical examination is required for the job by law. The purpose of this code is to provide a standard for a transparent and fair recruitment and selection procedure. This Code is not binding, but employees can derive protection from these rules. The Code for example prohibits the requirement of a photo of the applicant prior to the applicant being invited to an interview.

AUTHORISATIONS FOR FOREIGN EMPLOYEES

Requirements for Foreign Employees to Work

If an employer wants to hire a foreign employee in a legal manner, several requirements have to be met. First of all, the foreign employee has to be in the possession of a residence permit. Secondly, the employer is obliged to obtain an employment permit. Employees with Dutch nationality and employees from one of the countries of the European Economic Area and Switzerland are exempt from these rules. When an employee works in the Netherlands, Dutch law does not

necessarily govern the employment relationship. A foreign employee could remain in the employment of his foreign employer on the basis of his foreign employment contract with a choice of law in favour of the laws of the foreign country and then (for example) be seconded to the Netherlands. In other words, the employer is not obliged to offer employees from another country a Dutch employment contract when they are transferred to the Netherlands. Employees can continue to work on the basis of their current (foreign) employment contract. In case of an international employment relationship, the Dutch tax authorities grant special tax benefits to foreign employees who are temporarily assigned to a Dutch subsidiary or branch from abroad, e.g. employees who reside in the Netherlands or employees who are recruited by a Dutch employer. Under the so-called 30% Ruling, 30% of the employee's salary may be paid out as tax-free compensation for costs. In general, an addendum should be added to the employment contract declaring the applicability of the 30% Ruling in respect of the agreed wages.

Does a Foreign Employer need to Establish or Work through a Local Entity to Hire an Employee?

Foreign employers can hire employees in the Netherlands either through a local entity or a foreign entity. Before deciding on how to structure their business in Holland, foreign employers should consider the tax consequences.

EMPLOYMENT CONTRACTS

Minimum Requirements

An employment contract under Dutch law may be concluded orally or in writing. However, the employer will nonetheless need to inform the employee in writing with respect to certain conditions pertinent to the employment.

Fixed-term/Open-ended Contracts

An employment contract can be agreed upon for a fixed period of time (fixed-term contract) or for an unspecified period of time (open-ended/ permanent contract). A fixed-term employment contract will automatically convert into an open-ended employment contract if: i) a chain of temporary employment contracts covers 36 months or more; ii) a chain of three fixed-term employment contracts is continued. A chain is a series of fixed-term employment contracts that succeed each other with no more than six months in between. This rule is also applicable to employment contracts between an employee and various employers that must reasonably be deemed to be each other's successors with regard to the work performed. Since 1 January 2020, it is possible to shorten the interval period of six months to three months in a Collective Labour Agreement, if the nature of the activity so requires. This applies, for example, to seasonal labour. One month before the termination of a fixed-term employment contract of six months or longer, an employer must notify the employee as to whether the contract will be extended (or not).

Trial Periods

A probationary period must be laid down in writing. It is not possible to agree upon a probationary period in an employment contract that has a term of six months or less. The probationary period for both the employer and the employee should be equal. A probationary period is not valid if the employee involved is already employed at the employer, but at a different position and will be carrying out more or less the same work that he/ she has done elsewhere within the company.

Notice Periods

Dutch law provides for the following statutory notice periods for an employer: fewer than 5 years of service: 1 month; more than 5 years, but fewer than 10 years of service: 2 months; 10 or more years of service, but fewer than 15 years of service: 3 months; 15 or more years of service: 4 months. The employee must take into account a notice period of one month. A longer notice period may be agreed upon if it is laid down in writing. In that case, the notice period the employer has to observe must be twice the notice period the employee has to observe. The notice period starts running at the beginning of the month following the month in which notice is given (unless otherwise agreed). If the employee has reached the retirement age during employment, the notice period (for the employer) is 1 month.

PAY EQUITY LAWS

Extent of Protection

Presently, offering unequal pay for work of equal value is a violation of the Dutch Civil Code, the Equal Treatment for Men and Women Act and the General Equal Treatment Act. A legislative proposal

on equal pay for women and men is pending (as of September 2020) in the House of Representatives. According to the explanatory memorandum, there is still a significant pay gap in the Netherlands; thus the Act is intended as an additional measure to be incorporated into the Dutch Equal Treatment Act.

Remedies

Under existing legislation, the presumption of evidence to demonstrate unequal pay rests with the employee. It is up to the individual employee to demonstrate whether he/she may unjustifiably earn less than a colleague performing the same work. However, it can be difficult for the employee to acquire the relevant facts and figures. If the employer refuses to provide actionable data or impedes efforts to adjust salaries to achieve pay equity, the employee can initiate a procedure with the Courts. Should the abovementioned Act enter into force, the burden of proof will shift from the employee to the employer. This will be structured according to a certification system.

Large companies (with more than 50 employees) must obtain a certificate showing that they pay women and men equally, meaning that women and men in the same position and with the same working hours, receive equal pay. The certification will be granted by an independent body. Lastly, individuals who suspect that they are not being paid an equal wage can file a complaint with the Netherlands Institute for Human Rights. Before an employee can submit a complaint to the Institute, he/she must first approach the employer with the complaint. The employer then has two months to act on the complaint. In cases wherein the employee works for a company that has not installed a procedure for complaints, the employee can immediately approach the Institute for Human Rights.

IV. ISSUES ARISING DURING THE EMPLOYMENT RELATIONSHIP

WORKING CONDITIONS

Minimum Standards

Promoting health, safety and wellness in the workplace is the responsibility of both the employer and his employees. The employer has to establish a working conditions policy within the company.

Salary

In principle, employer and employee are free to agree to the wages to which an employee shall be entitled. However, the Act on Minimum Wages and Minimum Holiday Allowances contains certain minimum wages and minimum holiday allowances, which are normally adjusted each year. A collective labour agreement, if applicable, may also contain salary scales that are binding on individual employees.

Health and Safety in the Workplace

The employer is required to use the services of a working-conditions service, an institution that assists the employer in the overview and evaluation of the risks, assists sick employees, advises the employer on reintegration of sick employees, and more.

Managing COVID-19-Related Employee Issues

Whenever an employee gets infected, his leave is considered sick leave. The employer must pay at least 70% of the salary. Whenever one person of a household gets ill, the whole household needs to stay in quarantine, until everyone is free of symptoms for 24 hours. If an employee takes necessary care of a sick family member, the employee is entitled to short-term care leave. This short-term care leave amounts to twice the number of working hours per week within twelve months. During this leave the employer must pay at least 70% of the salary. There is an ongoing discussion about whether an employer needs to pay the salary of an employee that is not sick, but is quarantined and cannot work. The main rule is that an employee has the right to his salary, even when he is not working, unless it is caused by something that the employee is accountable for (which is rarely the case). Whether it is something that the employee is accountable for, will have to be determined on a case-by-case basis.

An employee cannot refuse to go to work because he fears infection. The employer can try to minimise the fear by pointing out all measures that they have taken to prevent contamination. If the employee still refuses to come back to work, the employer can give the employee a warning and indicate the consequences if he does not appear at work, which could be to stop continuing to pay wages. The

employer does not have to inform the authorities in any form regarding an infected employee. The EU General Data Protection Regulation prohibits an employer from keeping track of employees that are infected with corona. An employer can only record the fact that an employee is ill, but not any other circumstances. This Act also prohibits the employer from informing other colleagues about the illness of the specific employee.

COVID-19: Best Practices
Employers should be aware of their obligation to continue to pay salaries, even when the employee is not working due to COVID-19-circumstances, unless the employee is accountable for not being able to work (rarely the case).

SOCIAL MEDIA AND DATA PRIVACY

Restrictions in the Workplace
The employer can restrict the use of Internet and social media during working hours by a guideline/ code of conduct that states the rules concerning such usage. The employer must inform the employees about the email and Internet policy within the company.

Can the employer monitor, access, review the employee's electronic communications?
The employer is allowed to check whether the company's Internet and email rules are being followed, but the surveillance of any private use of the Internet during work cannot conflict with the employee's fundamental right of privacy, and the employer is obligated to provide advance notice of his intent to use such equipment for investigation purposes. Following the EU Regulation on privacy that entered into effect on 25 May 2018, employers must decide what level of privacy is required in each situation.

Employee's Use of Social Media to Disparage the Employer or Divulge Confidential Information
The Dutch Civil Code stipulates that an employee may never insult his employer, and the employee is not permitted to disclose confidential information about the company. A severe insult of the employer or his/her family members, as well as divulging confidential information about the company may result in an urgent reason for dismissal.

EMPLOYEE BENEFITS

Social Security
Social security in the Netherlands can be subdivided into social insurance benefits and social welfare benefits, depending on the source of the funding. Social insurance is funded from the contributions paid by employees. This system is compulsory. All employees are automatically insured and pay a contribution. Social welfare benefits are financed from central governmental funds. Dutch law requires employers to make certain withholdings from the employee's salary for income tax purposes and the employee's national insurance contributions. An employer is furthermore required to pay certain social security premiums for its employees.

Healthcare and Insurances
In the Netherlands, there is no obligation for the employer to provide for a healthcare insurance policy.

Holidays and Annual Leave
Employees are entitled to a statutory minimum number of vacation days equivalent to four times the weekly working hours. For example, an employee with a full-time workweek of 40 hours is statutorily entitled to a minimum of 20 vacation days per year. As from 1 January 2012, vacation days will lapse if they are not taken within six months after the year in which they were accrued, unless the employee was not reasonably able to take them, but the scheme applies only in respect to the statutory minimum of vacation days. In addition, ill employees will be entitled to accrue the same full number of vacation days as employees who are not ill. In addition to vacation days, employees are entitled to a holiday allowance, which, in general, equals 8% of the annual salary, insofar as the annual salary does not exceed three times the annual equivalent of the minimum wage.

Maternity and Paternity Leave
Female employees have the right to (at least) 16 weeks of maternity leave. During this maternity leave, the Employee Insurance Agency will pay 100% of the daily wage, not to exceed the maximum daily wage. The maximum daily wage in the Netherlands is currently EUR 219,28. From 1 January 2019, partners will have five days of birth leave at full pay after the birth of their child (based on full-time employment). Partners can choose to

take this leave immediately after the birth of their child, or to spread the leave over the first four weeks after the birth. As of 1 July 2020, partners can take additional birth leave for up to 5 weeks. First, the partner must take the 5 days of birth leave (based on full-time employment). During this leave, the employee is entitled to 70% of his or her salary (increased up to the maximum daily wages). The additional birth leave must be taken within 6 months of the child's birth (on or after 1 July 2020). An employee with a child under eight years old in his or her care, is entitled to parental leave. The employee can take at most 26 times his/her number of weekly contractual hours as parental leave. The right of parental leave ends when the child becomes eight years old. Parental leave is unpaid leave and no holiday entitlements will be built up during the hours of parental leave.

Sickness and Disability Leave

Employers are obliged to continue to pay the salaries of sick employees for the first two years of illness. The employer is obliged to pay 70% of the employee's salary. The salary paid by the employer during the first year of sickness cannot be less than the minimum wage. For the second year, the minimum wage limit does not apply. The 70% is not calculated on the amount of salary that exceeds the maximum daily wage.

Pensions

In general, an employer is not obliged to provide pension benefits to an employee, unless it has promised the employee that it would provide for a pension scheme or if a CBA or government initiative so requires. If the employer has offered a pension scheme to even one employee, they are obliged to offer the same to all other employees.

V. ISSUES ARISING ON TERMINATION OF THE EMPLOYMENT RELATIONSHIP

TERMINATION OF EMPLOYMENT CONTRACTS

Grounds for Termination

A fixed-term employment contract or a contract for a specific project ends by operation of law upon expiration of the term or completion of the project. As from 1 July 2015, an employer is obliged to notify the employee at least one month before the end of a fixed-term contract of six months or longer, as to whether the employment contract will be extended. The employer is also required to inform an employee who has a fixed-term contract about vacancies with an open-ended employment contract. If an employer wants to dismiss 20 employees or more within a term of three months within one of the working areas of the Employee Insurance Agency, he must notify and consult the relevant trade unions and notify the Employee Insurance Agency of its intention to do so. If the employer fails to comply with its obligation under this Act, the employee has a right to nullify the termination of his contract.

Is Severance Pay Required?

A statutory transition payment was introduced, effective 1 July 2015. From 1 January 2020, employees are entitled to a transition payment from the first day of employment, as well as during probationary periods. An employee will receive a third of the monthly salary per calendar year. The transition payment is capped at EUR 83.000 gross - or if the employee is entitled to a higher annual salary - then one annual salary. The transition payment is not due if the employee terminates the employment contract, unless this termination is a result of seriously culpable actions on behalf of the employer. As of 1 April 2020, a new compensation scheme entered into force. Employers can apply for compensation for the transition payment, if they dismiss an employee on the grounds of long-term occupational disability (after two years of sickness).

Moreover, as of 1 January 2021, in the event of a closure of a business by the employer for reasons of illness or pension, the employer will now be compensated. Employers must satisfy a number of narrowly circumscribed conditions in order to qualify for compensation. It is important to note that this option is only available to small-business employers (with less than 25 employees) who owe a transition payment incurred during a period of six months prior to the consent of the Employee Insurance Agency or termination of an employment contract. For calculating the duration of an employment contract, one or more employment contracts between the same parties (or successors) that have followed each other with intervals lasting

no longer than six months, will be counted together. In 2015, supplementary orders and decrees became effective, permitting employers to deduct costs that were made for the benefit of the employee, during the employment, from the transition payment. The transition payment will also not be payable if the employment contract ends as a result of the employee reaching the pensionable age, or another age at which the employee is entitled to a pension, or if the employment is terminated or otherwise ceases to continue as a result of a grave culpable act or omission, on the part of the employee (e.g., a legally valid summary dismissal). In addition to the statutory transitional payment, the courts may also award a fair dismissal payment in case of seriously culpable acts and omissions by the employer.

Whistleblower Laws

The Dutch Whistleblowers Authority is available to employees who want to report an abuse in the workplace within the public or private sector. The Whistleblowers Authority provides advice, support and, if necessary, carries out investigations. The Whistleblowers Authority Act, which came into force in the Netherlands on 1 July 2016, obliges all organisations in the Netherlands with more than 50 employees to introduce an internal reporting procedure for reporting abuses and bans retaliation against whistleblowers (individuals) who reported in the proper manner.

RESTRICTIVE COVENANTS

Definition and Types of Restrictive Covenants

A restrictive covenant is a clause included in the (signed) employment contract that prohibits the employee from engaging in certain activities for a specified period of time. The following restrictive covenants are recognised and may be enforceable under the law: i) non-compete clauses; ii) non-solicitation clauses; and iii) secrecy clauses.

Use and Limitations of Garden Leave

In principle, garden leave is not a concept recognised under Dutch law. Unilaterally releasing an employee of his/her duties without the employee's consent, is prohibited. If an employee does not agree to a release, the employer can suspend the employee. However, the employer should be able to substantiate the reason behind the suspension and if a fair reason is not in place, the employee can claim reinstatement (even in Court). The main question is what a "good employer" would do in a similar situation. If a good employer would have never reasonably given a release/suspension in this situation, it would be unlawful for the employer to do so.

TRANSFER OF UNDERTAKINGS

Employees' Rights in Case of a Transfer of Undertaking

Upon the transfer of a business, the rights and obligations of the employer and that business under the existing employment contracts with the employees will be automatically (by operation of law) transferred to the acquirer of the business. A prohibition of termination is applicable in case the reason of such termination is the transfer of undertaking. The employer has to consult the works council (or other employee representative body) about a proposed decision regarding the transfer of activities. The employer has to provide the works council or employee representative body with information on the grounds of the intended decision, the consequences for the employees, and the intended measures to be taken. The employer also has to inform the individual employees about the transfer of an undertaking and the consequences thereof for the employee.

Requirements for Predecessor and Successor Parties

For one year after the transfer of the business, the seller and the acquirer are jointly and severally liable for the fulfilment of the obligations under the employment contracts insofar as these obligations are accrued before the transfer. In principle, the buyer has to continue to apply the pension scheme of the seller. There are three exceptions: 1) if the buyer has its own pension scheme which he offers to the transferring employees; 2) if the buyer has to apply a mandatory sectoral pension scheme; 3) if a Collective Labour Agreement deviates from the pension scheme. If an employee explicitly objects to the transfer, the employee will not enter into the employment of the transferee. The employment contract of the employee will thus end by operation of law at the time of the transfer.

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I. HIGHLIGHTS

- The Working Environment Act is mandatory, and the employee may not, in advance, renounce his or her rights as provided by the law.
- Collective agreements are quite common, and an employer/confederation for enterprises and a trade union may, where specifically stated in the WEA, enter into collective agreements that deviate from provisions in the WEA.
- The main rule is that an employment shall be indefinite/fixed. The opportunity to enter into temporary employment contracts is limited and rather strictly regulated.
- The employer may only terminate the employment contract if it is objectively justified. The employer has the burden of proof regarding the grounds for termination.
- There is no statutory right to severance pay upon terminating an employment contract. Severance pay is however quite common, and must be assessed on a case-by-case basis.

II. INTRODUCTION

Norwegian labour law generally refers to the rules and regulations governing individual and collective relationships between employers and employees. Norwegian employment law is quite employee-friendly compared to the USA and many European countries. Employers must comply with the requirements of the Working Environment Act, which is the main employment legislation. The WEA regulates matters such as employment, whistleblowing, requirements for work environment, working hours, rights to leave, protection against discrimination, termination of employment, rights of employees in case of a transfer by undertaking and rules regarding disputes concerning termination of employment. It is not possible to waive the rules by agreement in advance, to the detriment of the employee nor can employees working in Norway for foreign employers deviate from the WEA. The WEA applies to all employees including employees in managerial positions. Self-employed workers are not subject to the WEA.

III. ISSUES ARISING UPON HIRING INDIVIDUALS

PRE-EMPLOYMENT CONSIDERATIONS

Limitations on Background Checks

Background checks may include verification of information given by the candidate, or more thorough investigations for mapping personal characteristics. It is common to check education, professional experience, business interests, credit, identity, address and references, as well as performing a media search. It is less common to check work permits, "CV-holes", alcohol or drug issues, salary, medical history, and the reason for termination of the former employment. The employer usually has an extensive right to verify the information given by the candidate. The employer may not gather information with regards to family life, religious point of view, ethnicity, functional disability, and sexual orientation (unless such information is of fundamental importance for the performance of the work required in the position). In spite of these prohibitions, such data may be gathered if the information is of fundamental

importance for the performance of the work required in the position. The employer may have a legal basis to review publicly-available information about a candidate on social media, in order to be able to assess specific risks regarding the candidate for a particular function, but only if it is necessary for the job and the candidate is correctly informed (for example, in the text of the job advert).

Restrictions on Application/Interview Questions

When the employer conducts an interview with the candidate, the employer cannot ask for information concerning sexual orientation, their views on political issues or whether they are members of trade unions. Nor may the employer obtain such information through background checks. The employer cannot ask for certificate of good conduct. The only exception is if the law regulating that particular position or profession requires that the candidate has a certificate of good conduct. Furthermore, information about whether or not the candidate has a clean record is considered as sensitive personal data. The employer can only obtain a credit report of the candidate, if the vacant position is high-ranking and entails great economic responsibility. In addition, credit reports may only be obtained for candidates selected in the final rounds of the recruitment process. The employer may only ask for information regarding the candidate's health to the extent that the tasks involved with the position have special health requirements. It is however prohibited to ask general questions about the risk for future health problems.

AUTHORISATIONS FOR FOREIGN EMPLOYEES

Requirements for Foreign Employees to Work

Foreign employees from outside the EEA/EFTA area, including self-employed individuals, must hold a residence permit, which may be obtained at the Foreign Service Mission or the Norwegian Directorate of Immigration, that entails the right to work in Norway. There are different types of permits depending on whether someone is a skilled worker, unskilled worker (seasonal workers and seafarers aboard foreign ships), specialist, student, researcher, etc. Residence permits may be obtained from the Foreign Service Mission or the Norwegian Directorate of Immigration.

Does a Foreign Employer need to Establish or Work through a Local Entity to Hire an Employee?

When a foreign employer wants to hire an employee in Norway, there is no requirement to establish or work through a local legal entity in Norway. However, all foreign enterprises that will operate business activities in Norway are required to register with the Norwegian Register of Business Enterprises. An enterprise is considered a foreign enterprise in Norwegian law if the company does not have its main office in Norway or on the Norwegian continent. The employer also has to register with the various government agencies.

EMPLOYMENT CONTRACTS

Minimum Requirements

The employment contract is required to be in writing and must contain certain elements pertinent to the employment. In case the work is performed periodically, the employment contract shall stipulate or provide the basis for calculation, when the work is performed.

Fixed-term/Open-ended Contracts

The main rule is fixed employment. Temporary employment engagements shall not exceed 15% of the total number of employees in the undertaking, of course it is always permissible to enter into such engagement with at least one employee in the company.

Trial Periods

An employment contract may include a "trial period" for a maximum of six months. To be valid, the trial period must be regulated in the written employment contract. During the trial period, the threshold for a legal dismissal with a notice period due to circumstances related to the employee is considered to be somewhat lower. The notice period within the trial period cannot be shorter than is 14 days, and runs from day to day.

Notice Periods

During the trial period, the notice period is only 14 days. The employment contract may provide for a shorter or a longer notice period. Notice of termination given during the trial period runs from the date the employee received the notice. It is common for employment contracts to have a mutual notice period of three months. The notice period may also be agreed upon through

collective agreements. If an employment contract is terminated after 10 years of continuous employment with the same employer, the notice period is prolonged to (at least) four months if it transpires after the employee has reached 50 years of age; five months after age 55; six months after age 60.

PAY EQUITY LAWS

Extent of Protection

The Gender Equality and Anti-Discrimination Act declares that women and men shall receive equal pay for work of equal value. The rule applies to all sorts of remuneration, such as bonus and overtime payments. Discrimination in compensation based on grounds other than discrimination on gender, is regulated by the general prohibition against discrimination. An employee who suspects discrimination in pay-setting, may demand that the employer provide written confirmation of the pay level and the criteria for the setting of the pay for the person or persons with whom the worker is making a comparison

Remedies

An employee challenging an equal pay practice may file a claim with the Norwegian Anti-Discrimination Tribunal. The Tribunal handles the cases on the basis of written statements from the parties. The Tribunal may decide that the illegal practice comes to an end and/or decide that the employee is entitled to compensation for the unlawful practice. The decision of the Tribunal may be subject to legal proceedings for the ordinary courts. There are several requirements related to the employer's active equality efforts. All employers shall, in their operations, make active, targeted and systematic efforts to promote equality, prevent discrimination on the basis of gender, including equal pay. Employers with more than 50 employees, shall issue a statement on the actual status of gender equality in the undertaking and what the undertaking is doing to comply with the activity duty. The statement shall be issued in the annual report or another document available to the general public. Further, employees of an undertaking and their representatives, the Anti-Discrimination Tribunal, the Equality and Anti-Discrimination Ombudsman and researchers, shall have a right to disclosure of documentation relating to equality work.

IV. ISSUES ARISING DURING THE EMPLOYMENT RELATIONSHIP

WORKING CONDITIONS

Minimum Standards

Employers and employees are free to negotiate the terms and conditions of their employment relationship. The Working Environment Act lays down the minimum requirements for the work environment, the workplace, working hours, employment contracts, employment protection, dismissal, redundancy and summary dismissal.

Salary

There are no statutory regulations concerning minimum wages. However, wage levels and minimum wages are generally laid down in collective bargaining agreements. For some specific sectors, the salaries laid down in the collective agreements also apply to employers in the sector without the collective agreement (e.g. construction, cleaning, shipbuilding and seafood production); such agreements are only generally applicable as to pay and working conditions; the objective is to prevent lower pay and working conditions for foreign workers, than that which is otherwise common in Norway.

Health and Safety in the Workplace

In order for the employer to maintain a healthy and safe workplace, there are several requirements for both the physical working environment and the psychosocial working environment. The workplace shall, among others, be equipped and arranged in such a way as to avoid adverse physical strain on the employees. When it comes to the psychosocial working environment, the work shall be arranged in a way that ensures the employees' integrity and dignity. The employer shall ensure that the employees are not subject to harassment or other improper conduct. Furthermore, the employer shall, as far as possible, protect the employees against violence, threats and undesirable strain as a result of contact with other persons.

Managing COVID-19-Related Employee Issues

As a general comment, many employers have been able to manage a host of issues through

flexible arrangements (home office, if possible) and working hours. As a result of this flexibility, employees in quarantine, with children at home, or have otherwise been affected by COVID-19, have managed to perform their work relatively close to normal. Employees who have fallen ill from the COVID-19 virus, benefit from the rights afforded to them pursuant to the ordinary rules on sickness leave and benefits as set out in the relevant legislation. The requirement of quarantine has, however, challenged the interpretation of the rules. Hence, the authorities have provided guidance resulting in some practical advice for employers. Firstly, the authorities have advised that employees who are in a group not at risk of being sick, may be entitled to sickness benefits in certain circumstances. Secondly, employees quarantined by the health authorities, may be entitled to sickness benefits if certain conditions are met. The authorities have, however, encouraged employers to enable employees to work from home, if possible. A large part of the workforce has been forced to contend with the closing of schools and daycare centres across the country. Employees impacted by these measures are entitled to parental leave for childcare and their rights have been somewhat extended. As of 11 May, most schools have reopened, and therefore these measures are less relevant at this time. However, schools and kindergartens have restricted their business hours as they gradually reopened, necessitating the need for greater flexibility in the workplace.

An employee who fears infection and refuses to work, albeit unnecessarily from a medical point of view, is violating his/her duty to work. This may serve as an objectively justified ground for dismissal if the violation is severe enough. The employer should in these cases provide a written warning to the employee, stating that such behavior is unacceptable. If the employee still refuses to return to work, the employer should summon the employee to a consultation meeting and consider dismissal. The GDPR establishes strict limitations on the disclosure of information concerning an employee's heath condition. Please note that exemptions from the ordinary rules applicable in such cases and have not, to date, otherwise been adopted.

COVID-19: Best Practices

Most employers in Norway have already settled the holiday period. Our recommendation going forward, is to carry out proper assessments on the recurring temporary layoffs, and the need for labour based on a long-term perspective. COVID-19 has significantly impacted the Norwegian economy and, as a result, employers will need to implement a cost reduction strategy. If the measures include redundancy and dismissals, the employer should begin to plan how they intend to carry out this process. Employers should further assess how the work will be organised when the employees return from holiday, including consideration of whether employees shall be permitted to work from home.

SOCIAL MEDIA AND DATA PRIVACY

Restrictions in the Workplace

The employer is free to restrict the employee's use of Internet and social media, as long as the restriction is not against any agreements between the employee and the employer, or against any statutes of the company. In addition, the restriction must have an objectively justified reason. It is not common to restrict the employee's Internet use in general, since the Internet is necessary for most work. However, it is quite common that the use of social media can be restricted.

Can the employer monitor, access, review the employee's electronic communications?

The employer's right to monitor, access and review the employee's electronic communications is restricted to the employee's e-mail account given by the employer for work related purposes, the employee's personal areas in the company's data network, and other electronic equipment the employer has provided for the employee to use in his or her work. The restrictions apply to both current and past employees in the company. The employer may only access information from such mentioned places when it is necessary to ensure the daily management or other legitimate interests of the undertaking, or when the employer has a justified reason to suspect the employee's misuse of his or her work e-mail account, or other work related electronic equipment, which constitutes a severe breach of the employee's duties in the employment relationship, or that may constitute a reason for dismissal of the employee without a notice period, or termination with a notice period. The employer may not monitor the employee's use of electronic equipment, hereby the Internet use, unless the aim of such monitoring is to either

administrate the undertaking's computer network, or to look for, or investigate, security issues in the network.

Employee's Use of Social Media to Disparage the Employer or Divulge Confidential Information

Whether the employee is free to disparage the employer in social media is a question of whether or not his/her claims fall under freedom of speech. The freedom of speech is regulated in the Norwegian constitution. The freedom of speech gives the right to communicate anything that is not prohibited by any other laws; such as the employee's obligation to be loyal to his employer and not say or do anything that is untrue or will unfairly harm the employer. The employee is, in general, free to use social media outside working hours as he or she pleases, and the employer cannot set any restrictions as such. On the other hand, the employee is obligated not to reveal any confidential information that belongs to the company, and this includes using social media to reveal this kind of information. The revelation of confidential information might constitute a breach of contract that may result in termination of the employment. If the breach of confidentiality has caused a financial loss, it may carry liability for damages. Unauthorised revelation of trade secrets is also a legal offence.

EMPLOYEE BENEFITS

Social Security

Persons who work or are residents in Norway are, as a rule, obliged to be members of and to pay contributions to the Social Security Scheme. Employers have to pay social security contributions on wages and other remuneration that the employers have to report. The obligation to pay employer's social security contributions does not follow the membership of the employee and can apply even if the employer is not engaged in activity in Norway and even if the employee is not liable to pay taxes in Norway. The employer's social security contributions are stipulated as a percentage of the reported amount. The contributions are differentiated, with rates that vary between different geographical zones. Employees' social security contributions are stipulated as a percentage of personal income.

Healthcare and Insurances

The National Insurance Scheme covers a range of benefits including sick pay, work assessment allowance, disability pension, unemployment benefits, retirement pensions, survivor's pension, occupational injury benefits, healthcare allowance, benefits to single parents and benefits during pregnancy, birth, adoption and parental leave.

Holidays and Annual Leave

Minimum holiday rights for employees are outlined in the Holiday Act, which grants an employee a minimum right of 25 working days of holiday leave per year. The term "working days" includes Saturdays. Employees over 60 years of age are entitled to an additional 6 working days of holiday leave. The holiday year runs from 1 January to 31 December. Many collective agreements grant extended holiday rights. Five weeks of holiday is now quite common in Norway. As a general rule, an employee is entitled to 18 consecutive working days of holiday leave during the period 1 June and 30 September. An employee is also entitled to take the remaining seven working days of holiday leave together. Holiday pay is earned the year before it is paid (the holiday year). Holiday pay is 10,2 percent of the wages paid during the earning year. The amount is normally 12 percent if an employee is entitled to five weeks' holiday under an individual or collective agreement. For employees over 60 years of age who are entitled to an additional week, the holiday pay is either 12,5 or 14,3 percent, depending on whether the employee is entitled to five or six weeks of holiday. There are 10 (ten) public non-working days per year in Norway.

Maternity and Paternity Leave

Maternity leave, including compensation, lasts for a maximum of 59 weeks. 3 weeks before the birth and the first 6 weeks after birth are reserved for the mother, and are compulsory. 15 weeks are reserved for the father. The employees have the right to compensation during maternity and paternity leave. The compensation is either 80 percent of the salary for 59 weeks or 100 percent for 49 weeks. In addition, parents have the right to take a leave of absence for an additional year without compensation.

Sickness and Disability Leave

When an employee has a right to leave due to sickness, he also has a right to sick pay (the salary is fully compensated), which is customarily split between the employer and the National Insurance Scheme. The employee is protected against

dismissal on the grounds of sickness leave, during the first 12 months after the beginning of the period of absence due to such reasons. In principle, disability leave is not a concept recognised under the laws of Norway.

Pensions

Retirement pensions are divided into three levels: Level 1: retirement pensions from the National Insurance Scheme ensure an income in old age. Drawing from a retirement pension can begin the month after a person turns 62, as long as sufficient pension rights have been accumulated. A person who is retired can work as much as he or she wants without their pension being reduced. They accumulate rights to a retirement pension when they work or otherwise have a pensionable income before turning 75. The pension rights are adjusted in accordance with the general life expectancy of the population. Level 2: employers must provide mandatory occupational pensions in addition to retirement pensions.; at least 2 percent of an employee's gross income is paid into pension funds. Level 3: private savings, irrespective of employment and the Norwegian pension scheme.

V. ISSUES ARISING ON TERMINATION OF THE EMPLOYMENT RELATIONSHIP

TERMINATION OF EMPLOYMENT CONTRACTS

Grounds for Termination

Grounds for termination include: i) dismissal of an employee due to business related reasons; ii) dismissal of an employee due to reasons related to the individual employee; iii) collective dismissal based on objective grounds; iv) resignation by the employee; v) expiration of the contract term or end of the specific job; and vi) employer's death, retirement or permanent illness.

Is Severance Pay Required?

There is no statutory right to severance pay in Norway. The only payment that the employee is entitled to is ordinary salary payment and additional contractual benefits during the period of notice in accordance with the terms of employment. Many undertakings are immediately bound by different collective agreements to offer employees severance pay. In addition, employers who are not bound by any collective agreement may choose to offer some kind of severance package including, for instance, job-training, education, release from the duty to work, severance pay, etc. The right to such benefits is normally conditional upon the employee entering into a termination agreement whereby the employee, inter alia, waives the right to institute legal proceedings pursuant to the Employment Act. Termination agreements may be entered into before the employee receives notice or after notice is given.

Whistleblower Laws

The Working Environment Act regulates the employee's right to notify the employer, public authorities, the media or others in whistleblowing cases. An employee has a right to notify of censurable conditions at the employer's undertaking. The same applies to workers hired from temporary-work agencies. The employee shall proceed responsibly when making such notification, notwithstanding the right to notify in accordance with the duty to notify or the undertaking's routines for notification. The same applies to notification to supervisory authorities or other public authorities. Retaliation against an employee who makes such a notification is prohibited; same applies for workers hired from temporary-work agencies. The prohibition applies for both employers and hirers. Anyone who has been subject to unlawful retaliation may claim compensation without regard to the fault of the employer or hirer.

On 1 January 2020, new rules on whistleblowing at the workplace came into effect. The changes in the relevant chapter in the Working Environment Act mainly contribute to clarification on current law, but also include some material changes. Among the changes, the personnel sphere covered by the whistleblowing regulations is expanded to include students and prisoners among others, when these persons are performing work. Further the employer's obligation to follow-up a notification on censurable conditions is now stipulated in the law. In addition, the notion of censurable conditions, in which is the scope of the rules, is exemplified in the law so as the prohibition of retaliation is defined in the law. For employers in the day-to-day work, an important practical change is related to

the requirement to the undertakings notification procedures.

RESTRICTIVE COVENANTS

Definition and Types of Restrictive Covenants

The Working Environment Act differs between three different types of restrictive covenants, each enforceable under the law: i) non-compete clauses; ii) non-solicitation of customers; and iii) non-solicitation of employees.

Use and Limitations of Garden Leave

Garden leave describes the practice whereby an employee leaving a job is instructed to stay away from work during the notice period. If an employee has resigned, or otherwise had their employment terminated, a period of at least one month's notice shall be applicable to either party, unless otherwise agreed to in writing, or laid down in a collective pay agreement. This means that the employee has a right to remain in his position during the notice period. Note that the notice period is calculated from the 1st in the upcoming month, after the date of the termination. An exception from this rule applies if the employment relationship is terminated when the employee is on a probationary period. If so, the notice period may only be 14 days, counting from the day of the termination. The employer and the employee may agree to disregard the period of notice. More challenging, are cases where the employer unilaterally wishes to deprive the employee of his right to work during this period. If the right to remain in the position is to be limited by the use of garden leave, the employer has to have "particularly weighty reasons", which depends on an overall evaluation of the interests of the parties; of particular importance is whether the employee's right to remain in the position may result in considerable damage. The employee is nonetheless entitled to the same pay and contractual benefits during the garden leave. The employer cannot legally predetermine the use of garden leave. The use of garden leave has to be determined in connection with the situation at the time of the termination of the employment.

TRANSFER OF UNDERTAKINGS

Employees' Rights in Case of a Transfer of Undertaking

The rights and obligations of the former employer ensuing from the contract of employment or employment relationships in force on the date of transfer shall be transferred to the new employer. The new employer is also bound by any collective pay agreement that was binding upon the former employer. This does not apply if the new employer, within 3 weeks after the date of transfer, declares in writing to the trade union that the new employer does not wish to be bound. The transferred employees have, however, the right to retain the individual working conditions that follow from a collective pay agreement that was binding upon the former employer. This shall apply until the collective pay agreement expires or until a new collective pay agreement is concluded that is binding upon the new employer and the transferred employees.

The employee's right to earn further entitlement to retirement pension, survivor's pension and disability pension in accordance with a collective service pension scheme shall also be transferred to the new employer. The new employer may, however, decide to make existing pension schemes applicable to the transferred employees. An employee may oppose the transfer of the employment to the new employer. Employees who have been employed for a total of 12 months over the last 2 years before the date of transfer, and who object to the transfer of employment, have the right to new employment with the previous employer for one year from the date of transfer, unless the employee is not qualified for the position. The right to new employment lapses if the employee has not accepted an offer of employment in a suitable position within 14 days after receiving the offer.

Requirements for Predecessor and Successor Parties

The previous employer and the new employer are obliged to discuss the transfer of the undertaking with the employees' elected representatives as early as possible. This information shall include reasons for the transfer, date or proposed date of the transfer, the legal, economic and social implications for the employees, changes in circumstances relating to collective pay agreements, measures

planned in relation to the employees, rights of reservation and preference and the time limit for exercising such rights. The same information shall also be given to the affected employees as early as possible. Most collective agreements also contain regulations in regard to information and discussion.

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SOBCZYK & PARTNERS LAW FIRM

I. HIGHLIGHTS

Employers should be aware of and prepare for the following risks:

- An ever-evolving tax and social security system.
- High presence and activity of trade unions in the case of major employers (mostly in industrial-related sectors).
- Labour courts sensitive to employee rights.
- Strict EU data protection regulations (i.e. hindering transfer of personal data outside of the EU).

II. INTRODUCTION

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

III. ISSUES ARISING UPON HIRING INDIVIDUALS

PRE-EMPLOYMENT CONSIDERATIONS

Limitations on Background Checks

There are strict limitations on background checks. An employer is only allowed to obtain the information concerning the candidate as indicated in legal acts – in the Labour Code or, if applicable, in other specific acts that may concern specific job positions. Some limited forms of background checks (such as verifying the references from the previous employer) might be possible after obtaining the candidate's detailed and explicit consent. However, the lack of such consent or its withdrawal (and consequently – inability to process the verification) may not be the basis for disadvantageous treatment of the candidate and it may not cause any negative consequences for the persons, in particular, it may not constitute a reason justifying the refusal of employment.

Restrictions on Application/Interview Questions

An employer should demand an applicant to provide the following personal data only: name(s) and surname, date of birth, contact data indicated by such a person, and in the scope necessary to perform work of a specified type or in a given job position – education, professional experience and employment history. Personal data is provided to an employer in the form of a statement issued by the person whose data is provided. An employer may require the relevant documentation to confirm personal data of the persons.

Employers may require the provision of personal data other than the data specified above pursuant to separate regulations. The consent of a candidate may constitute the basis for processing their additional data by an employer, except for personal data relating to criminal convictions and offences. A lack of consent or its withdrawal may not be a basis for disadvantageous treatment of a candidate. Also, it may not cause any negative consequences for the person, in particular, it may not constitute a reason justifying the refusal of employment. It is important to note that the consent of the candidate does not

justify processing any categories of personal data. Processing must always comply with basic principles arising from the GDPR, including the principle of adequacy and minimisation. Therefore additional questions that force the candidate to provide information about their personal life, especially those concerning the candidate's family life and personal relationships, are strictly prohibited.

AUTHORISATIONS FOR FOREIGN EMPLOYEES

Requirements for Foreign Employees to Work

Foreigners from the EU member states and from a state within the European Economic Area as well as their family members have unlimited access to employment in Poland. Foreigners from other countries must obtain a work permit and, in some cases an entry visa, if they want to take a job in Poland. A work permit is issued exclusively upon a written application of an entity, which commissions a foreigner to perform work. Such a permit is issued to a specific foreigner. Furthermore, it defines the entity which commissions a foreigner to perform the work and the position the foreigner is to hold or the kind of work he/she is to perform. The work permit is issued for a specific term, however not longer than three years, and can be extended. Besides the work permit, the entitlement of a foreigner to work in Poland also requires obtaining an appropriate visa unless the foreigner is staying in Poland legally by other means. In some cases, the immigration provisions waive the obligation of a work permit.

Does a Foreign Employer need to Establish or Work through a Local Entity to Hire an Employee?

No. In Poland, foreign employers are allowed to hire employees directly.

EMPLOYMENT CONTRACTS

Minimum Requirements

The Labour Code distinguishes three types of employment contracts, including an employment contract for a trial period, an employment contract for a fixed term and an employment contract for an unlimited term. The employer should confirm in writing for the employee the conditions as regards the parties to the contract, its type and terms and conditions, particularly conditions of pay. All changes to the conditions of work and pay require a written form. It is also possible to conclude with an employee a part-time employment contract. Such employment may not, however, result in less advantageous employment terms and conditions in comparison to full time employees who perform the same of similar work.

Fixed-term/Open-ended Contracts

Unlimited-term contracts are the most common. Recently, however, there is a trend to depart from this form of employment toward fixed-term contracts or agreements in civil law. A fixed-term employment contract is concluded either until an agreed calendar date or until the date, which can be defined by a fact, which will occur in the future. The period of employment under a fixed-term contract, as well as the total period of employment under fixed-term contracts concluded between the same parties of the employment relationship, may not exceed 33 months, and the total number of the contracts may not exceed three. Moreover if the term of employment under a contract of employment for a fixed-term is longer than the 33 months, or if the number of concluded contracts is higher than three, it is understood that the employee is hired under a contract of employment for an indefinite term.

Trial Period

An employment contract for a trial period is concluded in the event when, prior to making a decision on initiating an employment relation, one or both parties thereto wish to get acquainted with the conditions of the future execution of mutual rights and obligations at a workplace. It is up to the parties to conclude such an agreement. The trial period may not exceed three months.

Notice Periods

Requiring a notice period in an employment contract is acceptable if provisions of law state so. The Labour Code allows for a notice period in a contract concluded for a trial period, for a fixed-term and for an unlimited term. The notice period may vary from two weeks, one month, or three months for both fixed and unlimited terms; and 3 working days, 1 week or 2 weeks for contracts wherein the trial period is concluded. In principle, it is possible, by way of normative agreements, to introduce longer notice periods than the ones provided for in the Labour Code.

PAY EQUITY LAWS

Extent of Protection

Employees have the right to the same remuneration for the same work or for work of the same value. Such remuneration includes all components of remuneration, regardless of their name and character, as well as other work-related benefits allocated to employees in cash or in forms other than cash. Work of the same value is understood as work, the performance of which, requires from the employees comparable occupational qualifications, confirmed by documents envisaged in separate provisions or by professional practice and experience, as well as comparable responsibility and effort.

Remedies

An employee who suspects discrimination in terms of remuneration or unequal remuneration, may take the case to court or file a complaint with the National Labour Inspectorate. In the event of a court dispute, if an employee accuses the employer of violating the provisions of non-discrimination, the employee should indicate the alleged cause of discrimination as well as facts to present the violation as probable. From this time, the employer bears the burden of proving that the differentiation of the situation of employees was caused by objective reasons.

It is becoming more popular among major employers (over 1000 employees) to introduce pay equity regulations, allowing for the monitoring of pay equity among employees and adjusting pay accordingly. Many employers, in order to avoid accusation of renumeration discrimination, introduce a clause of earnings confidentiality in employment contracts or work regulations, which forbids informing other employees about the amount of the employee's remuneration, sometimes even under the threat of dismissal, which is contrary to the law, and therefore null and void. For example, in the judgment of 26 May 2011, the Polish Supreme Court decided that disclosure of remuneration that was covered by a confidentiality clause, in order to prevent violation of the principle of equal treatment and to manifest the remuneration discrimination, cannot constitute a reason justifying the termination of an employment contract. An employee can disclose the information on his remuneration if he suspects that there are cases of remuneration discrimination at the workplace. It should also be remembered that the information on the amount of individual remuneration is the personal data of the employee, not the employer, so ultimately the employee has the right to use this information.

IV. ISSUES ARISING DURING THE EMPLOYMENT RELATIONSHIP

WORKING CONDITIONS

Minimum Standards

The provisions of collective labour agreements and collective settlement agreements as well as the rules and procedures and statutes, have priority before the solutions in the Labour Code and the provisions of other acts and secondary legislation, as long as they are not less beneficial to the employees. It is also acceptable to grant employees' rights that are more advantageous than those provided by the Labour Code. As of September 2020, new legislation is pending in the field of remote work, which is intended to replace regulations on telework – however, the Ministry of Labour has not yet provided any precise draft thereof.

Salary

An employee has a guaranteed minimum pay for his/her work, which is set pursuant to the principles and the procedure provided for in the Minimum Wage Act. If, however, a higher minimum salary has been set in collective labour agreements or the remuneration rules and procedures, then the employer is obligated to respect such agreements in place of the act. Apart from his/her basic pay, an employee may receive different allowances. Additional remuneration can be divided into those which are obligatory (e.g., extra pay for working overtime, extra pay for working at night), and those which are optional (e.g., extra pay for working shifts, service premiums).

Health and Safety in the Workplace

The employer is obliged to protect the health and well-being of employees by ensuring conditions of health and safety at work, through the appropriate use of the achievements of science and technology.

Managing COVID-19-Related Employee Issues

Quarantine: if a quarantined employee is able to work and performs work from home, they are entitled to full remuneration for the work done. However, based on the applicable regulations, all persons in quarantine may be treated as temporally unable to work and therefore may apply for sick pay or sick benefit. Medical leave for employees affected by COVID-19: a person infected with COVID-19 virus is qualified as unable to work due to illness. Therefore they are entitled to sick pay or sick benefit. Childcare: parents and caregivers of disabled children up to 18 years old are entitled to an additional care allowance in case of closing of a day care centre, children's club, nursery, school or other institution to which the child attends, or the impossibility of the daily caregiver or nanny to care for the child due to COVID-19. Other parents and caregivers are entitled to a care allowance based on general rules.

Employees are not allowed to refuse to work due to fear of infection. Of course, if the type of duty allow for it, such employees can agree with the employer to provide remote work. If employee refuses to work in fear of infection, they may suffer disciplinary consequences, including dismissal. There are no specific legal provisions concerning informing of staff in case of a confirmed infection. However it is considered that in such case the employer should not inform the whole staff about the identity of the infected person. Only those who had direct contact with the infected and were estimated to be in a risk group should be informed that somebody (but again – without disclosing the identity) in their surrounding could be or is infected. These employees might, for example, be instructed to perform remote work or to watch themselves for symptoms. There is no explicit legal basis for employers to inform the sanitary inspection about COVID-19 cases. It should rather be assumed that since employers have no legal obligation to examine employees in this respect, the sanitary inspection should inform employers about COVID-19 cases, rather than vice versa. Of course, if the employer has doubts about a suspected or detected case, they may contact the sanitary inspection.

COVID-19: Best Practices

Recommendations for a safe return to work:

- Employers must organise tasks in such a way as to ensure safe and hygienic working conditions on the one hand, and on the other – to ensure the continuity of the establishment's operations.
- The employer should, inter alia: re-assess occupational risk taking into account new types of risk, including mental health and psychosocial risks, create an action plan including appropriate security measures and provide appropriate prevention measures.
- Employers are obliged to provide employees with disposable gloves or hand disinfectants and to ensure a distance of at least 1.5 m between workplaces.
- Employees are required to cover their nose and mouth with pieces of clothing, masks or helmets while providing direct customer service.
- Employers must make sure to frequently clean and disinfect workplace surfaces, objects, rooms, common areas and stations.
- A number of business establishments have introduced temperature checks or epidemiological control surveys and surveillance systems for employees, workers and visitors.
- Introducing mandatory employee self-monitoring (Coronavirus Self-Checker) is also a popular solution among employers in Poland.

SOCIAL MEDIA AND DATA PRIVACY

Restrictions in the Workplace

The employer may restrict the employee's use of Internet and social media during working hours.

Can the employer monitor, access, review the employee's electronic communications?

As long as it is necessary to ensure the organisation of work enabling full use of working time and proper use of the work tools made available to the employee, the employer may monitor, access and review the employee's business e-mails, as well as other forms of communication. The provisions on such forms of monitoring should be included in work regulations. From May 2019, new rules on protection of employees' personal data came into force. The regulations introduced detailed requirements in terms of various forms of monitoring at work (including video monitoring), as well as rigorous rules on processing the personal data of employees and job candidates.

Employee's Use of Social Media to Disparage the Employer or Divulge Confidential Information

The employee is obliged to take care of the best

interests of the employer's establishment and keep confidential any information, disclosure of which could damage the employer. Violation of employer's personal rights or confidential information may be treated as a serious breach of the employee's basic duties and employer may terminate the employment contract without notice.

EMPLOYEE BENEFITS

Social Security

The principles of social insurance coverage and the rules of establishing social insurance contributions are regulated in the Act on the social insurance system, under which employees are subject to mandatory pension, disability, health and accident insurance. Depending on the type of contribution, it is financed by the employer and the employee in different proportions. Nevertheless, it is the employer who is obligated to calculate the amount of the contribution to the Social Insurance Agency and deduct it from the employee's income. The employer is also responsible for the punctual transfer of the contributions to the Social Insurance Agency.

Healthcare and Insurances

From the contributions made to the social insurance, an employee has a right to sickness benefits, maternity benefits, an attendance allowance, compensation benefits and a funeral allowance, as well as damages in the event of bodily injury caused by an on-the-job accident. Employees are entitled under health insurance to benefit from public health care centres.

Holidays and Annual Leave

An employee is entitled to annual, uninterrupted, paid holiday leave, the duration of which, depending on the number of years worked, is 20 or 26 days. Holiday leave is granted on days which, for the employee, are working days. Upon the employee's application, the holiday leave may be divided into parts. In such a case, however, at least one such part of the holiday leave should last no less than 14 consecutive calendar days. The employee is entitled to the remuneration for the holiday leave, which he/she would have received had he/she been working. Apart from the holiday leave, the employee is entitled to time off from work on Sundays and public holidays. At present, there are 13 public holidays in a calendar year.

Maternity and Paternity Leave

Regardless of the employee's length of service with the employer, a female employee has a right to maternity leave of 20 weeks upon giving birth to one child. This leave is extended proportionately in the event of giving birth to more than one child. The female employee can use no more than 6 weeks of the maternity leave before the anticipated date of the birth. An additional 32-week-long parental leave (resulting in a total of a 52-week leave related to childbirth) may be granted to any of the parents. As a general rule, the parent on childbirth-related leave will receive 100% of his or her basic remuneration for the first half of the leave, and 60% for the second half. Having used up at least 14 weeks of maternity leave after the delivery, the female employee can renounce the right to the remaining part of the maternity leave. In such a case, the remaining, unused time of the maternity leave is awarded to the employee - the father who is raising the child upon his written request. Additionally, the employee - the father who is raising the child – is entitled to a paternity leave of 2 weeks.

Sickness and Disability Leave

While an employee is unable to work due to an illness or isolation caused by a contagious disease, lasting in total up to 33 days in a calendar year, and in the case of an employee who has reached 50 years of age, lasting in total up to 14 days in a calendar year, the employee retains the right to 80% of his/ her remuneration. In case of an illness during pregnancy - within the period specified above - an employee retains the right to 100% of her remuneration. If the period of incapacity to work should last longer, the employee is entitled to sickness benefits paid by the Social Insurance Agency. A person classified with a severe or moderate degree of disability is entitled to an additional holiday leave of 10 working days in a calendar year. The right is acquired by the person after working one year and after being classified in one of the above degrees of disability.

Other Forms of Leave

The employer is obliged to release an employee from work for a period of: 2 days - in the case of the employee's wedding, birth of a child, or death and funeral of his/her spouse or child, father, mother, stepfather or stepmother; 1 day - in the case of the employee's child's wedding or death and funeral of the employee's sister, brother, mother-in-law,

father-in-law, grandmother, grandfather and other individuals maintained by the employee or under his/her direct care. There are other special-case leaves as well, such as leave in order to donate blood or plasma, or leave for persons summoned to appear before a court or administrative body.

Pensions

The current pension system in Poland consists of three segments, generally referred to as the pillars. In the first pillar, the Social Insurance Agency manages the funds. The means are not invested, although they are recorded on the insured person's individual account and are subject to valorisation. The second pillar is based on the operations of Open Pension Funds whose task is to trade and multiply the fund. The third pillar consists of the Employee Pension Schemes and Individual Retirement Accounts. The first and the second are mandatory, whereas participation in the third one is voluntary. The pension under the first pillar is calculated on the basis of the sum of valorised contributions recorded on an individual account of the insured at the Social Insurance Agency, the valorised initial capital and an average lifespan for women and men. The amount of the pension under the second and the third pillar depends on the investment effectiveness of the funds. At present, the retirement age is 60 years for women and 65 years for men. Only after reaching this age, may one apply for the retirement pension. The exceptions are bridge retirement pensions for those working under special conditions or performing work of a special character. Such persons have a right to pension benefits at the age of 55 for women and 60 years of age for men.

V. ISSUES ARISING ON TERMINATION OF THE EMPLOYMENT RELATIONSHIP

TERMINATION OF EMPLOYMENT CONTRACTS

Grounds for Termination

An employment contract can be terminated only on the grounds listed in the Labour Code: under a settlement agreement between the parties thereto; by a unilateral statement of either party to the employment agreement while preserving the notice period (termination on a notice); by a unilateral statement of either party to the employment agreement without keeping the notice period (termination without notice); upon the end of the term for which the employment agreement was concluded.

Is Severance Pay Required?

In connection with terminating employment relations within a collective dismissal and individual dismissals for reasons which do not concern the employee (if the employer employs at least 20 employees), the employee is entitled to a severance payment; the maximum amount of severance is approx. 8.600 EUR. This limit may however, be exceeded by agreement of the parties. There are also special categories of employees (government agency representatives, teachers and persons who perform home-based work, among others) whose dismissal requires the employer to pay a specified amount of severance payment.

Whistleblower Laws

Work on the Act on Transparency in Public Life, which includes regulations on protection of whistleblowers, is currently in progress.

RESTRICTIVE COVENANTS

Definition and Types of Restrictive Covenants

The extent of the restrictive covenant (i.e. in scope, length of time and geographic reach) as well as the consequences for each party in the event of a breach of said covenant, and any other pertinent details should be clearly defined in the agreement between the employer and employee. Non-competition agreements and non-solicitation of customers clauses are recognised and may be enforceable under the law. However, non-solicitation of employee clauses are invalid based on case law as they violate the right to free choice of employment; no person may be prohibited from exercising his/her profession.

Use and Limitations of Garden Leave

The employer may exempt the employee from the obligation to perform work until the lapse of the notice period, upon termination of the employment contract. During the period of exemption, the employee retains the right to remuneration.

TRANSFER OF UNDERTAKINGS

Employees' Rights in Case of a Transfer of Undertaking

Employees' rights in the case of a transfer of undertaking are defined in the Labour Code. Under the law, the new employer becomes a party to the current work relations. Consequently, under the principle of a legal successor, the new employer acquires any and all rights resulting from the work relations established with the previous employer, and all obligations which the previous employer owed to the employees of the entity. This entity's employees preserve the rights they were entitled to prior to the business transfer, and they are bound by the same duties they had toward the previous employer.

It is the new employer's duty to inform the company trade unions, and in the case of their absence, the employees, about the planned transfer of the company at least thirty days before the planned transfer of the business. This information should include the planned transfer date, the reasons for the transfer, the legal, economic and social effects thereof on the employees, as well as the intended activities concerning the conditions of employment, in particular the working conditions, salary and retraining. An employee of the business being transferred may end the employment relation with the new employer. Within two months from the transfer, the employee can terminate the employment relation with a seven-day notice. However, the transfer to a new employer cannot constitute a reason for the employer to terminate the employment relation.

Requirements for Predecessor and Successor Parties

The new employer is bound by the content of the employment relations in force at the time of the transfer. The content of the employment relation is shaped not only by the employment contract, but also by any normative agreements which the previous employer was a party to. The new employer is obligated to apply the provisions of collective labour agreements to those employees who were covered by such agreements, for a period of one year prior to the day of the business transfer.

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PORTUGAL.

MORAIS LEITÃO

I. HIGHLIGHTS

- A relevant reform to labour law took place in 2009 and additional changes were introduced after 2011. These reforms had a significant impact on employee rights and obligations.
- Two of the most striking features of Portuguese law are probably the variety of its sources and the level of protection it grants employees.
- Collective bargaining agreements are entered into at the regional, national or industry levels, between the unions and employers' organisations or on company or multiple company levels between the unions and the relevant employing companies.
- The scope of application defined in a collective bargaining agreement may be extended, after its entry into force, by a government extension act. In such cases, the provisions of the extended collective agreement, depending on the extension terms, will apply either in a specific region or at a national level, to all companies operating in the relevant business sector or industry and employees at their service (regardless of such employees being union affiliated).

II. INTRODUCTION

Portuguese labour law is highly protectionist. Its rules and principles apply both to individual employment relationships and to collective bargaining agreements, which endow trade unions with an important role, particularly in business areas or industries where said agreements are applicable on a broader scale as a result of government extension measures. In 2009 the Labour Code (originally issued in 2003) underwent a relevant reform. This resulted in more flexible solutions, namely on work time organisation issues. From 2011 onwards, in view of the austerity package measures, a number of relevant changes were also introduced, e.g. reductions to the severance compensations due in case of redundancy and reductions to extra work pay. Some of these measures were changed in 2016 under a tendency to withdraw some of the previously applied austerity provisions (e.g. national holidays that had been suspended were put back in place in 2016).

III. ISSUES ARISING UPON HIRING INDIVIDUALS

PRE-EMPLOYMENT CONSIDERATIONS

Limitations on Background Checks

There are some legal restrictions on conducting background verifications on job candidates and employees such as drug tests, financial and credit checks, criminal checks, academic qualifications or previous employments. Some legal restrictions also apply to conducting health checks and to selecting a candidate on the basis of health information. Under data protection laws, personal data must be maintained only for the period strictly required.

Restrictions on Application/Interview Questions

Restrictions on applications and interview questions are in line with the limitations on background checks related to the candidate's private life and on the candidate's health or pregnancy.

AUTHORISATIONS FOR FOREIGN EMPLOYEES

Requirements for Foreign Employees to Work

A general principle foresees that expatriates working on work permit are granted equal rights and obligations as national employees - requires a written form of the employment contracts with expatriates working on work permit (non-EU). In accordance with the law, companies must assure the candidate holds a residence visa or permit specifically granted for carrying out a professional activity as employee in Portugal. In cases where the employer has the intention to employ a foreign citizen (non-EU) currently living abroad, a statement confirming that the employment offer is included in the legal defined quota or that no quota has been set and that no preferential candidate (Portuguese, EU citizen) was found to perform the job shall be issued by the Portuguese Institute of Employment and vocational training and delivered to the candidate for submission together with the visa request. For the same purpose, the employer shall also provide the candidate with an employment contract or promise of employment contract.

Does a Foreign Employer need to Establish or Work through a Local Entity to Hire an Employee?

Foreign employers are not necessarily required to establish or work through a local entity to hire employees. From a corporate perspective, and as a rule of thumb, if engaging local employers means that the foreign employer is intending to exercise its business activity in Portugal for more than one year, then a local permanent representation should be incorporated, adopting the form of subsidiaries or branches. In addition to the permanent establishment issues – and the interconnected corporate tax issues – having employees working from Portugal will, nevertheless, trigger new procedures and obligations that require measures to be taken with regards to: i) accident at work insurance; ii) social security benefits and contributions; and iii) employee income tax issues.

EMPLOYMENT CONTRACTS

Minimum Requirements

Generally speaking, the employment contract does not require any special form and may, therefore, be agreed under written form or verbally. However, there are certain situations in which the contract or some clauses must be executed in writing, examples of which are: i) fixed term employment contract; ii) part-time employment contract; iii) temporary work contract or intermittent employment contract; iv) teleworking contracts; v) single employee contracts with multiple employers; vi) non-competition clauses. There is no legal requirement for employment contracts to be executed in Portuguese, thus the use of other languages (e.g. English) is acceptable provided the employee understands the language used. Moreover, bilingual versions may also be used, in which case it is recommended to set a prevailing version. Nevertheless, contracts drawn in a foreign language, as a rule, will have to be translated into Portuguese when filed with a Portuguese authority or official, and a translation certification may also be required.

Fixed-term/Open-ended Contracts

Unless otherwise specified by the parties, employment contracts are deemed open-ended (i.e. permanent employment). Fixed term contracts are permitted by law provided that they are executed in written form and provided they are meant to fill a role required on the basis of a merely temporary need of the employing company. Hence, if there is no written contract, the employment contract will be deemed to be an open-ended contract.

Trial Period

Trial periods (initial probation) for permanent employees are 90 days, 180 days for high complexity, trust or responsibility roles and 240 days for management, directorate and equivalent responsibility roles. Fixed and unfixed term temporary contracts are subject to shorter probation periods i) 15 days if agreed for an expected or fixed duration shorter than 6 months; and ii) 30 days for durations equal to or longer than 6 months.

Notice Period

The employee is free to resign, subject only to certain prior notice periods. It is not possible to agree on longer probation periods than those legally foreseen, but it is possible to agree on shorter probation periods, as well as to fully exclude probation periods. Companies often pay salary in lieu of notice period in situations of collective dismissal, but the legality of this practice is questionable. The employee is allowed to do it with the consent of the employer. The salary must

be fully paid until the date of the proper termination of the contract.

PAY EQUITY LAWS

Extent of Protection

In Portugal, on 21 February 2019 Law no. 60/2018, of 21 August, entered into force approving measures to reinforce equal payment across gender for equal work or work of equal value. This law amended a previously existing law, establishing annual reporting duties upon employers on equal opportunities between men and women. It also updated provisions contained in 2009 legislation and legislation governing the employment public body for non-discrimination – Comissão para a Igualdade no Trabalho e no Emprego ("CITE"). At national level, a cabinet resolution (dated 21 May) approved, inter alia, the global action targets for the period 2018-2030 in the framework of the National Strategy for Equality and Non-Discrimination, as well as the respective Action Plans. At EU level, the EU Action Plan 2017-2019 of 20 November 2017 with a view to closing the gender pay gap, should also be mentioned.

Remedies

The current rules (as of 21 August 2019) allow for any employee or union representative to request an opinion from CITE on the existence of gender based wage discrimination. The request must be submitted in writing and contain a duly substantiated allegation of wage discrimination. The employer is notified to speak up and provide information on its remuneration policy, and criteria underlying the calculation of the remuneration of the applicant and of the employee(s) identified in the request for an opinion, with the CITE to deliver a technical proposal for an opinion. If the employer exercises its response rights and CITE concludes that there are indications of discrimination, the employer will be given a 6 months period to justify such evidence or demonstrate the adoption of corrective measures to correct differences.

CITE will give a final, binding opinion following the expiry of the above referenced period or to issue a proposal for an opinion, depending on whether the employer has, or has not, made available information concerning the remuneration policy, and the criteria used for the calculation of the applicant's remuneration and the employee(s) whom he believes are discriminating against him. CITE's final opinion is notified to the labour authority (ACT), for the purposes of fining the employer on gender based discrimination, which qualifies as a very serious offence under the Portuguese Labour Code. The lack of information is tantamount to not justifying pay differences, which are deemed to be based on discrimination. This procedure applies to any employer, regardless of the number of employees in his service. Dismissal or other sanctions allegedly imposed to punish a labour offence, shall be presumed as being abusive if they take place up to one year after the request for an opinion.

IV. ISSUES ARISING DURING THE EMPLOYMENT RELATIONSHIP

WORKING CONDITIONS

Minimum Standards

In Portugal, collective labour regulation instruments can determine the minimum working terms and conditions. At the same time, collective labour agreement instruments can only be set aside by a labour contract when the latter establishes more favourable conditions for the employee and if the contrary does not result from the collective labour agreement rules.

Salary

The monthly minimum wage in Portugal in 2020 was fixed at €635. However, in the Azores islands the minimum wage was €666,75 and in Madeira island €650,88, in order to compensate for insularity. Amounts have risen to €665 in 2021 (increasing to €698,25 in the Azores and €682 in Madeira).

Health and Safety in the Workplace

The employer has the obligation to permanently ensure employee health and safety conditions at work. To comply with such duty, the employer must follow a set of general principles focused on the prevention of work accidents and professional illnesses, and thus to comply with several duties. In general terms, the employer must put in place and ensure: i) technical work accident preventive measures; ii) employee training, information and consultation on workplace safety; and iii) internal or

external health and safety services. The employer must implement appropriate company healthy and safety (H&S) activity at work. This includes organising and keeping appropriate H&S services and other preventive measures, like ensuring risk exposure assessments and the performance of tests and other actions on occupational risks and health monitoring. Pregnant or lactating employees cannot perform some activities, due to a high-risk of exposure to physical, biological or chemical agents and activities carried out in dangerous working conditions.

The COVID-19 pandemic outbreak has had a huge impact on H&S issues. Employers are now required to organise appropriate contingency plans relating to the SARS-CoV-2 infection, and procedures to be followed in case of employees presenting symptoms of COVID-19 at the workplace, in line with the guidance issued by the health authorities (some measures are specific to certain business areas or industries). Also, employers should be mindful of any particular workplace organisation and health requirements for a post lock-down return to the workplace.

2020 was, in every sense of the word, an atypical year following the global outbreak of the COVID-19 pandemic. The Portuguese Labour Code and related employment and social security legislation were not sufficiently flexible, single-handedly, nor as swift as the circumstances demanded, in order to fully respond to the wide-ranging requirements of a national state of emergency. The Portuguese Government adopted temporary exceptional measures – including swift furlough and financial support measures and allowances – in the form of successive legislative measures, which were not always easy to interpret, but had to be applied. The measures had an impact on several matters such as, inter alia, employer Occupational Safety and Health Services issues, remote working, holiday scheduling and financial support and incentives for employers (including swift furlough procedures and dismissal bans and restrictions on responding to the business crisis resulting from lockdown measures and acute losses in turnover and business activity.

Managing COVID-19-Related Employee Issues

Employees affected by COVID-19 will be subject to the rules that are generally applicable in case of sick leave. Absences due to sickness are justified and if the absence extends for more than one month the employment contract is deemed to be suspended. The employee is entitled to sick leave allowance (paid by the Social Security), the amount of which will vary between 55% and 75% of the reference salary amount. Sick leave allowance entitlement starts on the first day of absence (unlike the general rule that provides that the allowance is only payable after the third consecutive day of sick leave). The employee must comply with prophylactic isolation when there is a serious risk to public health, confirmed by the health authority. This situation is deemed equivalent to sick leave but in this case the employee is granted sick leave allowance equivalent to his or her full salary (100%). Nevertheless, if remote work is possible, the employee in prophylactic isolation will keep working, remotely, in which case salary will be due as when working at the employer premises. If, during the prophylactic isolation period the employee is diagnosed to be infected with COVID-19 then the situation will be converted into a sickness leave and sickness leave allowance will be payable, instead of the full prophylactic isolation allowance.

Where the case of offices or premises being forced to close does not apply and the employer has to meet all obligations relating to adequate SST protection in the current pandemic circumstances, and if the employee has no justifiable basis to do so (only the mere theoretical fear of infection), the employee cannot refuse to work. In the event of refusal, the general rules on unjustified absences will apply, this also leading to disciplinary infraction. It should be noted that nothing prevents employer and employee from agreeing on unpaid leave for a specific period or even being excused from work, without loss of salary.

SOCIAL MEDIA AND DATA PRIVACY

Restrictions in the Workplace

Employers may dictate the terms for the use of company information technology (IT) and communication means but employees are entitled to keep their private use confidential, including the content of personal emails and Internet access. According to the Portuguese Data Protection Authority, the employer may define the rules on the admitted private use of IT and communication means made available at the workplace and rules should form part of internal company regulations.

Can the employer monitor, access, review the employee's electronic communications?

Closed circuit TV (surveillance cameras) in office premises cannot be used to control the employee's performance. In the workplace, surveillance cameras may be used to protect the safety of persons and goods or when the nature of the activity so requires. Before the GDPR, its use was subject to a prior authorisation from the Data Protection Authority, and employee work councils had to be consulted at least 10 days prior to the authorisation request being filed with the competent data protection authority. The employer is under the obligation to inform the employees of the existence of such equipment. As with any other data processing activities, the employer, whilst acting as Controller in the processing of data regarding its employees, must fulfil the information duties set by the GDPR; for example, the employee must be duly informed of the categories of his personal data processed by the employer, purposes of and legal basis for the processing, the recipients or categories of recipients of such data, etc.; he is also entitled to information on his rights of access to his data and on the rights to his data correction, erasure and updates and how to exercise same rights. Generally, the transfer of personal employee data outside the EEA can only happen when the country of destination ensures the same level of protection for the rights and freedoms of the individuals, in relation to the processing of their data, as the Member States of the EEA or if there is an adequacy decision from the Commission regarding the State which will receive the data.

Employee's Use of Social Media to Disparage the Employer or Divulge Confidential Information

As a general rule, employees are entitled to privacy in personal and family life, including in the workplace. The use by the employees of social media communication means, cannot be used or monitored, when evaluating the employee. The aforementioned principle does not grant the employee total freedom to do or publish discretionarily on social media, this meaning that, for example, if the employee disparages or divulges confidential information of or relating to the employer, its business, its customers, or its employees, sanctions could be pursued for such behaviour. The employee is subject to general loyalty and respect duties toward the employer. As such, if the employee does not comply with these general duties he/she may be subject to disciplinary measures available to the employer (which range from a reprimand to a dismissal with just cause), depending on the seriousness of the violation and the damages caused to the employer.

EMPLOYEE BENEFITS

Social Security

Several sectorial compensation funds mostly incorporated during the second decade of the twentieth century and in a nationwide basis are at the origin of the Portuguese Social Security system. These insurance funds were included in the Social Security System in the 70s, giving rise to the unified Social Security System. However, the General Retirement Fund, established in 1929 to ensure the protection of civil servants, maintained its autonomy, allowing employees of public administration benefit from a special regime.

The employer and the employee are subject to social insurance contributions, which must be paid on a monthly basis. The global contributory rate is 34.75% of the contribution base. The employer is in charge of 23.75% and the employee of 11%. Nevertheless, the employer has to deduct the employee's contributions from its gross wage and to deliver them to Social Security. Civil servants have a specific welfare protection scheme also subject to compulsory contributions. The Social Security System covers (i) sickness, (ii) maternity, paternity and adoption, (iii) unemployment, (iv) professional diseases, (v) disability, (vi) old age and (vii) death.

Healthcare and Insurances

The employer does not have a duty to provide any specific fringe benefits to an employee, such as health insurance, life insurance, etc. In a number of cases, nevertheless, this type of benefit is established in collective bargaining agreements and will be required and apply accordingly. All employers are required to retain insurance for the protection of employees against work related accidents.

Holidays and Annual Leave

Employees are entitled to 22 business days of paid vacation per year. In the case of temporary contracts lasting up to 6 months, the employee is granted 2 working days of holiday for each completed month of service, and in the case of those lasting up to 12 months or ending in the year subsequent to the

year of hiring, the employee is entitled to a holiday leave period proportionate to the duration of the contract.

Maternity and Paternity Leave

Parental leaves granted for the birth of a child are provided under Portuguese law. These may be shared between the parents (in which case the total parental leave period may be 180 days). The mother may also enjoy up to 30 days of the parental leave before delivery. The employed mother will, in any case, be entitled to a minimum mandatory period of leave (six weeks following the birth). The father has a specific mandatory paternity leave of 15 days, to be used in the 30 days following birth (5 such days must be used immediately following the date of birth). In case of adoption of a child under the age of 15, the adopting employee has the right to a license equal to the Initial Parental Leave. The father and mother are entitled to supplementary parental leaves for child care (no more than 6 years of age). The father and mother can enjoy any of the following types of regimes consecutively or up to 3 interpolated periods; the employee must inform the company in writing at least 30 days in advance. After the right referred to above has been exhausted, the parents are entitled to childcare leave, on a consecutive or interpolated basis, up to a maximum of two years. In the case of a third child or more, the leave is limited to three years.

Sickness and Disability Leave

Employees are entitled to receive a sickness allowance from the social security system when temporarily unable to work due to illness. The sickness leave suspends the employment contract as of 30 days and has no maximum period. Most employees are entitled to 1095 days of paid sick leave, independent workers and research fellows to 365 days of paid sick leave. The amount of the sick leave allowance depends on several factors and will range between 55% and 100% of the worker's reference remuneration.

There are two types of disability leave and benefits in Portugal: i) Disability pension and ii) Special protection in disability. The disability pension is a benefit attributed to persons who are permanently incapacitated for work. The special protection in disability is aimed at people who are incapacitated for work with a prognosis of rapid evolution, to a situation of loss of autonomy with a negative and irreversible impact on the profession they carry out, caused by specific diseases (familial paramiloidosis, Machado-Joseph disease, AIDS - virus human immunodeficiency virus (HIV), multiple sclerosis, cancer of the skin, amyotrophic lateral sclerosis, Parkinson's disease, Alzheimer's disease and rare diseases or other diseases of non-professional or third party liability, sudden onset or early onset).

Other Forms of Leave

After the right to a supplementary parental leave has been exhausted in any of the aforementioned modalities, the parents are entitled to leave for childcare. This license can be taken consecutively or interpolated and lasts for a maximum of 2 years or 3 years, in the case of up to 2 children or more, respectively. During the enjoyment of this license, the employee cannot carry out any work activity for other employers or activity that implies absence from his usual residence. Parents are entitled to leave for up to 6 months (extendable up to 4 years) for assistance to a child suffering from disability or chronic illness. If the child is 12 years of age or older, the need for assistance must be confirmed by medical certificate. Other licenses or leaves of absence are provided for in the following situations: exemption from work by a pregnant or breastfeeding employee, in order to protect her safety and health; waiver for prenatal consultation; exemption for evaluation for adoption; waiver (reduction of working hours) for breastfeeding; waiver from some forms of working time organisation; exemption from the provision of overtime; exemption from night work.

Pensions

The typically provided pension, besides those previously mentioned for illness and disability cases, is the old-age retirement pension, which is comprised of a monthly amount paid to protect the beneficiaries of the general social security scheme, in the old-age situation, replacing the remuneration of work. In 2018, the retirement age was set at 66 years and 4 months, and has increased by one month for 2019 and 2020, being 66 years and 5 months. In 2021, it is set at 66 years and 6 moths. If the person in question is younger than the aforementioned ages, they may be eligible for one of the following: i) early retirement due to long-term unemployment; ii) early retirement under the age flexibility scheme; and iii) special schemes for anticipating the age of access to the old-age pension - exercise of activity in certain professions. In general, employees must have a

minimum of 15 calendar years of work with records of remunerations, or 144 months with records of remuneration - beneficiary covered by voluntary social insurance.

V. ISSUES ARISING ON TERMINATION OF THE EMPLOYMENT RELATIONSHIP

TERMINATION OF EMPLOYMENT CONTRACTS

Grounds for Termination

According to Portuguese law, the termination of an employment contract depends on very strict rules that demand the gathering of grounds and several formal procedures. Meanwhile, the employment contract expires in one of these situations: i) once its term elapses; ii) supervening impossibility, absolute and definitive, of the employee rendering work of the employer receiving such work; and iii) with the employee`s retirement for age or disability.

Is Severance Pay Required?

Employees subject to collective dismissal, dismissal resulting from job extinction or failure to adapt to the job position are entitled to compensation which calculation basis varies, depending on the seniority period under consideration and date on which the contract was initially executed, between 1 month, 20, 18 or 12 days base salary and seniority premiums per year of service (fractions of seniority are to be calculated on a proportional basis). Should the basis for the decision to dismiss an employee be non-existent or should the employer fail to comply with the procedural requirements, the termination of the labour agreement is unlawful and the employee is entitled to the payment of her salary from the date of dismissal until the final court decision. The employee is also entitled to choose one of two remedies: her reinstatement into the company or payment of a compensation for dismissal to be set by the court. The indemnity may vary between 15 and 45 days' base salary plus the seniority premiums for each year (or fraction of a year) of seniority, with a minimum of three months' remuneration.

Whistleblower Laws

The Portuguese data protection authority (CNPD) addressed the specific matter of "Whistleblowing Hotlines" in a guideline decision in 2009, containing the authority's official guidelines for Whistleblowing procedures, which should be taken into account when an employer wishes to set-up and manage such lines. As with other matters that concern personal data, the applicable law for this type of processing activity is now the GDPR. As such, GDPR principles and duties must be fulfilled by the employer when developing and implementing whistleblowing hotlines and similar mechanisms. Legislative measures towards transposing the EU Whistleblower Protection Directive are on their way as the deadline of 31 December 2021 moves closer.

RESTRICTIVE COVENANTS

Definition and Types of Restrictive Covenants

Agreements to restrict the activity of employees during employment or after contract termination are allowed under certain terms and conditions. Non-compete agreements/clauses (after termination) are enforceable only if the activity of the employee is likely to cause harm to the employer and payment of a non-competition compensation amount is agreed and complied with. It is also possible for the employee to agree to a non-termination covenant, by which the employee undertakes not to terminate the contract, subject to a maximum period of 3 years, as a way to compensate the employer for high expenses incurred with the employee's professional training. Although it is common to find that companies have included non-solicitation covenants (non-solicitation of customers / employees,…) in their outsourcing, service provision and joint venture agreements, among others, these restrictive covenants are actually not enforceable under Portuguese labour law.

Use and Limitations of Garden Leave

When resigning or when having been served a prior notice for dismissal (e.g. collective dismissal) employers frequently choose to grant the affected employee a paid leave. Employers cannot actually instruct the employee to stay away if he/she choses to continue performing his/her work role until the prior notice period is completed. The only possibility given to the employer is to instruct the

employees to use any unused holiday period during the final part of the prior notice being served and, therefore, in practical terms, to actually leave before the end of the prior notice period. Garden leaves in the context of pending disciplinary proceedings are allowed particularly after the accusation note has been served to the employee.

TRANSFER OF UNDERTAKINGS

Employees' Rights in Case of a Transfer of Undertaking

When proceeding to the business transfer that involves the transfer of undertaking (one or more business units or parts of business units, i.e., organised means pursuing an economic activity) transferor and transferee must consult with employee representatives and provide relevant information on the planned transfer. The employee is entitled to maintain his job position previously held with the predecessor, with all existing terms and conditions, with the successor, once the transfer of the undertaking occurs.

The employee has the right to oppose the transfer of the employer's position in his employment contract when i) the transfer may cause serious damages to the employee; or ii) if the organisation's policy does not merit the employee's trust. If the employee wishes to oppose the transfer of the employer, he/she must do so in writing to the transferor, identifying himself, the contracted activity and the grounds for opposition – this may result in the maintenance of the employment relation with the transferor. During the 2 years subsequent to the business transfer, the transferor is jointly liable with the transferee for employee credits arising from the transferred employment agreements, which became due prior to the business transfer date.

Requirements for Predecessor and Successor Parties

Prior to transfer, employee representatives (Works Council and trade union representatives) or, in their absence, employees directly have to be informed in writing prior to the transfer about the transfer's date, motives and legal, economic and social consequences, as well as measures envisaged in relation to the employees and the content of the contract between the predecessor and the successor. Where there are employee representatives and special measures are put in place as result of the transfer, employee representatives have to be consulted prior to the transfer. These obligations encumber both the transferor and the transferee, in relation to their respective employees or their representatives.

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ROMANIA.

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I. HIGHLIGHTS

- Most disputes involve financial claims from employees that usually include overtime payment, granting of working conditions, bonuses, etc. Employers often face collective actions from employees regarding these financial claims. Unions usually promote such collective actions.
- Unions must represent 50%+1 of the employees in one company in order to be representative and part of a collective agreement. In order to still make the collective negotiations accessible to unions, the law allows union federations to participate in company level collective negotiations, as representatives of the member unions that do not reach the requirements to be representative, if the federations represent 7% of the employees in the industry sector.
- Employers have the right to regulate working hours, but special legal provisions limit this right.
- Great importance is given to the form of the documents drafted by the employer. Court cases usually involve verifying the form of the documents and a significant number of rulings are based exclusively on this aspect.
- Strict regulations apply to individual and collective dismissals. In case of unlawful dismissal, the employee has the right to reinstatement and is granted all financial rights for the entire period in which he was unlawfully dismissed. Dismissed employees will often sue for unlawful dismissal.

II. INTRODUCTION

Romanian employment law is the product of constant changes made over the last years in order to establish equilibrium between the power of union organisations and the power of the employers. This has proven a hard task. As a result, Romanian legislation has both pro-employee regulations, being one of the few that establishes the mandatory reinstatement of wrongfully dismissed employees, allowing the union federations to participate in collective negotiations at the company level, as well as pro-employer regulations limiting the right to strike for employees under collective agreements.

III. ISSUES ARISING UPON HIRING INDIVIDUALS

PRE-EMPLOYMENT CONSIDERATIONS

Limitations on Background Checks

Private companies cannot conduct background checks, other than requiring information from the candidate and recommendations from previous employers. They can however, ask the candidate to present a criminal record issued by the competent authorities. The employer has to ask the candidate for a medical certificate that ascertains that the candidate is medically fit to be employed, since his medical fitness prior to the signing of the agreement is an issue of the employment agreement's validity.

Restrictions on Application/Interview Questions

There are limited legal provisions on hiring practices in Romania. The Labour Code states only that the employee has to be informed on the essential clauses of the individual employment agreement during the hiring procedure. Ordinarily, vacant positions that are to be filled by hiring new personnel are advertised in media and/or on specialised on-line sites with general access. For public institutions there are specific rules on publishing the available jobs on their own website and in the Official Bulletin (local or national editions). The employer can ask for a CV and select only some of the candidates to meet with. Job interviews are held either face-to-face, over the

phone, or using live video messaging technology. There are no rules or express limitations on what questions the employer can ask the candidate, but it is generally accepted that the questions need not be too personal. Also during the hiring process the employer has to pay attention not to discriminate any category of candidates. To this end, the questions that are asked should not refer to matters that are grounds for discrimination.

AUTHORISATIONS FOR FOREIGN EMPLOYEES

Requirements for Foreign Employees to Work

In Romania, citizens of the EU or the EEA do not need a work and residence permit. Foreign citizens (who are not EU or EEA citizens) must obtain a work permit in order to perform activity as an employee. The work permit is issued by the Romanian Office for Immigration. As a rule, the work permit is issued for a one-year period. The number of working permits issued every year is limited and is determined by the government. In 2020, the maximum number of working permits that could be issued was the highest ever, with 30,000 new working permits made available. Non-EU and EEA citizens have the right to work in Romania under certain conditions.

Does a Foreign Employer need to Establish or Work through a Local Entity to Hire an Employee?

In order to hire an employee under Romanian law, the employer has to have a national legal entity. Romanian law can also apply to employment contracts conducted between foreign employers and local employees, if the parties so choose. Employees of foreign companies can perform work in Romania based on their existing employment agreement, or can be dispatched to a Romanian company.

EMPLOYMENT CONTRACTS

Minimum Requirements

As a rule, the individual employment agreement is an unlimited (open-ended) term contract. However, the individual employment contract may also be for a fixed-term or part-time. Any kind of individual employment contract must be concluded in writing, in the Romanian language and on the basis of both parties' consent (employer and employee). Before the beginning of the employment relationship, the employer has the obligation to conclude the individual employment contract and register it with the employees' electronic program (ReviSal). When negotiating the employment contract, both the employer and the employee can be assisted by third party specialists, including lawyers.

Fixed-term/Open-ended Contracts

Open-ended contracts are the rule under Romanian law. Fixed-term contracts may be concluded only for the limited cases provided by the Labour Code (requires that agreement states essential information and duration of contract).

Trial Period

In order to verify the skills of the employee, the parties may agree upon a probationary period, mentioned within the individual employment contract, of a maximum 90 calendar days for standard positions and a maximum 120 calendar days for managerial positions. With respect to disabled persons, the probationary period will be of a maximum 30 calendar days.

Notice Period

The individual employment contract may be terminated by the employer or by the employee. In case the contract terminates due to the employer's decision, with the exception of 1) dismissal for disciplinary reasons or 2) if the employee is arrested for more than 30 days, the employee is entitled to a notice period of no less than 20 working days. The employer has the right to waive the notice period and to agree to terminate the contract due to the employee's will, at any moment before the end of the notice period.

PAY EQUITY LAWS

Extent of Protection

The Romanian Constitution, the Labour Code and the law that establishes the salary for employees and public servants working for public institutions and authorities, all recognise the right to pay equity as a fundamental principle. However, employers are not required to disclose information to specialised authorities, report salary levels for the purpose of verification of pay equity, or take any positive action to ensure equality in compensation or benefits.

Remedies

An employee challenging equal pay practices can petition the NCCD, which can take administrative measures in order to eliminate the discriminatory

practices, or he/she may bring the claim before the local courts directly.

IV. ISSUES ARISING DURING THE EMPLOYMENT RELATIONSHIP

WORKING CONDITIONS

Minimum Standards

Employers and employees are free to negotiate the terms and conditions of their employment relationship. However, employees have certain minimum rights granted by the law and the parties' negotiation cannot stipulate conditions or rights below the legal minimum provisions. Any contractual clauses that are meant to establish rights below the minimum ones are null.

Salary

As of 1 January 2020, the minimum gross monthly wage for a 168-hour work month is: LEI 2,230.00 (approx. EUR 458.00 or USD 544.00) for jobs that do not require a higher education; LEI 2,350.00 (approx. EUR 482.00 or USD 573.00) for jobs that require a higher education; and LEI 3,000.00 (approx. EUR 616.00 or USD 732.00) for jobs in the construction sector. Employers cannot pay a full-time employee less than the minimum gross monthly wage. Special provisions apply to public servants. The negotiation of the monthly wage is individual, as a rule. Employees can be granted other benefits, financial or otherwise, such as supplementary insurances, the use of a company car and/or other company owned property (housing, telephones, laptops, etc.). Fiscal treatment of each benefit is to be determined according to the Fiscal Code (some of the benefits are exempted of all fiscal taxes, some are exempted of some of the fiscal taxes and some are considered to be part of the monthly wage).

Health and Safety in the Workplace

With regards to the measures to be implemented for the health and safety of their employees, employers should bear in mind that there exists a series of principles aimed at preventing health and safety issues, such as avoiding risks, evaluating the risks that cannot be avoided, adapting the work to the individual, especially when designing the workplace and when choosing the equipment, as well as work methods and training for employees. At every employer's level, a health and safety committee has to be organised. Equal numbers of members will represent the employees and the employer within this committee. a medical certificate is necessary to conclude the individual employment agreement. Also, periodic medical check-ups are to be performed by a specialised doctor.

Managing COVID-19-Related Employee Issues

Employees that are quarantined are self-isolating for mandatory legal reasons or have tested positive for COVID-19 all benefit from paid sick leave. During this time their individual employment agreement is suspended and they receive an indemnity of 75% of their salary. For the initial 3/5 days the indemnity is paid by the employer, the rest is paid by the national health fund. Since all positive cases are admitted to hospitals, employees will not benefit from sick leave for childcare as they would for any other medical condition of the child (the child will be in hospital and the parent will not be allowed to stay with the child). Employees can express their concern on specific health risks and the employer should analyse those claims however the employee cannot legally refuse to work based on these concerns. If the employee does not perform their activity they are not entitled to their salary and most employers have internal regulations stating that after a certain number of days of absence the employee can be dismissed for disciplinary reasons. If an employee tests positive the authorities will notify the employer of the positive result in order for the employer to take all the mandatory actions required, including notifying all other employees that were in close contact with the employee that tested positive. The identity of the employee that tested positive will not be disclosed to other employees that were not in close contact for confidentiality reasons.

COVID-19: Best Practices

- Employers are recommended to include in their internal regulations provisions that allow them to implement specific rules during exceptional situations (such as restricting access to specific areas, requiring employees to take additional safety measures, limit contact between employees). The newly included provisions should be general enough to be able to be enforced in different types of situations but also

specific enough to be useful when exceptional situations might arise.

- It is recommended for employers to negotiate with employees individualised working programs (the employee starts the working program at different hours) or uneven working programs (the employee works for a different number of hours each day, within the limits of the 40 hours/ working week), in order to limit contact between employees and the time spent in common spaces.
- Teleworking, if possible, should continue even after the epidemic situation is no longer urgent. This practice in the long-term can be used as a cost cut measure as the company will require smaller workspaces.
- A good practice is to use stable work teams for specific assignments and to limit the interaction between work teams. In person meetings should only be organised if absolutely mandatory. During collective negotiations the negotiating teams should be limited to fewer participants for each meeting.
- As mentioned the employers can limit work-related travel to only essential and urgent cases and they can also postpone training or identify training options that can be done through electronic means.
- When hiring new employees it is recommended to use the maximum legal trial period, as during a trial period an employee may be terminated without cause. In addition, it is recommendation is to use fixed-term employment if possible.

SOCIAL MEDIA AND DATA PRIVACY

Restrictions in the Workplace

On objective grounds and with the use of clear internal procedures, the employer can restrict the employee's use of Internet and social media during working hours. This restriction applies to the use of the Internet and social media on company provided platforms, including portable devices.

Can the employer monitor, access, review the employee's electronic communications?

A relevant national case that was brought to the attention of the European Court for Human Rights, confirmed that in the case where the employer has strict, clear and objective rules on the use of the Internet, and other programs that require Internet use, such as instant messaging programs, and which had been acknowledged by the employee, the violation of such rules can result in a disciplinary action and even in a disciplinary dismissal.

Employee's Use of Social Media to Disparage the Employer or Divulge Confidential Information

If the employee has any confidential information as a result of his position within the company, he cannot divulge such secret with the use of social media. A recent ruling of a national court established that the social media is a public space, even if it has restrictions on access, meaning that any mentions on social media are to be regarded as publicly made. Also as a result of the general principle of conducting the relationship on good faith, the employee should refrain to make public affirmations that could discredit his employer. Using social media in a manner that may affect the image or even the activity of the employer, may result in disciplinary action against the employee. Also, if the image or the activity of the employer is severely affected, the employer can also claim a financial compensation from the employee. Using confidential information and making it available on social media without authorisation can also lead to the disciplinary sanctioning of the employee, and may be grounds for a financial compensation claim.

EMPLOYEE BENEFITS

Social Security

In Romania, there are mandatory pensions, healthcare, unemployment common national systems that apply to all employees and employers. There are mandatory contributions made to each of these systems, by the employees. The employer pays a single contribution. The systems cover predetermined benefits for the employees. For the employer, the required monthly contribution is 2.25% of the gross income for each employee. For the employee, the required monthly contributions are 25% of the employee's gross income for the pension system and 10% of the employee's gross income for the healthcare system.

Healthcare and Insurances

Apart from the mandatory contributions that we referred to previously there are no other mandatory insurances that the employer is required to provide. Additional health and life insurance can be provided by the employer as a benefit. The fiscal regime of such benefits takes into consideration the amount paid by the employer.

Holidays and Annual Leave

There are approximately 15 public holidays in Romania and the workers are entitled to remuneration for each. Since some of the public holidays are religious there are legal provisions that state that paid holidays are to be granted to employees of other religions than the Christian Orthodox, considered majoritarian in Romania. Employees have the right to benefit from a minimum of 20 working days of paid annual leave each year. Compensation with financial benefits is only allowed in case of the termination of the employment. The employer has to ensure that employee benefits from a continuous period of 10 consecutive working days of paid annual leave. Romanian law establishes a minimum duration of 20 working days of annual paid leave. The social partners may negotiate a collective employment agreement that provides more favorable conditions for the employees. Except for the case of terminating the employment contract, an employer cannot replace the right of the employees to a minimum annual holiday entitlement with the payment of the indemnity for the holiday.

Maternity and Parental Leave

Romanian law provides for a period of 126 mandatory maternity leave days, of which 63 days can be granted before the due date and 63 days after the due date. The employee can receive more than 63 days for each of the periods, but has to benefit from at least 42 days of leave after the due date. The maternity leave is considered a medical leave, the employee's physician being the deciding factor in how the days are divided between the two periods. Apart from maternity leave, parents can also benefit from a paid leave in order to raise a young child, up to 2 years of age, or if the child has a disability. During this leave period the parent receives an indemnity that is a percentage of the income the parent had prior to the leave period. Incentives are granted to parents that return to work before the 2-year period expires. The indemnity is not paid by the employer.

Sickness and Disability Leave

Medical leave is granted to the employee if the illness prevents him/her from performing his/her activity. The medical leave indemnity is paid by both employer and the state healthcare system depending on the number of days of medical leave. The first 5 days of medical indemnity are paid by the employer and the rest of the period by the state healthcare system. The indemnity is a percentage of the income of the employee. Disability leave can be a form of medical leave or a form of pension, depending on the type of disability (people with permanent disabilities that cannot work benefit from a special type of pension).

Other Forms of Leave

Employees have the right to paid or unpaid training leave. The employer has to grant paid training leave if he failed to ensure the periodic training of the employee. Unpaid training leave can be granted to employees who engage in training activities on their own initiative. Parents have the right to receive paid leave if they have children under the age of 12 enrolled in schools where classes were suspended due to exceptional events (such as extreme weather or medical crisis). Only one of the parents can benefit from this type of leave and only if neither of the parents work from home.

Pensions

The mandatory contribution to the pension system covers in Romania 2 Pylons of the pension system – the state provided pension (Pylon 1) and the mandatory private pension (Pylon 2). In order to fund these two pylons, the mandatory pension contribution of both the employer and the employee are divided between the state pension system administrator and private insurance companies. The percentage of the mandatory contribution that is given to private insurance companies is very low; 3.75% in 2020. In addition to these 2 mandatory pylons the pension system in Romania recognises 2 more pylons. Pylon 3 or the individual facultative pension system allows the employee to contribute to a private pension system with up to 15% of his monthly income, while pylon 4 allows the employee to contribute to a private pension system without any limits to the contributions. Pylon 4 pension plans usually include life insurance. Pylons 3 and 4 are not mandatory. The employer can offer the employees the benefit of one of these facultative insurances. In addition to contributions to the national healthcare system the employer can offer the employees the benefit of private health or life insurance.

Any uniform of equipment necessary for health and safety reasons will be provided, free of charge, to the employee by the employer. In certain industries where there are known risks to the health of the employees (such as exposure to toxic

or irritant materials) additional rights to cover what is known as a protection diet should be granted. The employer can also grant daily meal tickets to employees as an additional benefit. The meal tickets are strictly regulated, have a legally established value, and have a distinct fiscal treatment (they are only subject to income tax). Employers can grant vacation tickets (vouchers) with distinct fiscal treatment that can only be used for traveling services within the country. Vacation tickets are more common in public companies. Other forms of benefits that can be granted by the employer are the kindergarten tickets or gift tickets, all having a distinct fiscal treatment.

V. ISSUES ARISING ON TERMINATION OF THE EMPLOYMENT RELATIONSHIP

TERMINATION OF EMPLOYMENT CONTRACTS

Grounds for Termination

Under Romanian law, the employment contract may terminate de jure, by mutual consent or by notice given by one of the two parties. The grounds for dismissal must be real and serious and there are two types of valid grounds: objective grounds and economic grounds. The dismissal for economic grounds may be individual or collective. A dismissal for reasons not related to the person of the employee, is the termination of the individual employment contract determined by the cancellation of the employee's position, for one or several reasons, which are not connected to the employee's person. Cancellation of the position must be effective and have a real, serious cause.

Is Severance Pay Required?

Severance pay for individual dismissals is to be paid only if it is agreed as such in the individual or collective employment agreement. The only time that the Labour Code states that a severance payment (not specifying the amount) should be negotiated is for physical and/or mental unfitness to perform the activity required by the job description. The Labour Code only states that such compensation should be negotiated in the collective employment agreements, meaning that in the absence of such an agreement, the employer cannot be made to pay the employee any amount upon his termination.

Whistleblower Laws

Only whistleblowing within public institutions, and the protection of employees and public servants in public institutions, is legally regulated in Romania. The whistleblower has to act in good faith and for the general interest in order to be protected. For the private sector, customary rules have to be used when considering the protection of an employee in whistleblowing cases.

RESTRICTIVE COVENANTS

Definition and Types of Restrictive Covenants

The following restrictive covenants are recognised and may be enforceable under the law: i) non-compete clauses; ii) non-solicitation of customers; and iii) non-solicitation of employees.

Use and Limitations of Garden Leave

Garden leave is not regulated under Romanian law. If the employment is terminated and the employer does not require the presence of the employee during the notice period, he can ask the employee to not perform work during the notice period. In case of resignation, the employer can waive his right to benefit from the notice period, meaning that he can agree for the employee to stop working immediately (and not pay the employee anymore). However, in case of dismissal the employer has to be careful in forcing the employee not to work during the notice period since the employer still preserves his constitutional right to work. Some collective employment agreements have provisions that allow the employee that was dismissed to perform work only for half of the normal working hours during the notice period in order for the employee to be able to actively seek employment (in this case it is up to the employee if he wants to benefit from this contractual clause).

TRANSFER OF UNDERTAKINGS

Employees' Rights in Case of a Transfer of Undertaking

The transfer of an undertaking, business or part of a business to a new owner by agreement is subject to the Labour Code and Law no. 67/2006.

The legal provisions grant a strong protection for the employees subject to the transfer. Prior to the transfer, both the seller and the purchaser have the obligation to consult their trade unions or the employees' representatives with respect to the judicial, economic and social implications related to the transfer of undertaking. All of the seller's existing rights and obligations arising from the employment contracts and collective labour agreements will be transferred to the purchaser, except for cases when the seller is subject to restructuring or insolvency procedure. Nevertheless, the transfer of undertakings cannot be a reason for the individual or collective dismissal of the transferred employees by the seller or purchaser.

Requirements for Predecessor and Successor Parties

According to Law no. 67/2006, the seller has the obligation to notify the purchaser about all the rights and obligations that are transferred between parties. The purchaser is bound by all rights and obligations resulting from the existing employment contracts at the time of the transfer and has the obligation to maintain all the rights until the contracts expire or are terminated. Beginning one year following the transfer, the purchaser has the possibility to renegotiate the collective clauses with the employees' representatives.

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RUSSIA.

PEPELIAEV GROUP

I. HIGHLIGHTS

Russian employment laws are regularly reviewed, but are still considered to be archaic, excessively bureaucratic and not meeting the demands of business:

- Bureaucracy – almost every interaction between the company and its employee needs to be formalised as a paper document with a "blue" signature (a significant step forward to ease these rules has been introduced as of 1 January 2021 for teleworkers).
- Formalism – many procedures (e.g. redundancy) are highly formalised and any sidestep is likely to result in the employer's actions being classified as illegal.
- Unregulated areas – Russia does not have analogues of many concepts of European law, e.g. severance does not depend on seniority, the transfer of an undertaking will not entail the obligation to onboard affected employees, and restrictive covenants are generally void.

Russian employment law protects the employee in various spheres; first of all, by setting complicated procedures for company-initiated dismissals; fixed term contracts are permissible only in limited cases and special protection is given to employees with dependents.

II. INTRODUCTION

Russia is a federative state, which consists of 85 constituent territories (cities of federal importance, republics, regions and other territorial administrative components) with certain legislative rights. Employment issues fall within the scope of the common competence of the Federation and its integral parts. The principal act governing employment rights is the Labour Code of the Russian Federation, which is applicable throughout the whole country (all other regulatory acts adopted at a federal, regional or municipal level must not contradict the Labour Code).

III. ISSUES ARISING UPON HIRING INDIVIDUALS

PRE-EMPLOYMENT CONSIDERATIONS

Limitations on Background Checks

Russian legislation rigidly limits the scope of a background check by the principles of: i) obtaining all personal data from the employee directly (thus the company may either request the candidate to provide a reference from former employers, or obtain the employee's written consent to its requesting such references directly); ii) the right to demand only those documents that are listed by law (these are very few – the passport, education certificate, labour book or electronic record of employment, registration in the pension system and military registration, if relevant). Demanding a certificate of a clean criminal record is allowed only for specific professions; and iii) basing the choice of a candidate solely on business qualities that are clearly job-related. As such, background checks are often carried out informally (we have to admit that such practice is widespread). Recruiters also use available public information to check on the candidate (court websites, the bailiffs' database of enforcement proceedings, social networks).

Restrictions on Application/Interview Questions

A job advertisement must not contain discriminatory provisions unrelated to the business qualities of the future employee. Interview questions should

concern job-related qualities of the candidate (education, experience, skills, goals, etc.). Exploring other areas, such as time to commute to work, family status, trade union membership, religion, smoking or drinking habits, age, nationality, etc. may result in claims concerning the processing of excessive personal data or an ungrounded refusal to hire (though such claims are rare for Russia). A refusal to hire must also be justified solely by the business qualities of the employee that are clearly related to the role.

AUTHORISATIONS FOR FOREIGN EMPLOYEES

Requirements for Foreign Employees to Work

The general rule for employing a foreign national requires a) that the foreign national must have a valid work permit and must comply with all visa requirements (if they require a visa to enter Russia); b) the employer must have a valid permit to employ foreign workers; and c) the profession of the foreign employee concerned must be included within the quota that is determined annually by the Russian state authorities. There are exceptions to this rule that provide for less strict regulation and fewer requirements to comply with for certain privileged categories of foreign employees, e.g. highly qualified foreign specialists and their family members, and nationals of those ex-Soviet republics who do not require a visa to enter Russia.

Employing a foreign national who does not have a valid work permit in Russia is an administrative offence. The employer company may have to pay a penalty of up to RUB 800 000 (up to RUB 1 million for certain regions) or face an injunction to suspend any economic activity for up to ninety days. The same penalties will apply to those companies that do not have a valid permit to hire foreign personnel (whenever such a permit is required).

Does a Foreign Employer need to Establish or Work through a Local Entity to Hire an Employee?

There is no formal prohibition on a foreign company hiring an employee in Russia without establishing a local entity. Still, there are many technical issues (payment of taxes and social charges, filing reports on hiring, dismissal, transfers, obtaining work permits, etc.) that can be resolved only via a local presence.

EMPLOYMENT CONTRACTS

Minimum Requirements

Employers in Russia must enter into employment contracts in writing. If an employee is admitted to work without a written employment contract, such contract is implied (de facto employment). It is also implied that the employee has been engaged by the employer without any probation period. An employment contract is normally accompanied by the relevant job description (a list of key tasks assigned). An employment agreement may contain provisions on probation, the non-disclosure of confidential information, and other terms that do not worsen the position of the employee compared with those provided for by law or company policies. If the contract contains terms that are below the level guaranteed by law or company policies, such contractual terms will not apply.

Fixed-term/Open-ended Contracts

As a general rule, employment contracts are open-ended in Russia. The duration of a fixed-term contract must not exceed five years. Extending or renewing a fixed-term contract may entail the risk that it will be classified as open-ended. As concerns fixed-term agreements, there are cases where such agreements must be concluded (e.g. with an individual replacing a colleague, a contract for temporary work for up to two months), and cases where they may be concluded (e.g. employees in secondary employment, contracts with the CEO, etc.). A fixed-term contract does not terminate automatically on its end date. The employer should serve 3 days' written notice of termination and should perform the standard termination actions.

Trial Period

An employer hiring an employee may wish to establish a trial period. The maximum length of a trial period is 3 months. A longer, 6-month trial may be established only for the CEO of a Russian company (and deputies), the chief accountant (and deputies), heads of branches, etc. A trial period cannot be established for specific categories of employees, such as pregnant women and women with children up to 1.5 years old, employees under 18, graduates from state educational establishments applying for employment for the first time within one year after graduation, etc. It is recommended to set clear criteria to be met for probation to be qualified as passed.

Notice Period
Mandatory notice terms can be reduced/extended, but only if this favours the employee. The key minimum periods for notice to be served by the employer are: 2 months in the case of redundancy (lay off), payment in lieu of notice is possible, subject to parties' consent; 3 days in the case of the expiry of a fixed term contract (no notice is required if the employee acts as replacement); and 3 days in the case of termination due to an unsuccessful probation. Dismissal for cause has no notice requirements, but an employee should be given at least 2 business days to justify the misconduct, so this basically serves as the notice period.

PAY EQUITY LAWS

Extent of Protection
The Labour Code obliges the employer to ensure equal pay for work of equal value. Being guided by this, and also by the general prohibition of discrimination in the field of employment, remuneration should depend solely on the value of work provided (its quality, expertise, volume, etc.). There are no regulatory requirements in the Russian Federation that compel an employer to disclose, report or take any positive action to ensure equality in compensation or benefits.

Remedies
It is important to emphasise that there are no special remedies for this sphere in Russia. Employees quite often apply to the courts or to the State Labour Inspectorate claiming they are receiving lower pay than their peers. Such claims are not supported by the courts, provided that the employer evidences the differentiation by a difference in work value, which in its turn, should be documented by appraisal results, the scope of tasks performed, etc. Employees as a rule, cannot evidence that underpayment is caused by discriminatory motives.

Apart from this, there are important court precedents on the subject of pay equity focused on: i) the requirement to provide equal pay to new hires who are still on probation; ii) the requirement to provide equal pay to employees on fixed-term contracts, as compared to their colleagues on indefinite contracts; and iii) the requirement to preserve bonus rights for employees who have worked the target period, but have been deprived of a bonus due to their leaving the company.

IV. ISSUES ARISING DURING THE EMPLOYMENT RELATIONSHIP

WORKING CONDITIONS

Minimum Standards
Employees must comply with labour safety requirements, treat the company's property with due care, and immediately inform the employer of any threat to their life and health or to the company's property. Each employer has to have a Workplace Safety Service or Specialist, who has due qualifications in this area. Companies with under 50 employees may outsource such function. Each workplace must be appraised by a licensed organisation and classified depending on the level of harmfulness/hazard; indicating the workplace's class in this regard, is a mandatory term of the employment contract.

Salary
Russian federal laws determine a minimum wage on an annual basis. Constituent territories of Russia are entitled to set, by regional agreements, a higher minimum wage to apply in their respective territories. Actual salaries are commonly higher than the minimum wage.

Health and Safety in the Workplace
An employer must provide employees with safe working conditions. An employer must also investigate and record all accidents that occur on their territory or premises, and must inform the appropriate authorities of accidents that have occurred.

Managing COVID-19-Related Employee Issues
The COVID-19 pandemic revealed that the Russian employment law lacks regulation for such force majeure cases. To bridge this gap, significant amendments have been made to the Russian Labour Code in the section regulating remote work. From 1 January 2021, there is flexibility as to whether an employee performs 'office work' or 'telework' (i.e. works remotely) which allows an employee to have both office and "home office" days during the week. In addition, remote work can be set for up to six months. A special mechanism has been introduced for the employer to unilaterally announce remote

work during an epidemic or another force majeure event. Employees who cannot work remotely will have downtime with reduced pay, and those who are working remotely will be entitled to compensation of related expenses.

SOCIAL MEDIA AND DATA PRIVACY

Restrictions in the Workplace

An employer has a right to restrict and prohibit the use of social media and the Internet during working hours, as provided for in the internal policies or employment contracts. An employer may also prohibit their employees from publishing any business-related information or making statements on behalf of the company on their social media accounts, without the employer`s consent. This should also be prescribed by the internal documents (such as policies, instructions, internal rules and codes).

Can the employer monitor, access, review an employee's electronic communications?

In practice, an employer has the right to monitor access, and review an employee's electronic communications or other corporate devices, if their use is permitted solely for business purposes. Such limitations can be set by company policies or employment contracts.

An Employee's Use of Social Media to Disparage the Employer or Divulge Confidential Information

According to the specific circumstances of the case, an employee's use of social media to disparage the employer or divulge confidential information may trigger disciplinary action (in some cases up to dismissal) and may also constitute an administrative offence or a crime. Cases where employees face an employer's sanctions for divulging confidential information are becoming more prominent in Russia. Evidencing any monetary damage caused by the disclosure is also a complicated task, and it should be noted that Russian law allows recovery from employees of direct actual damage only and not loss of profit (in general case).

EMPLOYEE BENEFITS

Social Security

The following facts are recognised as insured events: reaching retirement age, disability, the loss of a breadwinner, illness, injury, an industrial accident or occupational disease, pregnancy and childbirth, plus maternity and paternity leaves until the child is 1.5 years, among others. When an insured event occurs, the insured persons receive insurance coverage from the relevant state non-budgetary fund (Social Insurance Fund, Obligatory Health Insurance Fund and Pension Insurance Fund).

Healthcare and Insurances

Russian employers pay insurance premiums to the Obligatory Health Insurance Fund, which finances the obligatory health insurance for all nationals, from birth. Employers also pay premiums to the Social Insurance Fund to cover the risk of industrial accidents. Quite many companies provide additional medical coverage to employees for the term of employment; in some companies this coverage is extended to family members.

Holidays and Annual Leave

Each employee has the right to annual paid leave of at least 28 calendar days. Extended annual paid leave is provided to specific categories of workers, e.g. employees working in the Northern regions, or in a harmful workplace, or having "irregular working hours". Annual leave should be provided in the year it accrues, and if some days remain unused they roll over to subsequent years without limitation. Receiving monetary compensation for unused days during employment is limited, while at termination, compensation is due for all of the unused leave entitlement.

Maternity and Paternity Leave

There are two types of maternity leave in Russia: pregnancy and childbirth leave starts 70 calendar days (84 in the case of a multiple pregnancy) before childbirth and lasts 70 calendar days (86 in case of birth complications and 110 in case of a multiple birth) after childbirth, with payment of the state-funded allowance in the amount set by law; and childcare leave can last until the child is 3 years old. This leave can be taken by the mother, father or any other relative or guardian who actually takes care of the child. The state allowance is envisaged for the period until the child is 1.5 years old.

Sickness and Disability Leave

For periods of sick leave (to be confirmed by a medical certificate), an allowance is paid to the employee instead of her salary; the allowance is paid at the expense of the Social Insurance Fund,

with the exception of the first three days, which are paid for by the employer.

The amount of the temporary disability allowance depends on the length of service of the insured person and may be 60%, 80% or 100% of the average wage on which insurance premiums are calculated (but cannot exceed the legal maximum). Russian law does not operate a separate concept of 'disability leave', which is instead handled as a succession of ordinary sick leave until the employee recovers or is qualified as permanently disabled.

Other Forms of Leave

There are numerous cases when certain categories of employees are entitled to additional forms of annual leave (fully paid), such as: employees of Northern regions (entitled to 8, 16 or 24 days of additional paid leave, depending on the region); employees with 'irregular working hours' are entitled to 3 extra days; employees in harmful workplaces are entitled to 7 extra days; etc.

There are also cases which provide an entitlement to additional paid or unpaid days off (e.g. 4 paid days off per month for a caretaker of a disabled child; paid days off for medical check-ups;…). Many employers enhance the statutory guarantees; the most popular involve providing additional paid leave on 1 September for parents whose children go to school, and paying for days off taken for marriage, childbirth (for a father) or for the death of close relative.

Pensions

The current Russian retirement age is 60 for men, 55 for women; but is gradually being increased and is targeted to be 65 for men and 60 for women by 2028. Still, some categories of individuals may retire earlier (e.g. medical workers, employees in Far North regions).

Since state pensions are quite low, employees may choose to pay additional pension insurance contributions to an investment account intended to fund their state pension. The employer may pay matching contributions to the employee's investment accounts of the state pension, though he is not obligated to do so. Individuals in Russia also have the option to pay into voluntary Russian pensions, via private Russian pension funds.

In addition to the above listed statutory benefits, it is important to take note of the requirement to compensate employees working in specific Northern regions, for the cost or their travel to the place of annual leave and back, every two years (also for family members who are unemployed).

The following are optional, but popular benefits worth mentioning:

- paying up to salary during sick leave for a limited number of days per year;
- paid days of self-certified sick leave (commonly up to 5 per year);
- additional pay during maternity leaves;
- lunch allowance;
- paying up to salary during business travel or annual leave (during such periods the employee is paid average wages, which might be below the base contractual salary);
- material aid in case of childbirth, marriage or other family occasion.

V. ISSUES ARISING ON TERMINATION OF THE EMPLOYMENT RELATIONSHIP

TERMINATION OF EMPLOYMENT CONTRACTS

Grounds for Termination

Termination of employment agreements is one of the most heavily regulated areas of Russian employment law, involving a specific set of formalities (notices, deadlines, severances,…) for the various dismissal grounds of which there are six groups: i) separation agreement; ii) expiration of the term of a fixed-term employment agreement; iii) termination at the initiative of the employee (resignation); iv) termination at the initiative of the employer (for cause, related to transfers and redundancy); v) forced termination, due to circumstances beyond the parties' control; and vi) the illegal signing of an employment contract (e.g. hiring someone who is banned from that profession).

The collective dismissal procedure includes extended notices to any relevant trade union and to the State Employment Service (3 months before the separation date, while for an individual dismissal it is 2 months). It should be noted that collective dismissals are rare, as this concept applies only to separation on the ground of redundancy (lay off). It is common practice that employees on the redundancy list are offered separation agreements and leave on these grounds, thus allowing the company to avoid the criteria of collective dismissal.

"At-will" termination of employment relationships is generally not permitted, except for a CEO of a Russian entity. In any case, whenever an employer intends to terminate an employment contract even on the grounds of an employee's having served a resignation notice, the dismissal procedure must be carried out in strict compliance with all legislative and procedural requirements applicable to that particular ground for dismissal.

Is Severance Pay Required?

No severance is required in case of termination: i) for cause; ii) due to the expiry of a contract's term; iii) through an employee's resignation; and iv) in specific other cases. Severance pay in the amount of two weeks' average wages shall be paid to employees in the event of termination under certain conditions (due to employee's health condition, drafted into military service or refusal to relocate when employer moves, etc.). A company's CEO is paid severance in the amount of 3 times the average monthly wage in the case of termination by the company's decision ("at-will").

Whistleblower Laws

In Russia, there are no special whistleblowing rules in the sphere of employment. There is only a general obligation for employees to immediately inform the employer of any threat to life and health, or to the company's property.

RESTRICTIVE COVENANTS

Definition and Types of Restrictive Covenants

According to Russian law, non-compete clauses are not enforceable. The only statutory possibility allowing employers to restrict or control work for third parties relates to a CEO of a Russian company; who can work for another employer, but only with the employer's consent. Covenants not to solicit customers/employees are considered to be covenants not to compete and, therefore, are at odds with federal law. Such clauses are nevertheless often set contractually, as a so-called "gentleman`s agreement".

As there is no legal basis to conclude non-compete agreements, employers use indirect means of protecting their interests, at least partially for example, via confidentiality agreements or non-disclosure agreements. The following restrictive covenants are not applicable under Russian law: non-compete clauses; non-solicitation of customers; and non-solicitation of employees.

Use and Limitations of Garden Leave

Russian law does not recognise the concept of garden leave. The doctrine that most closely resembles garden leave, concerns the suspension from work, but this can occur only in a small number of cases prescribed by law, e.g. if an employee cannot perform duties for medical reasons or due to the suspension of a job-related permit (such as a driving licence), or due to alcoholic intoxication. The period of such suspension is generally unpaid and short-term. Where employers face the need for garden leave, they have no option but to negotiate with the employee for him/her to take annual leave or additional paid or unpaid leave.

TRANSFER OF UNDERTAKINGS

Employees' Rights in Case of a Transfer of Undertaking

There is no Russian analogue to the transfer of undertaking concept contained in UK law and European law. The company is free to transfer its business to another legal entity, while this creates no obligation towards the affected employees.

Requirements for Predecessor and Successor Parties

In the absence of any special regulation in the event of a transfer of an undertaking, the predecessor and successor parties shall follow the general legal rules in handling the HR aspects of the transfer. Commonly, the predecessor and successor agree that selected employees will be offered jobs with the successor. There is no legal requirement to offer the same employment terms for employees who are to be transferred, but it is quite common to do so, to facilitate the transition. The remaining

employees who have no business tasks in the predecessor companies are either transferred to other roles or separated by agreement, or on the grounds of redundancy (lay-off).

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SINGAPORE.

CLYDE & CO CLASIS

I. HIGHLIGHTS

- The Employment Act is Singapore's main piece of employment law legislation and provides for the basic terms and working conditions for employees.
- All employees (whether foreign or local) are covered by the Employment Act, except for seafarers, domestic workers and statutory board employees or civil servants.
- Singapore is an at-will employment jurisdiction.
- Minimum salary levels are not prescribed by legislation and therefore, there is generally no minimum wage in Singapore, except for a progressive wage model which applies to certain employees in certain sectors.
- A social security scheme called the Central Provident Fund is mandatory for Singapore citizens and permanent residents of Singapore.

II. INTRODUCTION

The Singapore employment legal system is comprised of employment legislation and common law principles. In addition, guidelines and advisories from the Ministry of Manpower ("MOM") and the Tripartite Alliance for Fair & Progressive Employment Practices ("TAFEP") are highly persuasive. Employment-related claims can be heard in the Employment Claims Tribunal, State Courts of Singapore and the Supreme Court of Singapore. The key employment legislation in Singapore is the Employment Act of Singapore, which applies to foreign nationals and Singapore residents who are under a contract of service with an employer in Singapore, except for seafarers, domestic workers, statutory board employees and civil servants. Part IV of this Act, which provides for rest days, hours of work and other conditions of service, only applies to: a workman (doing manual labour) earning a basic monthly salary of not more than S$4,500; and a non-workman employee earning a basic monthly salary of not more than S$2,600. Managers and executives are generally not covered.

III. ISSUES ARISING UPON HIRING INDIVIDUALS

PRE-EMPLOYMENT CONSIDERATIONS

Limitations on Background Checks

There are currently generally no legal restrictions on an employer (or third party) conducting a background check on a job applicant. Credit checks are in practice conducted for candidates and employees employed in certain regulated roles, where they have access to the employer's assets or deal with financial matters. It is customary practice to ask candidates to sign a self-declaration or statutory declaration that they have or do not have a criminal record. For Singapore citizens, a certificate of clearance may be issued by the Singapore Police Force upon application, which will certify that the individual has no prior criminal convictions in Singapore.

Restrictions on Application/Interview Questions

As employers are required to recruit employees on the basis of merit, questions related to age, race, religion, gender, marital status and family

responsibilities or disability may be viewed as discriminatory and should not be asked during an interview.

AUTHORISATIONS FOR FOREIGN EMPLOYEES

Requirements for Foreign Employees to Work

All foreign employees working in Singapore are required to have a valid work pass before commencing work in Singapore. The most common work passes are Employment Passes, S Passes and Work Permits. When applying for work visas for foreign employees to work in Singapore, the type of work and the individual employee's general skillset determine which work pass is most suitable. To further support employment opportunities of Singaporeans, there has been an increase in the minimum salary requirements for work pass applications for foreign employees.

Does a Foreign Employer need to Establish or Work through a Local Entity to Hire an Employee?

In respect of Employment Passes, a foreign employer that does not have a registered office in Singapore would need to get a Singapore-registered company to act as a local sponsor and apply for an Employment Pass on their behalf. In respect of S Passes and Work Permits, the employing entity must be a company registered with the Accounting and Corporate Regulatory Authority (ACRA) in Singapore. Please note that foreign employers which carry on business in Singapore are usually required to register their presence with the Accounting and Corporate Regulatory Authority.

EMPLOYMENT CONTRACTS

Minimum Requirements

Employers must issue key employment terms in writing to all employees, such as, amongst others: full name of employer; full name of employee; job title, main duties and responsibilities; start date of employment; duration of employment (if employee is on fixed-term contract); working arrangements, such as daily working hours, number of working days per week and rest day; salary period; basic salary; etc.

Fixed-term/Open-ended Contracts

Fixed-term and open-ended employment contracts are both permitted and common in Singapore. Similar to open-ended contract employees, fixed-term contract employees are entitled to statutory benefits under the Employment Act and other relevant employment related legislation.

Trial Period

In Singapore, the length of the probation period is not prescribed nor is it mandatory for there to be a probation period. Common market practice would be for a probation period of between three to six months. Employees on probation are covered by the Employment Act and enjoy the same rights as full-time employees. An employee's length of service is calculated from the date on which the employee starts work (not the date of confirmation).

Notice Period

Employers and employees may contractually agree to the length of the termination notice period, though such period must be identical for both employers and employees. Such notice period would usually be set out in the employment contract. Notice can be waived by mutual consent between the employee and the employer. If the employment contract does not specify the notice period, the notice period will depend on the employee's length of service.

PAY EQUITY LAWS

Extent of Protection

There is no specific statutory protection in Singapore that mandates equal pay for equal work. Neither is there any specific legislation preventing gender-based salary discrimination in Singapore. However, employers should keep in mind their general obligations to hire on the basis of merit, as well as their duty to ensure the health and safety of their employees in the workplace.

Remedies

Any discriminatory job advertisements or human resource practices may be reported to the TAFEP. Where an employee has been dismissed on discriminatory grounds based on age, race, gender, religion, marital status and family responsibilities or disability, the employee may file a wrongful dismissal claim with the Tripartite Alliance for Dispute Management. If the dismissal is deemed to be wrongful, the employer may be ordered to reinstate the employee to his former job, and pay for any loss of income (caused by the dismissal) or pay monetary compensation.

IV. ISSUES ARISING DURING THE EMPLOYMENT RELATIONSHIP

WORKING CONDITIONS

Minimum Standards

The Employment Act sets out certain minimum prescribed benefits and working conditions, such as annual and sick leave entitlements and payment of salary. Furthermore, Part IV of the Employment Act, provides additional protections in respect of rest days, hours of work and other conditions of service, only applies to: i) a workman (doing manual labour) earning a basic monthly salary of not more than S$4,500; and ii) a non-workman employee earning a basic monthly salary of not more than S$2,600 (managers and executives are generally not covered).

Salary

Minimum salary levels are not prescribed by legislation and there is therefore generally no minimum wage in Singapore, except for a progressive wage model which applies to certain employees in certain sectors. In accordance with the Employment Act, employers must pay an employee's salary at least once a month and within 7 days after the end of the salary period. All employers must: i) issue itemised pay slips to employees covered by the Employment Act; and ii) keep detailed employment records, including salary records, of employees covered by the Act.

Health and Safety in the Workplace

Pursuant to the Workplace Safety and Health Act of Singapore, stakeholders are required to ensure the safety and health of employees in the workplace, so far as reasonably practicable. Stakeholders would include employers, principals, occupiers, manufacturers or suppliers (including hazardous substances and machinery and equipment), installers or erectors, employees and the self-employed. "Workplace" means any premises where a person is at work or is to work, for the time being works, or customarily works, and includes a factory.

Managing COVID-19-Related Employee Issues

Employees who are on medical leave or on home quarantine orders due to COVID-19 should be treated as being on paid medical leave, as part of the employee's medical leave eligibility under their employment contracts, collective agreements, or under the Employment Act. Where employees have used up their paid medical leave benefits, employers are encouraged to consider providing medical coverage as the employee concerned may face financial hardship during this time. Employers must:

- As far as reasonably practicable, allow natural ventilation of the workplace during working hours;
- Take the temperature of every individual entering the workplace and check if they have any specified symptoms;
- Collect contact details of individuals entering the workplace;
- Refuse entry to febrile individuals or individuals who display any specified symptoms, or who refuse to comply with the taking of their temperature and/or provide their contact details;
- Implement safe distancing measures;
- Ensure febrile individuals or individuals who display specified symptoms:
    - wear a face mask;
    - leave the workplace immediately; or
    - if not possible to leave immediately, isolate the individual.

Generally, employees should not be expected to report to work unless teleworking is not an option. Employees or other individuals who are (i) febrile; or (ii) have any specified symptoms must not enter the workplace. An employee who is feeling unwell, is febrile or has any specified symptoms, should be reported to the employer. The employee should leave the workplace and consult a doctor immediately. Employers must track and record these cases of illness as part of their Safe Management Measures.

COVID-19: Best Practices

Employers should strive to update their employment policies and procedures to account for teleworking arrangements. This would help to align employer and employee expectations on what is required from both parties in respect of teleworking. From a practical aspect, employers may wish to check with their insurers to ensure that their existing work injury insurance covers injuries arising out of employment when the employee works from home as injuries sustained while teleworking

would generally be eligible for compensation under the work injury compensation framework.

SOCIAL MEDIA AND DATA PRIVACY

Restrictions in the Workplace

It is relatively common for employers to impose a ban on social media usage in the workplace, implement a social media policy governing employees' use of social media in relation to the employer, and provide training on the use of social media.

Can the employer monitor, access, review the employee's electronic communications?

An employer may legally monitor its employees' electronic communications where the employer has obtained the employee's consent for the collection, use or disclosure (as the case may be) of their personal data against notified purposes, which must be purposes that a reasonable person would consider appropriate in the circumstances. Otherwise, the employer must show that the collection, use and disclosure of such personal data falls within the scope of one of the statutory exceptions under the Personal Data Protection Act.

Employee's Use of Social Media to Disparage the Employer or Divulge Confidential Information

It is good practice for the consequences of breach of the social media policy to be stated in either a company policy or the employment contract. The employer should follow the disciplinary procedures set out in its own policy or rules. If the employer has no disciplinary policy in place, due inquiry should, in any case, be carried out before disciplinary action is taken.

EMPLOYEE BENEFITS

Social Security

The Central Provident Fund ("CPF") is a mandatory social security savings scheme funded by contributions from employers and employees, that enables working Singapore citizens and permanent residents of Singapore to set aside funds for retirement and addresses healthcare, home ownership, family protection and asset enhancement. Employers are required to pay both the employer's and employee's share of CPF contributions every month, and are entitled to recover the employee's share from the employee's wages.

Healthcare and Insurances

Employers are required to obtain work injury compensation insurance for: i) all employees doing manual labour, regardless of salary; and ii) all employees doing non-manual work, earning a salary of S$2,100 or less a month (this will be increased to S$2,600 or less a month from 1 April 2021). Additionally, employers who employ work permit and S Pass holders are required to buy and maintain medical insurance coverage of at least S$15,000 per year for each work permit and S Pass employee.

Holidays and Annual Leave

By law, employees are entitled to paid public holidays. An employee who has served an employer for a period of not less than 3 months is entitled to a minimum of 7 days of paid annual leave for the first 12 months of continuous service with the same employer, and an additional 1 day of paid annual leave for every subsequent 12 months of continuous service with the same employer, up to 14 days of paid annual leave.

Maternity and Paternity Leave

A female employee may be entitled to either 16 or 12 weeks of maternity leave, depending on which eligibility criteria is met. The first 8 weeks of maternity leave will be paid by the employer pursuant to section 76(1A) of the Employment Act, while the remaining 4 weeks of maternity leave will be unpaid if the female employee has less than 2 living children, or if the female employee has 2 or more children (i.e. twins or triplets. etc.) during the first pregnancy. For the avoidance of doubt, if the female employee has 2 or more living children and the children were born during more than one previous confinement (i.e. not twins or triplets, etc.), the female employee's 12 weeks of maternity leave will be unpaid. Male employees may be entitled to 2 weeks of government-paid paternity leave if the following requirements are met: i) his child is a Singapore citizen at birth or a Singapore citizen within 12 months from the date of birth; ii) he is, or had been, lawfully married to the child's mother between conception and birth; and iii) he has served the employer for a period of at least 3 months before the birth of his child.

Sickness and Disability Leave
Employees are entitled to paid sick leave if they have worked for at least 3 months with the employer. Where the employee is between 3 to 6 months of service, the sick leave entitlement is pro-rated. Disability leave is not provided for under the laws of Singapore, however the Work Injury Compensation Act may provide for additional medical leave wages in the event of injury. There have been a number of recent changes to the Work Injury Compensation Act, including changes to the compensation and medical expenses limits, coverage of mandatory insurance to certain employees, expansion of the scope of compensation and strengthening reporting obligations

Other Forms of Leave
Employees may also be eligible for adoption leave, shared parental leave, infant care leave, childcare leave and extended childcare leave.

Pensions
Apart from the CPF, Singapore's mandatory social security savings scheme, there is no other mandatory pension scheme in Singapore, nor are these typically provided. Other typically provided benefits include dental coverage and medical insurance coverage, where such coverage is not otherwise required.

V. ISSUES ARISING ON TERMINATION OF THE EMPLOYMENT RELATIONSHIP

TERMINATION OF EMPLOYMENT CONTRACTS

Grounds for Termination
Singapore is an at-will employment jurisdiction and employers and employees may terminate the employment relationship in accordance with the employment contract and applicable notice period (and payment in lieu of such notice). In addition, valid grounds for dismissal include misconduct, poor performance and redundancy. Employers who go through a retrenchment exercise are required to notify the Ministry of Manpower of the retrenchment, if they have at least 10 employees and have retrenched 5 or more employees within any 6-month period. Employers should also abide by the Tripartite Advisory on Managing Excess Manpower and Responsible Retrenchment issued by the TAFEP. Each employee should be terminated in accordance with the termination provisions in their respective employment agreements (including the termination notice period or payment in lieu of such notice).

Is Severance Pay Required?
Employees who have served the company for at least 2 years are eligible for retrenchment benefits. Those with less than 2 years' service may be granted an ex-gratia payment out of goodwill. The MOM generally recommends that employees be paid a retrenchment benefit of 2 weeks' to 1 month's salary per year of service, subject the prevailing norm of the industry and financial position of the company.

Whistleblower Laws
Singapore law does not expressly provide for specific statutory protection for whistleblowers in the context of employment. However, certain laws of general application may apply to protect whistleblowers. For instance, under the Prevention of Corruption Act of Singapore, witnesses in civil or criminal proceedings are generally not obliged or permitted to reveal an informer's identity.

RESTRICTIVE COVENANTS

Definition and Types of Restrictive Covenants
Under Singapore law, non-compete restrictions are generally prima facie unenforceable, unless they are reasonably required for the protection of the legitimate proprietary rights of the company. The restrictions must also be (1) reasonable in scope, geographical area and duration; and (2) not against public interest. Similar to non-competition clauses, non-solicitation clauses are generally unenforceable, unless the employer is able to prove that it has a legitimate proprietary interest to be protected by the non-solicitation clause.

Use and Limitations of Garden Leave
It is common for employment contracts to include garden leave provisions in Singapore. Where there is no express garden leave clause in the employment contract, an employer may request for an employee to go on garden leave.

TRANSFER OF UNDERTAKINGS

Employees' Rights in Case of a Transfer of Undertaking

Where the transfer is covered under the Employment Act, employees would generally have the right to (i) be notified of the transfer and of matters relating to the transfer; (ii) consult with the employer; and (iii) preserve the original terms and conditions of employment under the new employer.

Requirements for Predecessor and Successor Parties

Where the transfer is covered by the Employment Act, the employer would need to ensure that (i) affected employees or their union are notified of the transfer within a reasonable period and regarding the terms of transfer; (ii) ensure there is no break in employment during the transfer; and (iii) ensure that the original terms and conditions of employment are preserved after the transfer. The new employer would need to ensure that (i) the previous employer is informed of all matters that will affect the employees, so as to ensure that the employees may be informed within a reasonable period; (ii) perform the previous employer's rights, powers, duties and liabilities which are part of any contract or agreement with the employees' union before the transfer; and (iii) ensure that the original terms and conditions of employment are preserved after the transfer (unless otherwise agreed).

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SPAIN.

SUÁREZ DE VIVERO

I. HIGHLIGHTS

- Non-EU citizens must obtain a work permit.
- In principle, employment contracts are presumed to be for an indefinite term. However, the number of fixed-term employment contracts are subject to some limitations.
- Minimum working conditions are largely set out in the Workers' Statute and applicable CBAs.
- Employment contracts are automatically transferred with the business to the new employer. Employees' rights and obligations are also transferred.
- Termination can be based on objective grounds.
- Dismissals are void if the termination is discriminatory or involves protected employees.

II. INTRODUCTION

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

III. ISSUES ARISING UPON HIRING INDIVIDUALS

PRE-EMPLOYMENT CONSIDERATIONS

Limitations on Background Checks

Information regarding criminal records is confidential and public disclosure is prohibited as it could violate data protection regulations. Additionally, there is a general prohibition forbidding discrimination against any employee, for any reason, either before or after being hired. In addition, access to the Central Registry of Convicts will only be allowed for certain state agencies, judges and courts, as well as the judicial police, when there is such a requirement. Therefore, the employer cannot obtain such data unless the candidates or the employees provide the data voluntarily. As an exception to the general prohibition mentioned above, there are certain sectors whereby there exists a legal obligation that entitles the employer to request and proceed with background checks: Public Administration, the state/local police, the army, managing members of financial institutions, insurance agents, professionals who work with minors and casinos.

Restrictions on Application/Interview Questions

By a series of strict regulations and case law on the prohibition of any type of discrimination as well as a prohibition, as a general rule, on requesting candidates to submit personal data that is not directly related to the needs of the job they are opting for. However, in principle, it is indeed legitimate for the employer to use such information as long as it is public, unrestricted and available to anyone. There are no general guidelines that can be used to guarantee that the fundamental rights of the candidate will in no way be breached when extracting information from social networks. The employer is allowed to ask any question necessary, provided that it is reasonable and objective, and pertains to the job being offered. For example, requests for a candidate's minimum height and age could be necessary and objective for a flight attendant position.

AUTHORISATIONS FOR FOREIGN EMPLOYEES

Requirements for Foreign Employees to Work
Foreign employees from outside the European community, including self-employed individuals, must obtain an administrative authorisation, or work permit, to work in Spain. The work permit may be requested at the Immigration Bureau.

Does a Foreign Employer need to Establish or Work through a Local Entity to Hire an Employee?
When a foreign employer wants to hire a local employee in Spain, it must take charge of all the obligations related to the employee, such as the social security contributions and the income taxes. There are essentially two ways that a foreign company can hire employees in Spain. First, there is a possibility of setting up a company (subsidiary or branch) in Spain and hiring employees through it. The set-up process consists of establishing a fixed base of business in Spain, to develop an activity, and grant a Public Deed before the Public Notary. Tax laws require a legal representative resident in Spain, as well as a Digital Certification, in order to work with the Spanish Tax Agency. The company in Spain will have several other obligations as well. Second, in contrast to the first option and only when certain requisites are met, the foreign company may have a legal representative in Spain (representation office). The legal representative in Spain must be a Spanish resident (individual or company) and it will be responsible for ensuring compliance with taxes, and the social contribution system payments of the foreign company in Spain, as these cannot be carried out directly by the foreign legal entity.

EMPLOYMENT CONTRACTS

Minimum Requirements
Generally, Spanish Labour Legislation allows for freedom of form when making a contract. Employment contracts can be verbal or in writing. However, during the term of a verbal contract, either of the parties may require that the verbal contract be reduced to writing. As an exception to the freedom of form, certain employment contracts must be in writing, including, but not limited to: temporary employment contracts, contracts involving special labour relations (such as those concerning lawyers, top managers or commercial representatives) and part-time contracts.

Fixed-term/Open-ended Contracts
In principle, employment contracts are presumed to be for an indefinite term. There are, however, a limited number of definite-term employment agreements. If the employee continues to work past the original term of the temporary agreement, the relationship becomes indefinite in time and the employee becomes entitled to the standard severance upon termination.

Trial Period
In the event that no special provision is contained in an applicable collective bargaining agreement, notice periods cannot exceed six months for workers with an academic degree and for any other employees. However, the contract for entrepreneurs has established a trial period of one year.

Notice Period
Spanish Labour Law requires that a party seeking to terminate an employment agreement provide the other party to the agreement with a minimum of fifteen (15) days' notice prior to termination. This rule does not apply to interim contracts. The parties to the contract may agree upon longer notice periods.

PAY EQUITY LAWS

Extent of Protection
Three key measures offer protection: i) the Organic Act 3/2007 of 22 March; ii) Royal Decree Law 6/2019 of 1 March, on urgent measures to guarantee equal treatment and opportunities between women and men in employment and occupation; and iii) Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006, on the application of the principle of equal opportunities and equal treatment for men and women in matters of employment and occupation. The central, regional and local governments will actively mainstream the principle of equal treatment and opportunities for men and women (established by the Organic Act 3/2007) in the adoption and implementation of their legislative provisions. Moreover, from time to time, the State Government will approve a Strategic Plan for Equal Opportunities, which will include measures to attain the objective of equality between

women and men and eliminate discrimination on the grounds of gender. Additionally, the Organic Act regulates affirmative actions. Such measures, which will be applicable while the situation exists, must be reasonable and proportional to the objective pursued in each case. Equality plans will stipulate the specific equality objectives to be reached, the strategies and practices to be adopted to attain them, and the establishment of effective monitoring and assessment systems.

Remedies

Employees can change equal pay practices through their participation in the application and elaboration of equality plans; mandatory for companies with over 250 employees, when mandated in the applicable CBA and when the labour authorities agree to substitute the formulation and implementation of such a plan for accessory penalties, resulting from penalty proceedings. Royal Decree-Law 6/2019 modifies the Organic Act and requires companies with 50 or more workers to draft equality plans and mandates that such plans shall be registered accordingly. If an employee believes that the company did not adhere to an equal pay practice, he is entitled to initiate an internal demand (within the company) for the protection of his labour rights. However, if the company does not have an internal procedure for this type of claim, a demand can be filed with the courts or the relevant labour inspection authority in order to guarantee the equal pay provisions.

IV. ISSUES ARISING DURING THE EMPLOYMENT RELATIONSHIP

WORKING CONDITIONS

Minimum Standards

Employers and employees are free to negotiate the terms and conditions of their employment relationship. Still, employees have various minimum rights under the law, regardless of any contrary language in their agreement.

Salary

An employee's salary includes all amounts received by an employee in compensation for services rendered. Salary can be monetary or in kind, but the latter cannot be higher than 30% of the total amount received by the employee.

Health and Safety in the Workplace

The employer shall take the necessary measures to ensure that the use of the workplace does not create risks to the health and safety of its employees or, if this is not possible, so that these risks are minimised. A company's Health and Safety Committee is an internal body tasked with consulting on a regularly basis the company's actions in the field of risk prevention, and it will be constituted in all companies or work centres that have 50 or more employees. The Committee will participate in the preparation, implementation and evaluation of risk prevention plans and programs in the company, as well as promote initiatives on preventive methods and procedures.

Managing COVID-19-Related Employee Issues

Royal Decree-Law 6/2020 published on March 11th 2020, establishes in Article 5 that in order to protect public health, the periods of isolation or contagion of workers caused by the COVID-19 will be considered as a situation equivalent to work accident, exclusively for the economic benefit of the Social Security system for temporary disability. This economic benefit (sick subsidy) will be up to 75% of the employee's base salary. In addition, vulnerable individuals qualify for sick leave if their job puts them at risk of contracting COVID-19. Vulnerable individuals are considered those with cardiovascular pathologies, high blood pressure, diabetes, chronic lung disease, immunodeficiencies, cancer processes in active treatment.

All individuals applying for vulnerable status must provide a medical certificate in order to receive the sick subsidy. In the event that working conditions in the company imply a serious and imminent risk for the employees' health and safety, it is permissible for an employee or for the works council to suspend working activities for those individuals that may be affected by coronavirus. However, fear of infection alone does not trigger the effect of the aforementioned articles. If an employee merely fears infection and refuses to work, he or she could in principle be sanctioned. To the extent this sanction could be considered unfair, due to the reasonableness of the matter, is uncertain. We would advise that employers warn the employee prior to issuing a sanction. Employers must adopt the measures and provide the necessary

instructions so that, in case of serious, imminent and unavoidable danger, workers may stop their activity and, if necessary, leave the workplace immediately. An employer must ask that the worker to stay home and immediately communicate their situation to the health authority. Notwithstanding, the employer must communicate this situation to the risk prevention service, so that they may adopt the measures they deem appropriate.

In order to promote work-life balance, the Government recognised the workers' right to receive a reasonable accommodation and/or reduction of working hours, for employees who can prove duties of care for their spouse, partner and relatives to the second degree of consanguinity. This reduction may reach up to 100% of the working day. A reasonable accommodation must be requested by the employee – specifying scope, content and justification. Examples of a reasonable accommodation include: change of shift, change of schedules, flexible hours, midday break or continuous workday, change of function, etc. Said measures shall remain in force for 3 months after the end of the state of alert.

COVID-19: Best Practices

In order to promote a safe return to work we suggest companies take into account the new reality that has unfolded due to COVID-19: updating company policies related to telework, wage / hour issues and vacation time, accordingly.

SOCIAL MEDIA AND DATA PRIVACY

Restrictions in the Workplace

In Spain, there is no express legal prohibition for employees not to use social media at the workplace. Such a prohibition can be regulated by the employer by written form, with a detailed policy on surveillance and control of the company's property and the use of social media tools during working hours. Although there is no need to seek approval to implement or negotiate such policies, some companies choose to negotiate directly with these representative bodies, before communicating such policies to the individual employees. Therefore, the measures used by the employer will be assessed according to the principle of proportionality meaning the measures to control the employee at the workplace have to be justified, appropriate, necessary and balanced.

Can the employer monitor, access, review the employee's electronic communications?

Spanish law recognises the employer's right to take the most appropriate measures to control the work of their employees, so as long as they do not violate their fundamental rights. Case law has established that when the electronic communication systems used by employees are owned by the company, and therefore susceptible to being considered as work instruments and tools, they may be subject to the employer's control.

Employee's Use of Social Media to Disparage the Employer or Divulge Confidential Information

Without clear policies, it can be difficult to lawfully sanction employees for misuse of social media. It is important to have a social media policy implemented by the employer and communicated to the employees, in order to control the use of company resources and tools. Also, some courts in first instance consider it necessary to include in such a policy, that it may be used for disciplinary reasons against the employee. The company will be entitled to enforce the policy and sanction the employee whenever breached.

EMPLOYEE BENEFITS

Social Security

In Spain, the social security system of national insurance contributions covers: i) common contingencies, these contributions cover the situations included in the general social security regime; ii) professional contingencies cover expenses resulting from labour accidents and occupational diseases; iii) overtime; and iv) other concepts such as unemployment, training or the Wage Guarantee Fund.

Healthcare and Insurances

Social security offers public medical care to all affiliated workers.

Holidays and Annual Leave

Employees are entitled to a minimum of thirty (30) days of paid vacation per year (may be improved by contract or CBA). In addition, there are fourteen (14) public non-working days per year, which may differ slightly by region.

Maternity and Partner Leave

Maternity leave lasts sixteen (16) weeks. The

mother must take six (6) of these weeks immediately after the birth. The remaining ten (10) weeks can be organised by the mother under her discretion until the child is twelve months old. However, the biological mother can anticipate the suspension up to four weeks before the expected date of birth.

The term "Paternity" has been replaced by "Partner Leave" and refers to the parent other than the biological mother. For births after 1 January 2020, partner leave will last twelve (12) weeks. The partner must take four (4) of these weeks immediately after the birth. The remaining eight (8) weeks can be organised by the progenitor under his/her discretion until the child is twelve months old. This is an individual right of the worker and its exercise cannot be transferred to the other parent. From 1 January 2021, partner leave will last sixteen (16) weeks.

Sickness and Disability Leave

Temporary disability benefits are daily subsidies that cover the worker's loss of income due to any sickness such as common diseases or non-work-related injuries, occupational diseases or work-related injuries. The maximum duration of the benefit is 365 days, but it can be extended for a further 180 days if, during this period, the person is expected to be cured. The contents and amounts of these benefits are the following: i) in case of common diseases and non-work-related injuries the amount will be 60% of the base rate from the 4th day of leave until the 20th, inclusive, and 75% from the 21st day onward; ii) in case of occupational diseases or work-related injuries the amount will be 75% of the base rate for benefits from the day following the date of leave from work.

In the case of disability of the child or the adopted child or foster care child, the suspension of the contract for maternity leave and partner leave will have an additional duration of two weeks, one for each parent. Whoever, for reasons of legal custody, needs to be in charge of the direct care of a child under twelve years of age, or a person with a physical or sensorial disability who does not perform any paid activity, shall have the right to a reduction of their working day, with the proportional decrease in salary between, at least, an eighth, and at most, half of its duration. Workers shall also have the right to a leave of not more than two years, unless a greater period is established by collective bargaining, in order to attend to the care of a family member up to the second degree of consanguinity or affinity who, for reasons of age, accident, illness or handicap, cannot fend for herself and does not perform any paid activity.

Other Forms of Leave

The Workers' Statute recognises other benefits, including, amongst others: 15 calendar days in case of marriage; 2 days for the death, accident or serious illness, hospitalisation or surgical operation without hospitalisation, but requiring home rest, of relatives up to second degree of consanguinity or affinity and should the worker need to travel for this purpose, the interval shall be 4 days; 1 day for change of domicile; for the indispensable time required to undergo pre-natal check-ups and childbirth preparation techniques that have to occur during the working day.

Pensions

Retirement pensions are included in all social security regimes and are for life. The conditions for obtaining a pension include: i) having turned sixty-five (65) years of age (there are exceptions: it could gradually change from 65 to 67 years if it attests 38,5 of contribution); and ii) having paid national insurance contributions for a minimum of fifteen (15) years – at least two (2) years of contributions must have taken place within the 15 years prior to retirement.

V. ISSUES ARISING ON TERMINATION OF THE EMPLOYMENT RELATIONSHIP

TERMINATION OF EMPLOYMENT CONTRACTS

Grounds for Termination

In Spain, the following are grounds for termination: Mutual consent of the parties; Grounds established in the contract; Expiration of the contract term or end of the specific job; Employee's resignation; Employee's death or permanent illness; Retirement of the employee; Employer's death, retirement or permanent illness; Force majeure that makes it impossible to continue rendering services; Collective dismissal based on objective grounds;

Employee's voluntary departure based on breach of contract by employer; and Disciplinary dismissal of the employee.

Is Severance Pay Required?

A disciplinary dismissal does not entitle an employee to receive any compensation from the company. A severance payment will only be required in cases that involve a court ruling declaring the dismissal unfair.

Whistleblower Laws

There is no specific employment legislation in place that provides legal protection for whistleblowers. However, internal company policies usually provide for protection as well regulate specific procedures to report illegal practices. The need to have internal prevention mechanisms and channels in order to reduce or avoid any potential criminal liability for companies or their representatives, came into force on 1 July 2015. Usually, protection in an internal policy will be limited to the company's employees, which have a direct hierarchical relation with the company. Outsourcing services, agency workers or independent contractors do not fall under the organisational scope of the employer, but this does not mean that they cannot be protected in case any breach must be violated. The main principle is that confidential information is only available to those people who are essential to the investigation of the complaint; anonymous complaints are generally prohibited, as there is a real need to identify the complainant and the accused party. The body responsible for the investigation will need to inform the accused (re: protection and confidentiality of personal information) during all stages of the process, even upon its conclusion.

RESTRICTIVE COVENANTS

Definition and Types of Restrictive Covenants

The following restrictive covenants are recognised and may be enforceable under the law: i) non-compete clauses; ii) non-solicitation of customers; and iii) non-solicitation of employees.

Use and Limitations of Garden Leave

The employer cannot, unless expressly referred to in the employment agreement, put the employee under garden leave, as they are not provided for statutorily. This is the reason why they may only be mutually agreed to within the scope of the employment contract. In the event an employer puts an employee on garden leave without having regulated this possibility within the contract, the employer bears the risk of having the employee file a claim for lack of occupation, which ultimately may result in a court claim requesting a constructive dismissal, on the basis of a severe breach of the employer's duties for not procuring sufficient occupation. Employers often use garden leave during an employee's notice period to prevent the employee from having further access to customers, clients and staff and to prevent the employee from working for a competitor, but this is generally used in Spain only when there is evidence of gross misconduct by the employee.

TRANSFER OF UNDERTAKINGS

Employees' Rights in Case of a Transfer of Undertaking

Employees' rights and obligations are subrogated to the new shareholder and remain intact. This includes special benefits and retirement compensation that employees may be entitled to.

Requirements for Predecessor and Successor Parties

The Workers' Statute requires formal notice to employees in the event of transfer of undertakings, including date or proposed date of the transfer, reasons for the transfer, legal, economic and social implications for the employees, and any measures envisaged in relation to the employees. Employment contracts are automatically transferred with the business to the new employer. Employees' rights and obligations are also transferred.

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SWEDEN.

CEDERQUIST

I. HIGHLIGHTS

- An employment agreement does not have to take any specific form to be valid.
- An employment may only be terminated on objective grounds, such as redundancy or personal reasons.
- An employer has certain consultation and information obligations towards trade unions, even if the employer is not bound by any collective bargaining agreement.
- Generally, citizens of countries outside the EU must have a work permit to work in Sweden.

II. INTRODUCTION

The labour market in Sweden is to a great extent self-regulated by employers' organisations and trade unions. The Swedish labour law model is based on civil rules that govern most aspects of the employer-employee relationship. Mandatory laws and regulations in collective bargaining agreements provide a comprehensive framework for the terms and conditions of employment. Disputes are finally settled by the Swedish Labour Court, which is the final instance in employment related disputes. However, the majority of disputes are solved by the parties on the labour market through consultations and negotiations.

III. ISSUES ARISING UPON HIRING INDIVIDUALS

PRE-EMPLOYMENT CONSIDERATIONS

Limitations on Background Checks

Employers have limited possibilities of obtaining information from registers containing information regarding applicants, such as medical or criminal records, and are limited by the EU General Data Protection Regulation (GDPR) as regards the processing of such personal data. An applicant can, on the other hand, voluntarily present medical or criminal information about himself or herself, if the employer should request it in connection with the recruitment. There is no obligation for the applicant to comply with such a request, but the non-compliance may result in the applicant not being offered the position in question. Applicants to positions such as teachers and day-care teachers, however, may be obliged to provide an excerpt from their criminal records before an employment agreement is entered into. As regards credit checks, these are allowed and may be conducted by the employer, if the credit check is of relevance to the applied position, i.e. the position will involve economy related tasks such as accounting or handling payments as a cashier. Otherwise, consent should be provided by the applicant prior to a credit check.

Restrictions on Application/Interview Questions

Employers have the freedom to decide which questions need to be asked in order to determine if an applicant is suitable for a position. However, an employer may not ask questions that could constitute discrimination, such as if the applicant is expecting a child or if the applicant is a member of a trade union. Furthermore, the employer may decide on tests and examinations that should be conducted as part of an application. Apart from the prohibition of discrimination and that an applicant may never be required to take a genetic test as a condition of employment, there are no other legal limitations to requiring an applicant to, e.g., undergo a medical examination or a drug or alcohol test. An employer can refuse to hire an applicant who does not consent to a test. However, an

employer must act in accordance with good labour market practice.

AUTHORISATIONS FOR FOREIGN EMPLOYEES

Requirements for Foreign Employees to Work
Generally, citizens of countries outside the EU must have a work permit to work in Sweden. EU and EEA citizens do not need a visa and they have the right to work in Sweden without work and residence permits. People who have a residence permit in an EU country, but are not EU citizens, can apply to obtain the status of long-term resident in that country. They thereby enjoy certain rights that are similar to those of EU citizens. Furthermore, the Posting of Workers Act applies to posted workers in Sweden.

Does a Foreign Employer need to Establish or Work through a Local Entity to Hire an Employee?
A foreign employer is not required to have a permanent establishment in Sweden to hire employees. However, if the employees are going to perform work in Sweden, the Foreign Employer is normally obligated to pay taxes in Sweden, as well as to register as an employer in Sweden. The employer will also need to pay social security contributions on the locally hired employee's salary. It is possible to enter into an agreement with the locally hired employee wherein the employee will report and pay the social security contributions. In such cases, the employee, instead of the foreign employer, should register with the Swedish Tax Agency.

EMPLOYMENT CONTRACTS

Minimum Requirements
An employment agreement does not have to take any specific form. However, Sweden has implemented the directive on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship. As such, an employer must provide certain information in writing to the employee concerning the principal terms of the employment. This information must be provided to the employee within one month of the commencement of the employment.

Fixed-term/Open-ended Contracts
The general rule is that an employment agreement is for an indefinite period, unless otherwise agreed. The Employment Protection Act allows a general fixed-term employment when the employer is in need of fixed-term employees. A fixed-term employment agreement may also be concluded for a temporary substitute employment and for a seasonal employment. If, during the past 5 years, a worker has been employed with a fixed-term agreement for, in aggregate, more than 2 years, the working arrangement is transformed into an indefinite-term employment.

Trial Period
The Employment Protection Act permits probationary employment for a period of no more than six months. If the employment is not terminated before the expiry of the probationary period, the employment will automatically become employment for an indefinite term.

Notice Period
An employer must provide a prior notice of termination before dismissing an employee. Further, the employer must observe certain formal rules set out in the Employment Protection Act when serving a notice of termination to an employee. Notices shall always be made in writing and must state the procedure to be followed by the employee in the event the employee wishes to claim that the notice of termination is invalid or to claim damages as a consequence of the termination. The notice shall also state whether or not the employee enjoys rights of priority for re-employment. Statutory notice periods vary between one and six months, depending on the length of the employment term.

PAY EQUITY LAWS

Extent of Protection
The pay equity legislation consists of provisions in the abovementioned Discrimination Act, which set forth that employers are required to work with active measures to prevent discrimination and to promote equal rights and opportunities regardless of employees' gender, gender identity or expression, ethnic origin, religion or belief, disability, sexual orientation and age. The employer's active procedures shall include measures to promote pay equity, and to prevent non-objective differences in pay and benefits between women and men.

Remedies
The employer can incur liability under the Discrimination Act, to compensate the employee for

discrimination due to non-objective differences in pay and benefits based upon gender. Furthermore, if someone is discriminated against by a provision in an individual contract or in a collective bargaining agreement in a manner that is prohibited under the Discrimination Act, the provision shall be modified or declared invalid upon the request of the discriminated person. In addition, the Equality Ombudsman supervises compliance with the Discrimination Act and may order an employer, inter alia, to provide information or to take measures deemed necessary for supervision and compliance with the pay equity legislation in the Discrimination Act. If such order is not complied with, the Equality Ombudsman can issue an order to fulfil the obligation subject to a financial penalty.

IV. ISSUES ARISING DURING THE EMPLOYMENT RELATIONSHIP

WORKING CONDITIONS

Minimum Standards

There are mandatory rules concerning minimum working conditions in Swedish law that must be observed by the employer. For example, there are regulations regarding working hours, work environment and non-discrimination. However, the terms and conditions are mainly regulated in the individual employment agreement and/or, if applicable, in the collective bargaining agreement.

Salary

There are no provisions regarding minimum salary in Swedish law. However, provisions regarding such matters are often found in the collective bargaining agreements. On 7 April 2020, legislative changes as regards the Act on Short-time Work Allowance entered into force with retroactive effect as of 16 March 2020. Following the legislative changes, employers may apply for and receive, state funded financial support when employing short time working arrangements, as alternatives to dismissals during temporary and unexpected financial hardship. A short time working arrangement needs to be agreed between employer and employee, or employee organisation, and may entail a temporary reduction in working hours by 20, 40 or 60 percent and a temporary reduction in salary by 12, 16 or 20 percent, respectively. When applying such arrangements, the employer may qualify for financial support amounting to 43 percent of the part of the employees' salaries that correspond to the reduced working hours, i.e. the basis when calculating the financial support is 60 percent of the employees' salaries if working hours are reduced by 60 percent. Due to the Covid-19 pandemic, specific regulations were enacted, temporarily, during 2020 to allow employees to retain more than 90 percent of their salary even though working hours were reduced by 20, 40 or 60 percent, and to allow employers to receive financial support amounting to 98.6 percent of the salary that corresponded to the reduced hours of work.

Health and Safety in the Workplace

Sweden has extensive legislation providing guiding principles regarding the work environment including, but not limited to, regulations concerning the obligations of employers and others responsible for safety, to prevent ill health and accidents at work. regulations as regards the cooperation between employer and employee, for example rules about the activities of safety representatives at the workplace. Employers should investigate, implement and monitor activities so that ill health and accidents at work are prevented and a satisfactory work environment is achieved, by carrying out risk assessments, investigating ill health, accidents, serious incidents, implementing measures, controlling measures and allocating work environment assignments.

Managing COVID-19-Related Employee Issues

If the employer has taken reasonable measures, and the employee still refuses to come in to work and is without a valid reason for doing so, it can ultimately be considered as a breach of the employment agreement, giving rise to a cause for dismissal. Information regarding infected employees is considered sensitive personal data that should not be processed by the employer, unless there is a specific reason for doing so. Generally, the processing and disclosure of such data is unlawful and should be avoided.

If an employee has symptoms of COVID-19 or otherwise feels sick, the employee should call in sick. During the period of illness, the employee will receive sick pay from the employer during the first 14 days, and then compensation from the Swedish Social Insurance Office. If an employee's child is

sick, the employee can stay home to take care of the sick child. Such time is considered as temporary parental leave and entitles the employee to parental benefits from the Social Insurance Office. If a close relative is sick, there are special regulations under which the employee can be on unpaid leave, for a short period, in order to take care of a sick relative.

COVID-19: Best Practices

- If the employer qualifies for support under the short-term layoffs scheme, the employer should apply for state aid under this relief program.
- If possible, employees should be encouraged to work from home and instructed to avoid all unnecessary travel.
- Many employers have already signed agreements with new hires, who are planning to begin working following the end of summer (2020). Such employers should re-evaluate if these hires are still needed, since it is much easier to terminate the employment agreements of new hires before any work commences, unless the employer will place such new hires on a "probationary" period at the start of their employment.

SOCIAL MEDIA AND DATA PRIVACY

Restrictions in the Workplace

An employer has the right to direct and allocate work and thus is able to restrict employees' use of Internet and social media during work hours. However, practically, this depends on the type of work that is being performed.

Can the employer monitor, access, review the employee's electronic communications?

Furthermore, an employer with a legitimate aim to supervise communications of the employee may be allowed to do so as far as the employee has been informed of it beforehand and the supervision is not excessive in regard to the employee's right to privacy.

Employee's Use of Social Media to Disparage the Employer or Divulge Confidential Information

An employee who wilfully or through negligence attacks a trade secret of an employer, of which he or she has been informed in the course of the employment, shall compensate the employer for the damage caused by the attack. Moreover, the employee may, by use of social media, act in breach of his or her employment contract, e.g. the duty of loyalty. Depending on the circumstances at hand, the employee may be dismissed for disloyal behaviour. Though, the employee may have certain rights to criticise the employer when grievance is at hand.

EMPLOYEE BENEFITS

Social Security

There is no overall legislation regarding employee benefits, but there are some statutory provisions that give the right to payment in certain specific areas. Furthermore, employers are obliged to pay social security tax on the employee's salary and other employment benefits that, inter alia, include statutory pension contributions. The employer's social security contributions, paid in addition to the salary, amount to 31.42 percent (2020) of the employee's gross salary. These contributions are mandatory and include specific charges, such as, old-age pension, survivor's pension, fees for health insurance and work injury. The fees constitute part of the social security system.

Healthcare and Insurances

Except for insurances included in the mandatory employer social security contribution, there is no obligation under the law for the employer to provide the employees with different insurances. However, employers that are bound by collective bargaining agreements are obliged to take out certain insurances, such as, group life insurance (TGL) or work injury insurance (TFA), in addition to the insurances included in the employer social security contributions.

Holidays and Annual Leave

Vacation entitlement is regulated by the Annual Leave Act, which distinguishes between unpaid and paid vacation, and between a "vacation year" (1 April to 31 March) and a "qualifying year" (the 12-month period prior to the vacation year). An employee earns his or her entitlement to paid vacation during the qualifying year and is entitled to use his or her paid vacation during the vacation year. The basic vacation entitlement is 25 paid days per year. It is possible for employees to carry over their entitlement to paid (but not unpaid) vacation days to the next year, but only if the employee has earned more than 20 days of paid vacation, and only for those days that exceed 20 days.

Parental Leave

The employee may be on parental leave until the child is 18 months. In addition to the parental leave, the mother can start drawing parental allowance 60 days prior to the expected birth of the child. The father of the child may also be on paternity leave for 10 working days in connection with the child's birth. Compensation is paid by the state for a total of 480 days per child. The compensation may be paid until the child reaches the age of twelve years, but only 96 days may remain when the child reaches the age of four years. This entitlement of parental days is divided equally between the parents, but they have the right to transfer their entitlements to each other, with the exception of 90 days. These 90 days will be forfeited if they are not transferred to the other parent, hence, one parent may use a maximum of 390 days. For 390 days the allowance is capped at 80 percent of the employee's salary, though, the allowance can be SEK 1,006 per day as a maximum (2020). For the remaining 90 days, the compensation is SEK 180 per day. If a collective bargaining agreement applies, the employee may be entitled to certain compensation from the employer in addition to the compensation from the state.

Sickness and Disability Leave

The employee is entitled to mandatory sick pay payable by the employer, provided that the employment is expected to continue for more than 1 month or if the employee has been working for more than 14 consecutive days. Sick pay is paid by the employer during days 1-14 at 80 percent of salary, but the employer is entitled to make a deduction of approx. 20 percent of the employee's employment benefits during a week. If the employee suffers sickness again within 5 days, the previous sick leave period will continue. As from day 15, the employee may be entitled to compensation payable by the state. The entitlement to such compensation is based on strict rules and is decided by the Swedish Social Insurance Agency. There is no obligation for the employer to provide any supplementary sick pay, unless a collective bargaining agreement is in place. If an employee can be assumed to be on full or partial leave due to sickness during a period of at least 60 days, the employee is entitled to a rehabilitation plan drafted in cooperation with the employer and including adaptive and rehabilitative measures which may facilitate the employee's return to work. Disability leave is not recognised as being any different from sickness leave. However, a partial or full disability may entitle the disabled person to activity compensation or sickness compensation paid by the state.

Other Forms of Leave

Employees who have been employed during the preceding six months, or for a total of at least 12 months during the preceding two years, have the right to educational leave. Employees are also entitled to full leave from his or her work for, at most, six months in order to start a business. However, the business of the employee may not compete with the employer's business, and the leave does not have to be granted by the employer if the leave would result in significant inconvenience for the operations of the employer. Additionally, there are several circumstances which entitle an employee to leave in special situations (e.g. to take care of a close relative or to take Swedish-language education as an immigrant).

Pensions

The Swedish pension system is based on an income-related pension, premium pension and guarantee pension. The pension system is administrated by the state and financed by employers and employees jointly. The employer's contribution is paid through the employer's social security contributions. In addition to the state pension, the employees usually are entitled to supplementary pension provided by the employer, which, under a CBA, the employers are obliged to pay, and for those not bound by a CBA, such additional pension benefits are completely optional.

The predominant pension scheme for white-collar employees in the private sector is the ITP pension plan, which is a supplementary pension plan. The plan includes old-age pension, supplementary old-age pension, disability pension and family pension. The employees belong to ITP-1 (a defined contribution plan) or ITP-2 (a defined benefit plan) depending on the employee's age. For blue-collar employees the SAF-LO pension plan applies, which is a defined contribution plan. While no other benefits are required; it is common for employers to offer a fitness benefit.

V. ISSUES ARISING ON TERMINATION OF THE EMPLOYMENT RELATIONSHIP

TERMINATION OF EMPLOYMENT CONTRACTS

Grounds for Termination
Employers may dismiss employees either with or without notice. A dismissal with notice must be based on objective grounds. Objective grounds are not defined by statute or case law, but can be either for objective reasons or subjective personal reasons. Objective reasons are dismissals based on redundancy, re-organisation or the economic situation of the employer, while subjective personal reasons are all dismissals that relate to the employee personally, such as the employee's conduct or performance.

Is Severance Pay Required?
There are no statutory provisions regarding severance pay. However, an employee may be entitled to severance pay in accordance with an employment agreement, a collective bargaining agreement or a separation agreement.

Whistleblower Laws
An employee who reports criminal activity or other gross misconduct, of which the employee has a valid reason to suspect in the employer's business, shall be protected from reprisals from the employer. Protection from reprisals according to the Whistleblowing Act, however, generally requires that the employee try to report information on suspected conduct internally before disclosing it externally. Should the employer not act on the information reported by the employee, the employee may disclose it to the public or to the authorities. The protection offered by the Whistleblowing Act may not be set aside through an agreement (e.g. via a confidentiality clause in the contract).

RESTRICTIVE COVENANTS

Definition and Types of Restrictive Covenants
The following restrictive covenants are recognised and may be enforceable under the law: i) non-compete clauses; ii) non-solicitation of customers; and iii) non-solicitation of employees.

Use and Limitations of Garden Leave
An employer may unilaterally release the employee from their duty to work during the notice period. If a mutual separation agreement is reached, it is common for the parties to also agree on a release from work, i.e. garden leave.

TRANSFER OF UNDERTAKINGS

Employees' Rights in Case of a Transfer of Undertaking
In conjunction with the transfer of a business from one employer to another, the rights and obligations under employment agreements and employment relationships that existed at the time of the transfer to the new employer shall also be transferred. Where an employee's employment agreement and the employment relationship have been transferred to a new employer, the new employer shall be obligated, for a period of one year from the date of the transfer, to apply the employment terms and conditions (CBA) which the previous employer was bound to. Prior to the decision to transfer the business (or a part of it), the acquiring company and transferring company, must, as a rule, call for and conduct union consultations with the local union representatives under the applicable CBA. If the consultation requirement is not observed, the breaching company may be liable for damages to said unions.

Requirements for Predecessor and Successor Parties
The transferring company will remain liable (jointly with the acquiring company) towards the transferred employees for liabilities relating to the time prior to the transfer. However, the parties to a business transfer agreement are free to agree on a different distribution of liability between them.

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I. HIGHLIGHTS

- Switzerland has a dual system for the admission of foreign workers (preferential treatment of EU/EFTA nationals).
- Every employee has the right to decide whether to join a trade union or not. The unions are financed through the contributions of their members.
- A Swiss employer is fully liable for social security contributions in respect of his employees.
- Where the employer transfers a business or a part of a business to a third party, the employment relationship and all attendant rights and obligations pass to the acquirer as of the day of the transfer, unless the employee refuses to transfer.
- In principle, no particular cause to terminate an employment relationship is required.

II. INTRODUCTION

The legal regime governing employment relationships in Switzerland is generally more liberal and favorable towards the employer than in many other European countries. This is partly because labour unions are somehow less influential in Switzerland compared to, for example, labour unions in European Union countries, but also because the unemployment rate traditionally has been and remains relatively low in Switzerland. According to the principle of freedom of contract, the parties of an employment agreement are free to agree on the content and terms of their agreement to an extent that is substantially greater than in most other European jurisdictions. Swiss employment law, however, does contain some basic mandatory provisions. Most important, are the mandatory provisions aiming to protect the safety and the health of the employee. Public labour protection regulations cover, among other things, working hours and breaks, special protection for young employees, pregnant women and breastfeeding mothers, work-related injury insurance and industrial accident prevention. For issues relating to employment law, the provisions of the employment contract should be the first point of reference, taking into account mandatory statutory provisions. If the employment contract is silent on a certain issue, then the non-mandatory statutory provisions apply.

III. ISSUES ARISING UPON HIRING INDIVIDUALS

PRE-EMPLOYMENT CONSIDERATIONS

Limitations on Background Checks

Employers may contact references given in an applicant's CV or job application. Medical checks may be requested only to the extent that this is justified by the work involved (e.g. dealing with heavy workloads or dangerous jobs where physical fitness is a requirement). Drug screening is justified only to the extent that it is required due to the work involved (e.g. for truck drivers or dangerous jobs where physical fitness is required). Credit checks are generally not permissible unless the position in question justifies such a check (e.g., bankers, accountants or lawyers). Employers cannot screen a candidate's social media accounts. However, professional sites such as LinkedIn and Xing may be screened.

Restrictions on Application/Interview Questions
As a general rule, the employer may handle data concerning the employee only to the extent that such data concerns the employee's suitability for this job or are necessary for the performance of the employment contract. This also applies to pre-employment screening and hiring practices. Consequently, to give some examples, it is permitted to ask the candidate for an excerpt from the criminal register to the extent that the position in question justifies asking (e.g., for positions requiring higher trustworthiness).

AUTHORISATIONS FOR FOREIGN EMPLOYEES

Requirements for Foreign Employees to Work
In order to employ staff in Switzerland, it is not necessary to set up your own company in Switzerland. Employees can be employed directly by a foreign company. So far, Switzerland has a dual system for the admission of foreign workers. Nationals from the EC (European Community) or EFTA (European Free Trade Association) countries benefit from the Agreement on Free Movement of Persons and, in general, do not need a work permit if residence is taken in Switzerland, subject to certain restrictions and exceptions for nationals from the new EC countries. In regard to non-EC and non-EFTA nationals, only a limited number of management-level employees, specialists and other qualified employees are admitted from all other countries (subject to a quota as determined by the Federal Council). If non-EC or non-EFTA nationals (without residence in Switzerland) work in Switzerland temporarily for more than eight days for a non-Swiss company, such employees must be reported to the authorities in advance, even if no work or residence permit is required.

Does a Foreign Employer need to Establish or Work through a Local Entity to Hire an Employee?
In order to employ staff in Switzerland, it is not necessary to set up your own company in Switzerland. Employees can be employed directly by a foreign company.

EMPLOYMENT CONTRACTS

Minimum Requirements
Material requirements: under Swiss law, an employment contract is a contract whereby the employee is obliged to perform work in the employer's service for either a fixed or an indefinite period of time, and the employer is obliged to pay salary either based on time periods or based on the work performed. As compared to other contracts involving the rendering of personal services, the most distinctive feature of the employment contract is that the employee's personal and organisational dependence reflects a relationship of legal subordination, i.e. the employee is not free to choose the time, place or type of work he or she will perform. By contrast, for example, contracts for legal services concluded between attorneys and their clients typically lack such legal subordination and, accordingly, do not qualify as employment contracts. Consequently, different statutory rules will apply. Formal requirements: except for a few special agreements - such as the apprenticeship contract, the employment contract with a commercial traveler or the employment contract between a commercial staff supplier and an employee (which all require written form) - an employment contract is not subject to any specific form and may even be agreed verbally or by implication. Certain contractual provisions are, however, only valid if agreed in writing (e.g. restrictive covenants, exclusion of compensation for overtime, notice periods differing from statutory law, etc.).

Fixed-term/Open-ended Contracts
The parties are free to enter into an unlimited or a fixed-term contract. The sequence of several fixed-term contracts between the same parties may, however, be regarded as circumvention of the employee's protection against dismissal (if there is no objective reason for such sequence). In this case, the employment contract is considered to be unlimited.

Trial Period
During the trial period, either party may terminate the contract at any time by giving seven days' notice; the trial period is, by statutory law, considered to be the first month of an employment relationship. However, if agreed in writing, the trial period may be extended to three months. Where the period that would normally constitute the probation period is interrupted by illness, accident or performance of a non-voluntary legal obligation, the probation period is extended accordingly. During the trial

period, the statutory rules on termination at an inopportune juncture (pregnancy, illness, accident, military service, et al.) do not apply.

Notice Period

Ordinary termination: any employment contract concluded for an indefinite period of time may be unilaterally terminated by both employer and employee, subject to statutory notice periods ranging from one to three months, depending upon the length of service. Extraordinary termination: both employers and employees have a right to terminate the employment contract immediately and without notice for cause, regardless of whether or not the contract was concluded for an indefinite period of time and regardless of any statutory notice periods, which would apply to an ordinary termination.

PAY EQUITY LAWS

Extent of Protection

In Switzerland, employees have the right to equal pay for equal work, or work of equal value, irrespective of gender. Since 1981, equal pay has been enshrined in the Federal Constitution (Art. 8) and since 1998 this principle is specified in the Swiss Gender Equality Act. Workers may not be discriminated against on grounds of their sex, especially with reference to their marital status, their family situation or, in the case of female workers, pregnancy. The prohibition applies in particular to the recruitment, the allocation of tasks, the organisation of working conditions, remuneration, training, promotion and dismissal. Since 1 July 2020, the amendment to the Swiss Gender Equality Act has obliged companies with 100 or more employees to conduct wage equality analyses.

Remedies

The provisions of the Swiss Gender Equality Act are intended to facilitate effective enforcement of the law. This includes the introduction of free proceedings before the Cantonal courts for disputes relating to equality claims, the easing of the burden of proof, representative actions and protection against revenge dismissals. Swiss law does not provide for criminal sanctions in case of violations of equal pay regulations.

IV. ISSUES ARISING DURING THE EMPLOYMENT RELATIONSHIP

WORKING CONDITIONS

Minimum Standards

In Switzerland, the most important conditions of an employment contract are provided by statutory law and by the applicable collective agreement (if any). In particular, collective agreements set the terms and conditions of employment, which include, amongst others: categories and related job descriptions; duties and obligations; minimum wages; job retention rights during absences due to illness; salary increases due to length of service; termination, resignation, criteria for calculation of the severance pay; night work; maternity leave; and holidays.

Salary

Salary is usually paid at the end of the calendar month deducting all applicable social security contributions and withholding taxes (if any). Swiss law explicitly provides that the salary paid to employees must be stated in a pay slip. So far, four cantons (Jura, Neuenburg, Geneva and Ticino) have introduced minimum wages for all employees. They vary from CHF 19 to CHF 23 per hour. Minimum wages may also be found in collective labour agreements.

Health and Safety in the Workplace

Although Switzerland has set its own policies on occupational safety and health, these basically comply with the EU legislation. Differences do exist e.g., non-reporting of occupational accidents in Switzerland. The employer shall take all measures necessary to maintain and improve health protection and to ensure the physical and mental health of workers.

Managing COVID-19-Related Employee Issues

Quarantine: employees are entitled to compensation in the event of interruption of employment due to a quarantine ordered by a doctor or a public order. Loss of earnings is regulated in accordance with the Income Compensation Act and paid as a daily allowance. The daily allowance corresponds to 80% of the income and amounts to a maximum of CHF

196 per day. The compensation is limited to 10 daily allowances. Child Care: parents who had to interrupt their employment due to school closures in order to care for their children were entitled to compensation. On 11 May 2020, it became mandatory for public schools in Switzerland to have been re-opened, and since 6 June 2020, grandparents are no longer advised to stay away from their grand-children. Therefore, the special compensation for childcare is, for the moment, no longer in place. Medical Leave: employees suffering from COVID-19 receive paid medical leave. The length of the paid medical leave is dependent on whether the employer has a daily per diem sickness insurance in place, which normally covers 80% of the salary for a maximum of 720 days. If no such insurance is available, the length of the paid medical leave depends on the years of services. In the first year of service, the entitlement amounts to three weeks of full pay.

Healthy employees who do not belong to a risk group may not simply stay away from work for fear of infection. However, employers have a duty to protect the health of their employees and need to take the necessary appropriate measures (see section III. Health and Safety Measures, above). If home office is not an option and the employee refuses to work despite the fact that adequate protection measures have been put in place, the employer does not need to continue paying the employee's salary. Whether or not a termination for cause may be justified depends on the specific circumstances. There is no mandate for the employer to notify authorities if an employee is infected. If possible, we advise to obtain permission from the infected employee to inform members of the workforce and co-workers about the infection. Canceling of holidays due to travel bans – In principle, the employer can insist that an employee already takes planned vacation days, as long as the vacation allows the employee to recover, even if the employee cannot pursue his/her original holiday plan due to travel bans.

COVID-19: Best Practices

The "best practice" depends on many factors such as industry, size of company, possibility to work from home, etc. for many companies, one very helpful measure of support was the possibility to apply for short time work compensation and the possibility to work from home. The latter should be accompanied by clear instructions regarding work time, workplace environment, expense regulations and reporting.

SOCIAL MEDIA AND DATA PRIVACY

Restrictions in the Workplace

In principle, the employer can restrict the use of the Internet and social media during working hours. An employer may control social media in the workplace if it is necessary for the performance of the employment contract and further is proportionate. Under these conditions, an employer may block social media completely. In contrast, it is rather unlikely that an employer is able to show a legitimate interest in controlling an employee's use of social media outside the workplace. However, this may for instance hold true for ideological enterprises.

Can the employer monitor, access, review the employee's electronic communications?

To the extent that the employment falls under the Labour Act, monitoring mechanisms are not permitted if they are directed at the employee's behaviour. However, they may be permitted if they pursue other aims, for example, security or controlling the proper use of the work infrastructure and working time. Monitoring mechanisms need to be codified in internal regulations and the latter communicated to the employees. In general, an employer will only be able to monitor peripheral data (such as the point in time of the communications or interactions, their length, and the involved connections). Monitoring the actual content of communications requires outstanding interests, which the employer will not be easily able to show. As regards telephone communications, they are in principle protected by criminal law.

Employee's Use of Social Media to Disparage the Employer or Divulge Confidential Information

If an employee disparages or even defames the employer or illegally discloses business secrets through the authorised or unauthorised use of social media, or through entries in publicly accessible blogs or assessment platforms, this can justify sanctions up to termination without notice. In addition, the employer can have such entries deleted or banned by court order and, if necessary, take criminal action against the employee.

EMPLOYEE BENEFITS

Social Security

A Swiss employer is fully liable to social security contributions in respect of its employees. This system, however, only applies to resident employers and non-resident enterprises having a permanent establishment in Switzerland. The contributions are borne fifty-fifty by both employer and employees. However, the employer contributes insurance premiums for occupational accidents and diseases. He can deduct insurance premiums for non-occupational accidents (as well as the employee's share for pension, sickness and unemployment insurance) from the employees' salary. The rates are, in general, based on the gross salary.

Healthcare and Insurances

The mandatory Accident Insurance (UVG) contributes to the costs of medical treatment and gives financial support after accidents and occupational diseases. All employees occupied in Switzerland are covered. Sickness allowance insurance compensates for loss of salary due to incapacity for work caused by illness or pregnancy. All employees in Switzerland who have not yet reached the legal retirement age must be covered by unemployment insurance, subject to certain conditions. If you become involuntarily unemployed, you are entitled to 70% of the average earnings paid into your unemployment insurance in the previous six months. If you have a child or your daily allowance falls below a predetermined minimum, you are entitled to 80% of the average earnings in the last six months. The unemployment benefit is allocated as a daily allowance covering five days per week. Entitlement begins after a waiting period of five days of proven unemployment. Unemployment benefits provide up to 400 daily allowances to be received in a two-year period. Employees over 55 and having made unemployment insurance contributions for at least 18 months are permitted up to 520 daily allowances in the same period.

Holidays and Annual Leave

The minimum paid annual holiday entitlement in Switzerland for all employees is four weeks. Young employees up to the age of 20 are entitled to five weeks of holidays per year. Vacation must be used and cannot be compensated by payment; compensation of vacation by payment is admissible only at the end of an employment relationship. For the duration of their holidays, employees are entitled to the same pay as if they were working. Part-time employees and employees paid on an hourly basis are entitled to pro-rata holiday time. In addition, and depending on the canton in which they work, employees enjoy between five and fifteen public holidays per year. Whenever a public holiday falls on a work-free day, employees are not entitled to a substitute day off. A public holiday is not deducted from the vacation entitlement whenever it falls within the vacation of an employee.

Maternity and Paternity Leave

Maternity leave lasts 98 days (or 14 weeks) from the day it starts. Both full-time and part- time employees are entitled to maternity leave. Women who return to work earlier lose their entitlement to compensation. Mothers are paid 80% of their wages in the form of a daily allowance up to the maximum of CHF 196 per day. Cantonal provisions, staff rules and collective labour agreements may provide additional solutions. Women must not work during the first eight weeks after the birth. Paid Paternity Leave (new legislation as per 1 January 2021): fathers must take the new two-week paid paternity leave within six months after the child's birth. They can either take such leave days consecutively or as individual days. Employers must apply to the relevant social security authorities for loss of income compensation, as it is not paid out automatically. The amount of compensation is the same as under the maternity insurance: 80% of the average earned income before the birth of the child, up to a maximum of CHF 196 per day.

Other Forms of Leave

Paid Care Leave (new legislation as per 1 January 2021): in addition to paternity leave, the new so-called care leave legislation introduces an obligation on the employer to continue to pay the salary for the care of a family member or partner with a health impairment, during a short-term absence of a maximum of three days per specific impairment, up to a maximum of ten days per year (329h CO). Care Leave for the Care of Seriously Ill Children (new legislation as per 1 July 2021): newly introduced is a childcare leave if an employee's child is seriously impaired in health due to illness or accident. The leave is limited to a maximum of 14 weeks (329i CO). Salary continuation is governed by the Swiss Federal Act on Income Compensation for Service

Providers and for Maternity, which amounts to 80% of the salary and is capped at CHF 196 per day.

Pensions

The Swiss pension system rests on three pillars: 1) The first pillar provides old age pensions as well as benefits for widowers and orphans. The ordinary age of retirement is 65 years for men, 64 for women. It can be anticipated or postponed, with financial consequences. It is an PAYGO system, financed by contributions from employees and employers (4.2% of the employee's income each) and shall cover the basic living expenses. 2) The occupational pension scheme (2nd pillar) shall, together with the Old-age, Survivors' and Invalidity Insurance, enable the insured person to maintain his or her previous lifestyle in an appropriate manner. It is a funded pension plan. It is compulsory for employees and is financed by both employees and employers. The sum of the contributions of the employer should be at least equal to the sum of the contributions of his employees. The second pillar offers old age pensions. The pension funds also provide benefits in case of invalidity and benefits to survivors in case of premature death. Under certain conditions, the second pillar can be used before retirement to buy a principal home or to start an independent activity. 3) The third pillar consists of private pension schemes provided by the private sector. It is optional and financed entirely by the individual.

V. ISSUES ARISING ON TERMINATION OF THE EMPLOYMENT RELATIONSHIP

TERMINATION OF EMPLOYMENT CONTRACTS

Grounds for Termination

As a principle, both parties to an employment contract may terminate the employment agreement at any time, subject to either the statutory or contractual notice period; without the need to fulfill any particular grounds for termination. In recent years, courts have established stricter rules for dismissing elder employees with many years of service. The Federal Supreme Court has ruled that an employer has a higher duty of care toward these employees. In particular, the employer must inform the employee in good time, of the intended dismissal and the employee must have an opportunity to be heard. Solutions must be sought in order to maintain the employment relationship and avoid dismissal. Only if these measures do not bear fruit, can dismissal be pronounced as a last resort.

Is Severance Pay Required?

There are no statutory severance payment obligations. An obligation may, however, be provided by a collective agreement or by a social plan in case of collective redundancy.

Whistleblower Laws

Swiss labour law still lacks explicit labour law protection for whistleblowers despite political advances and government efforts. De lege lata, an employee must first turn to the employer's internal departments to uncover grievances. Only if they do not react can the authorities or the public be informed. However, there is still no effective protection against dismissal. A dismissal as a result of a permissible disclosure of grievances would be abusive, but valid. The employer could be sanctioned by penalty of payment up to a maximum of 6 monthly salaries.

RESTRICTIVE COVENANTS

Definition and Types of Restrictive Covenants

The law does not require a consideration for the post-termination non-competition covenant. However, courts are generally more reluctant to restrict agreed prohibitions where the employee receives consideration. Non-compete obligations are extinguished if the employer terminates the employment relationship without the employee having given him any good cause to do so, or if the employee terminates it for good cause attributable to the employer. Non-solicitation clauses follow the same rules as non-compete clauses. Non-Solicitation of Employees: the majority of scholars are of the opinion that non-solicitation covenants regarding employees are not subject to the same restrictions as general post-contractual noncompetition covenants, because such covenants do not restrict employees in their professional development. Nevertheless, the restrictions have to be adequate to protect the employers' legitimate interests, because excessive

covenants would constitute a breach of employees' personal rights. Accordingly, an employee can be prohibited from soliciting other employees.

Use and Limitations of Garden Leave

In principle, there is no entitlement to active employment under Swiss law. However, members of specific professional groups may be adversely affected in their economic development by garden leave, which is why a claim to active employment may exist in exceptional cases (e.g. professional athletes, researchers, pilots, surgeons, etc.). Garden leave is very common in case of dismissals, particularly the dismissal of executives and/or in connection with the dismissal of sales forces or client relationship managers. During garden leave, employees retain all contractual entitlements to remuneration, including pension entitlements. Hence, the base salary and variable salary must be paid. The calculation of variable salary during garden leave is quite often difficult, due to the lack of provisions in employment agreements or compensation programs. For instance, an employee may be entitled to on-target variable pay. However, if the employee was always over target in the past, he or she may be entitled to be paid on the basis of past performance. In case of a dismissal, garden leave may be granted to compensate the employee for their outstanding vacation balance, to a certain amount. There is no strict precept on the ratio – garden leave / compensation of vacation – and court practices vary considerably. As a rule of thumb, some courts apply the 1/3 rule, meaning that one third of the period of garden leave can be used for the compensation of vacation.

TRANSFER OF UNDERTAKINGS

Employees' Rights in Case of a Transfer of Undertaking

If a transaction qualifies as a (partial) business transfer, the employment relationships existing at the time of the transfer (including the ones under notice) are automatically transferred including all rights and obligations as of the date of transfer, unless the employee objects to the transfer. If an employee objects to the transfer, the employment relationship is terminated upon the expiration of the statutory notice period even if longer or shorter contractual notice periods apply.

If any redundancies, terminations or changes in the working conditions are planned in connection with a business transfer, the works council, if any, or otherwise the employees, must be consulted in due time, prior to the decision that employees are made redundant or the changes in the working conditions implemented. This consultation process is also necessary if the employees will be dismissed or the changes implemented after the transfer (by the new employer), because such dismissal and changes would be seen as a result of the transfer of business if implemented within the first few months after the transfer. It is important to note that the consultation process needs to be conducted before any decisions in regard to any measures are made. The employer needs to give the works council or the employees at least the possibility to make suggestions on how to avoid any measures, specifically on how to limit the number of dismissals.

Requirements for Predecessor and Successor Parties

The current employer and the new employer are jointly and severally liable for any employee's claim that have become due prior the transfer, and that will later become due until the date upon which the employment relationship could have validly been terminated. If a collective employment contract applies to any employment relationship transfer, the new employer would need to comply with it for one year, unless the collective employment contract expires earlier or is terminated by notice.

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I. HIGHLIGHTS

- Termination of employment is process-driven so if the right procedure is followed, liability can usually be avoided.
- Discrimination and whistleblowing laws provide a high degree of protection in the workplace; claims are frequently brought in the tribunals and compensation is based primarily on financial loss (with no cap) and there are no punitive damages.
- Although union representation is declining, workplace representation is becoming more common but is generally not problematic for employers.
- Women are entitled to take one year's maternity leave, and this leave can be shared with their partner; maternity pay can also be shared but the pay that can be shared is limited to 37 weeks' pay capped at GBP 151.20 per week.

II. INTRODUCTION

This guide is intended as a brief outline of employment law in England & Wales. Much of the relevant legislation also applies in Scotland. Northern Ireland has a separate statutory code although much of its employment law is coordinated with that of England, Wales and Scotland. This guide is therefore not to be used as authority for the law in Scotland or Northern Ireland. Provided they are prepared to pay sufficient compensation, employers in England & Wales can usually achieve what they wish. In any event, most businesses are conscientious about wanting to be seen as "good employers".

III. ISSUES ARISING UPON HIRING INDIVIDUALS

PRE-EMPLOYMENT CONSIDERATIONS

Limitations on Background Checks

There are certain background checks that must be carried out before hiring an individual. Employers have a duty to prevent illegal working in the UK by carrying out prescribed document checks on candidates before employing them to ensure they have the right to work in the UK. Employers may seek information about an individual's criminal records history by: voluntary disclosure; and official criminal records checks through the Disclosure and Barring Service. The processing of criminal convictions data is restricted under the GDPR and Data Protection Act 2018; meanwhile, clarification on what this means for employers, in practice, is currently pending. It is a criminal offence for an employer to require an individual to obtain a copy of their criminal records, by means of a subject access request, as a condition of employment or continued employment.

Restrictions on Application/Interview Questions

Employers must ensure that discriminatory practices are not used during the recruitment process, which includes job advertisements and the interview and selection process. It is generally unlawful for an employer to ask about the health of a job applicant, or about any disability they may have, before making an offer of employment. There is no legislation that specifically deals with social media use in recruitment, but when using social media to assess the suitability of potential new recruits, employers need to take care not to discriminate unlawfully. Another area of risk

for employers relates to data protection. Select information about an individual, which is available through a social media site will constitute personal data and in some cases, will amount to sensitive personal data under the GDPR. Employers will need to ensure that they are complying with the applicable data protection obligations, if they are using this information during the recruitment process. Employers should also keep clear and objective records of job applicants, focusing on the extent to which each candidate's qualifications, skills and experience matched the requirements given in the job specification.

AUTHORISATIONS FOR FOREIGN EMPLOYEES

Requirements for Foreign Employees to Work

EU nationals have previously had the right to enter, remain in and work in the UK without a UK visa. As of 31 December 2020, this right has ended and EU nationals arriving in the UK after this date will be subject to the same immigration requirements as non-EU nationals. Any EU nationals living and working in the UK before this date must make an application under the EU Settlement Scheme by 30 June 2021. They should register for Settled Status (if they have been in the UK for 5 continuous years) or Pre-Settled Status (if they have been in the UK for less than 5 years). As matters stand, from 1 January 2021 in most cases, non-UK nationals seeking entry into or permission to remain in the UK for the purpose of employment will need to apply under the new Sponsored Skilled Workers ("SSW") framework of the Points Based System ("PBS"), which replaces the Tier 2 (General) route. SSW applications can only be sponsored by Home Office approved UK-based employers, on behalf of the person they wish to employ.

Employers must ensure that the role for which they are recruiting is sufficiently skilled and meets the minimum salary threshold requirement, and that anyone coming to the UK speaks English to the required standard. All applicants must also meet the new Good Character requirements which means, for example, that they do not have a custodial sentence of at least 12 months. The government expects to release the final details of the PBS before 31 December 2020. The previously applicable Tier 2 (General) route could lead to Indefinite Leave to Remain ("ILR") after five years' lawful residence in the UK, and the SSW will also be a route to ILR. Alternatively, UK employers can use the Tier 2 Intra Company Transfer ("ICT") route for temporary transfers of those already employed by a group company outside the UK. Tier 2 ICT visas do not lead to Indefinite Leave to Remain.

Does a Foreign Employer need to Establish or Work through a Local Entity to Hire an Employee?

Foreign employers are not required to establish, or work through, a local entity in order to hire employees in the UK. How any tax and national insurance contributions will be dealt with, will depend on the circumstances, and advice should be sought in relation to this.

EMPLOYMENT CONTRACTS

Minimum Requirements

The standard type of employment contract in the UK is an "open-ended" contract which can be terminated on notice (subject to the protection which the law provides on unfair dismissal). An employment contract need not be in writing and may be partly written and partly oral. However, the basic terms of the employment must be confirmed to employees in writing. Since April 2020, further information must be included in the written statement of terms and this must be provided on or before their start date. From April 2020, this right was extended to workers who are entitled to the basic terms of their engagement in writing on or before their first day. The most common employment relationship is that of full time permanent employment, but an increasing number of staff have flexible working arrangements. This may include working part time, through fixed term contracts or through an agency. UK law gives special protection for these types of workers. Zero hours contracts have become more common in the UK. New regulations prohibit the inclusion of exclusivity clauses in such contracts. There are also special rules relating to apprentices, trainees and young persons. Agency workers are also entitled to a Key information document which must include certain basic information about the terms and conditions on which they work.

Fixed-term/Open-ended Contracts

Workers may be contracted to work for a fixed period only or to perform a particular task with the contract terminating at the end of this period

or on the completion of the task. Examples are those who are employed specifically to cover for maternity, parental or paternity leave; employees who do seasonal or casual work such as agricultural workers and shop assistants during busy periods; employees hired to cover unusual peaks in demand as in the tourist industry; and employees whose contracts will end on the completion of a specific task such as installing a computer system. There is no requirement to specify the reason why it is an agreement for a fixed-term, although a job title should be included in the contract to comply with the employer's statutory requirements on the written statement of particulars of employment.

Trial Period

Employment contracts often provide that the employee will undergo a trial or probationary period at the start of their employment, during which the employer has the opportunity to assess the employee's suitability for the position. The exact terms of the trial period will be governed by the employment contract, but it will typically last between three and six months. During this time, the employee may not be entitled to certain benefits.

Notice Period

The employment contract should state the notice period that either party must give to the other party to terminate the employment. Employees have a statutory right to receive a minimum period of notice from employers once they have been employed for one month: i) one week's notice for those with between one month and two years' service; and ii) thereafter, an additional week's notice for each continuous year of service, up to a maximum of 12 weeks for 12 complete years' service. The statutory minimum notice periods will be implied into the employment contract and will override any express terms providing for a shorter period of notice than that provided by statute.

PAY EQUITY LAWS

Extent of Protection

Equal pay legislation in the UK prohibits discrimination in relation to the terms and conditions of employment as between men and women. EU law which underpins the legislation will continue to be directly effective post-Brexit. Where men and women are paid at different rates, an employee can bring an equal pay claim and the employer must prove that the reason for this is not gender-related, or be able to objectively justify this.

Remedies

Equal pay claims are usually brought in the employment tribunal, either during employment or within six months of the termination of their employment or appointment. Equal pay awards are made up of:

- compensation of arrears of pay plus interest, limited to 6 years; and
- revised contractual terms, including remuneration terms, so that they are, in the future, the same as that of the person of the opposite sex doing the same work.

In a successful equal pay claim, the tribunal will also order the employer to undertake an equal pay audit (unless an exception or exemption applies). This involves publishing relevant information about gender pay (such as gender pay information relating to the people in question, identifying the differences in pay and any reasons for those differences and the employer's plan to avoid future equal pay breaches) on the employer's website and providing this to the individuals involved.

IV. ISSUES ARISING DURING THE EMPLOYMENT RELATIONSHIP

WORKING CONDITIONS

Minimum Standards

Employers have extensive obligations to safeguard the health, safety and welfare of all of their employees under both common law and statute.

Salary

Employers must pay all workers (not just employees) at least the statutory minimum pay per hour that they are entitled to. The National Minimum Wage ("NMW") is the minimum pay per hour payable for those under the age of 25. There are four hourly rates for the NMW, depending on the age of the worker and whether they are an apprentice; the top rate is currently GBP 8.20 (for those aged 21 and over). The National Living Wage ("NLW") is payable to most workers aged 25 and over and is

currently GBP 8.72 per hour. Employers can only make deductions from wages if the deduction is required by statute (for example deductions for income tax), the employee has expressly authorised the deduction or the deduction is provided for by a term of the employment contract. Men and women have the right to be paid the same for the same, or equivalent, work. Since April 2019, all workers (not just employees) have had the right to a written itemised pay statement (payslip) at the time, or before, their wages are paid to them, to enable them to establish whether they have been paid correctly and must include the number of hours paid where an individual is paid on an hourly rate basis.

Health and Safety in the Workplace

Employers have a general duty to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all their employees. This statutory duty is enforced by the Health and Safety Executive ("HSE"), which has the power to investigate breaches, and to prosecute and sentence individuals and organisations. Since March 2020, the UK government has introduced a number of temporary measures in response to the coronavirus pandemic, including the Coronavirus Job Retention Scheme and the Job Support Scheme, and changes to Statutory Sick Pay.

Managing COVID-19-Related Employee Issues

Unless they are well and able to work from home, employees will be entitled to Statutory Sick Pay (and may also be entitled to the employer's company sick leave and pay) if they are: sick and diagnosed with coronavirus, or have coronavirus symptoms; self-isolating because a member of their household has coronavirus symptoms, or on an official instruction, because they have been in contact with someone who has tested positive with coronavirus; shielding because they are classed as extremely vulnerable and were notified they should follow the shielding measures. There are a few options available for employees who need to care for a dependant who is sick or children who are unable to go to school. Employees who are unable to work because they have caring responsibilities resulting from COVID-19 can be furloughed under the Coronavirus Job Retention Scheme. The other options would involve employees taking unpaid leave, such as dependant's leave (they can take a "reasonable" amount of time off when pre-arranged care for a dependant has unexpectedly become disrupted or terminated) or employees with at least one year's continuous service could take parental leave (they can take up to 4 weeks' leave in a year, in blocks of a week).

If the employee is able to work from home then they should do so and be paid in full. If they cannot, the issue should be treated carefully. There may be health and safety reasons for employees not wanting to attend the workplace, such as a confirmed case of the virus or they have genuine health concerns which make them more vulnerable, or they live with vulnerable family members. From an employment law perspective, failure to obey reasonable and lawful management instructions is a breach of contract. Therefore, unless the employee has a good reason not to attend the workplace, an employer would be entitled to discipline the employee for refusing to attend, and might also be entitled to withhold wages.

Employers should keep staff informed about cases and infection risk in the organisation, but in most cases it will not be necessary to name the individual, and their identity should not be disclosed. Employers should not provide more information than necessary – they should simply inform staff that an employee has the virus and that appropriate precautions should be taken. This is because information about an employee's health is a 'special category personal data' and it can only be processed, including by being disclosed, in restricted circumstances. As pregnant women have been "strongly advised" to socially isolate, avoid travelling on public transport and work from home where possible, employers should allow pregnant women to work from home if possible. Where the nature of their role means that they cannot work from home and there is no suitable alternative work available that they could do from home, the employer should consider medically suspending the employee on full pay.

COVID-19: Best Practices

Most health and safety policies and practices will need to be amended to reflect the approach to controlling the risks presented by COVID-19. Workers should be involved in assessing workplace risks and in the development and review of workplace health and safety policies in partnership with the employer. Other policies that may need updating include sickness, disciplinary and grievance, travel, homeworking and Bring Your

Own Device policies. To avoid discrimination and equality issues arising out of return to work plans, employers must be mindful of the particular needs of different groups of workers and individuals, and must ensure that their plans do not disadvantage certain protected groups or individuals with a protected characteristic.

SOCIAL MEDIA AND DATA PRIVACY

Restrictions in the Workplace

Employers can set their own rules in relation to use of the Internet and social media at work.

Can the employer monitor, access, review the employee's electronic communications?

It is advisable for employers to implement clear policies on the use of social media and social networking websites, setting out the standards of conduct expected from staff and making clear that a breach may lead to disciplinary action, including dismissal. Otherwise it could be difficult for employers to defend dismissing an employee for inappropriate conduct on a social networking site. Employers can lawfully intercept, monitor and record communications for certain specified purposes, including investigating or detecting unauthorised use of the system by employees, provided they have made "all reasonable efforts" to inform employees that they may monitor email and Internet use.

Employee's Use of Social Media to Disparage the Employer or Divulge Confidential Information

In some cases, posting disparaging statements about the employer on social media may constitute misconduct amounting to a potentially fair reason for dismissal, and may be a repudiatory breach of contract leading to grounds for summary dismissal (i.e. dismissal by the employer without notice). Disclosure of the employer's confidential information on social media is likely to amount to a breach of the employee's employment contract, either of an express confidentiality clause or of the employee's implied duty of confidentiality, which could lead to the employer taking disciplinary and other action against them. Employers should consider putting in place clear rules on the use of social media and communicate these to employees. This could be in a social media and/or electronic communications policy.

EMPLOYEE BENEFITS

Social Security

The UK has a comprehensive social security system, funded from general taxation and from National Insurance Contributions. The social security system provides state benefits to cover maternity/paternity/adoption, childcare, disability and carer matters. It also administers retirement pensions. State benefits can be contractually supplemented by employers. The National Insurance Fund aims to provide subsistence level benefits to all those in need. Employers are under an obligation to collect income tax at source from employment income, pensions and taxable state benefits under the Pay As You Earn ("PAYE") system. Employed earners and their employers must also pay National Insurance Contributions ("NICs"). Various contributions are required to be made in respect of all UK employees. Class 1 contributions are payable in respect of earnings by both employer and employee.

Healthcare and Insurances

Employers carrying on business in Great Britain are required to have in place employer's liability insurance against liability for bodily injury or disease sustained by employees and arising out of and in the course of their employment in Great Britain. Some employers may offer employees benefits such as life insurance, permanent health insurance, private medical insurance and company cars.

Holidays and Annual Leave

Employees and workers are entitled to 5.6 weeks' paid annual leave (pro-rated for part-timers). This holiday entitlement can include public holidays, of which there are currently eight in England and Wales. Statutory holiday entitlement under the Working Time Regulations cannot normally be carried over into the following year, nor can workers be paid in lieu of taking statutory holiday, except on termination of employment.

Maternity and Parental Leave

Pregnancy rights include health and safety protection and the right to reasonable paid time off for ante-natal care. Family rights to leave and pay have been subject to major reform in Great Britain with the introduction of shared parental leave and pay which applies to all qualifying working parents of children. Whilst the default 52 weeks' maternity/adoption leave for employed mothers/

adopters remains, those employees are entitled to give up their leave and pay and share it with the father/their partner (i.e. whoever shares the main caring responsibility for the child at the date of birth/adoption). Employees with 26 weeks' service also qualify for Statutory Maternity/Adoption Pay which is calculated as follows: (i) six weeks at 90% of salary; and (ii) 33 weeks currently at a flat rate of GBP 151.20, or 90% of salary if that is lower. Shared Parental Pay follows the same flat rate for up to 37 weeks. Fathers/co-adopters continuously employed for 26 weeks are entitled to: two weeks' Ordinary Paternity Leave; and two weeks' Statutory Paternity Pay: currently at GBP 151.20, or 90% of salary if that is lower. All employees continuously employed for 26 weeks have the right to request flexible working, i.e. to change the hours/times they work or their work location, irrespective of their caring responsibilities. Although compensation for non-compliance, or for a decision based on incorrect facts, is capped at eight weeks' pay, victimisation, sex discrimination and unfair dismissal claims may also be brought following an employer's refusal to grant the employee's request.

Other Forms of Leave

Unpaid parental leave: eligible employees can take unpaid parental leave to look after their child's welfare; up to 18 weeks' leave for each child and adopted child, up to their 18th birthday. The limit on how much parental leave each parent can take in a year is 4 weeks for each child (unless employer agrees otherwise).

Time off for dependants: all employees are entitled to reasonable unpaid time off work to deal with an emergency involving a dependant (e.g., if a dependant falls ill or is injured, if care arrangements break down, or to arrange or attend a dependant's funeral).

Time off for public duties: all employees have to be allowed time off for jury duties/service. Employers do not have to pay employees for time spent on public duties or jury service, but some choose to do so.

Time off for losing a child or suffering stillbirth: a new law was introduced in April 2020 giving employed parents the right to 2 weeks' leave if they lose a child under the age of 18 or suffer a stillbirth from 24 weeks of pregnancy. Parents are also able to claim Statutory Parental Bereavement Pay for this period, subject to meeting the eligibility criteria.

Sickness and Disability Leave

Employers are required to pay Statutory Sick Pay to employees who are off work due to illness, after the third day of absence. The current rate of SSP is GBP 95.85 per week from April 2020, for a maximum of 28 weeks. Employers often supplement SSP with contractual sick pay for a specified period. The UK government introduced a number of temporary measures in response to the coronavirus pandemic. SSP is available from the first day of sickness absence to those advised to self-isolate for various reasons including because they are showing symptoms of COVID-19, or they are caring for others within the same household who have symptoms.

The cost of providing SSP to any employee off work due to coronavirus is refunded by the government for up to 14 days for businesses with fewer than 250 employees. Employers are required to pay SSP to employees who are off work due to injury, after the third day of absence (subject to qualifications). The current SSP rate is GBP 95.85 per week, as from April 2020, for a maxim of 28 weeks. Employers often supplement SSP with contractual sick pay for a specified period.

Pensions: Mandatory and Typically Provided

Employers have to ensure that workers in the UK, between the ages of 22 and state pension age, and earning a salary of at least GBP 10,000 per annum are automatically enrolled into a qualifying pension scheme to which the employer must contribute. There are minimum total contributions that have to be made. Currently for employers this is 3% of each employee's qualifying earnings. Some employers choose to provide other benefits to employees such as season ticket loans to enable employees to buy an annual train ticket to commute to work or subsidised gym membership, but this is entirely at the employer's discretion.

V. ISSUES ARISING ON TERMINATION OF THE EMPLOYMENT RELATIONSHIP

TERMINATION OF EMPLOYMENT CONTRACTS

Grounds for Termination

There are several ways in which a contract may be terminated. These include: Notice being given by either the employer or the employee; Mutual agreement; Expiry of a fixed-term contract. A fixed-term contract automatically terminates at the end of the fixed-term without the need for notice; Dismissal by the employer; Termination by the employee based on a serious breach of contract by the employer (that is, constructive dismissal).

Is Severance Pay Required?

Except for redundancy dismissals (where an eligible employee will be entitled to a statutory redundancy payment) there is no statutory entitlement to a severance payment as such. An employee is entitled to notice, and it is common for employees to be paid a sum in lieu of notice, usually equal to the value of pay over the notice period.

Whistleblower Laws

The dismissal of an employee will be automatically unfair if the reason or principal reason for their dismissal is that they have made a "protected disclosure". It is unlawful to dismiss employees, or to subject employees or workers to a detriment, if they disclose information with a reasonable belief in its truth, about certain types of wrongdoing by the employer. A qualifying disclosure arises where a worker discloses information which in their reasonable belief shows a certain type of wrongdoing has and/or will take place within the workplace. Such wrongdoing includes, but is not limited to: i) committing a criminal offence; ii) breaching a legal obligation; and iii) endangering healthy and safety. The worker must also have a reasonable belief that the disclosure is in the public interest. There is no requirement for good faith. A qualifying disclosure is "protected" if it is made directly to the employer, a "responsible" third party or a "prescribed" person such as a regulator. Workers should be encouraged to raise concerns internally in the first instance. A whistleblowing policy should be put in place to encourage this. As with discrimination claims: there is no qualifying period of employment necessary to bring a "whistleblowing" claim nor is there a cap on the level of compensation that may be awarded. It is not uncommon for employees to raise whistleblowing claims as part of the tactics of bringing a tribunal claim.

RESTRICTIVE COVENANTS

Definition and Types of Restrictive Covenants

A restrictive covenant is a clause, which is intended to protect an employer's business by restricting the activities of its employees, generally after the employment has terminated. These include: i) non-compete clauses; ii) non-solicitation of customers; iii) non-solicitation of employees; and iv) non-dealing clauses – prohibits an employee from doing business with certain clients or customers of their former employer for a given period of time after termination.

Use and Limitations of Garden Leave

Garden leave is a tool by which an employer can prevent departing employees from performing their regular duties. Typically, the employee will be prevented from attending the workplace but will still receive full pay. This has the effect of restricting the employee's access to customers, clients, staff and information, and hampers their ability to work for a competitor. If an employer wishes to put an employee on garden leave there must, in most circumstances, be an express term in the employment contract permitting it to do so. Otherwise, they could be breaching the employee's implied right to work and therefore be in breach of contract.

TRANSFER OF UNDERTAKINGS

Employees' Rights in Case of a Transfer of Undertaking

The Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE") applies to employees when either: a business or asset is transferred from one entity to another; or there is a change of identity in an entity providing a service (e.g. outsourcing). The effect of TUPE is that all employees "assigned" to the economic entity or activity will transfer to the transferee

(i.e. the successor). In addition, the transferor's (i.e. the original employer's) rights, powers, duties and liabilities under the employment contracts of those employees who are transferring, transfer to the transferee. The transferor and transferee have a duty to inform and consult with "appropriate representatives" (generally trade union representatives or representatives elected from the affected employees) of "affected employees" about the facts and implications of the transfer. Employers that breach this duty may be liable for up to 90 days' pay for each "affected employee". Finally, subject to certain exceptions, dismissals are automatically unfair if the sole or principal reason for dismissal is the TUPE transfer unless there is an economic, technical or organisational reason entailing changes in the workforce.

Requirements for Predecessor and Successor Parties

Both the transferor and the transferee (predecessor and successor) have an obligation to inform and, if appropriate, consult with appropriate representatives in relation to any of their own employees who may be affected by the transfer or any "measures" (any step, action or arrangement) taken in connection with the transfer. The duty to consult only arises if the employer envisages taking measures in relation to the affected employees. Certain information must be provided to the appropriate representatives long enough before the transfer to enable consultation to take place.

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UNITED STATES.

JACKSON LEWIS

I. HIGHLIGHTS

- The laws governing employment relationships in the United States come from federal, state and local statutes, agency regulations, and case law.
- Under U.S. law, there are no minimum requirements for an employment contract.
- Except in certain mass dismissals or as provided for in an employment contract or a collective bargaining agreement, U.S. law does not impose a formal "notice period" to terminate an individual employment relationship.
- Employees employed on an "at-will" basis may be terminated, with or without cause or grounds, provided it is not for an illegal reason, notably discrimination on grounds of a category protected by law or protected "whistleblowing" activity (reporting certain employer activity where the employee reasonably believes that the information he or she provided relates to potential violations of specific laws).
- Under U.S. labour law, if a majority of the employees in the bargaining unit who cast their vote had voted in favor of union representation, the union obtains the right of "exclusive" representation of all the employees in the bargaining unit (not only the employees who voted in favor of the union).

II. INTRODUCTION

The employment relationship in the United States is subject to markedly less regulation than in other countries. With the exception of some protections on wage and hours and a prohibition on discrimination, the parties to an employment relationship in the United States are generally free to negotiate and set the terms and conditions of their relationship. Moreover, the default position is that private-sector employment relationships are at-will: either the employer or the employee may terminate the employment relationship at any time, for any (non-discriminatory or non-retaliatory) reason with or without notice.

III. ISSUES ARISING UPON HIRING INDIVIDUALS

PRE-EMPLOYMENT CONSIDERATIONS

Limitations on Background Checks

It is illegal in certain U.S. states (and cities) to ask about an applicant's criminal history on an employment application. Such laws typically make exceptions for certain positions for which criminal history information may be required by law. The best practice under U.S. law is generally to avoid asking about arrests and/or convictions on the job application and, instead, wait until the employer has made a conditional offer of employment. In the case of a conviction revealed later in the application process, the best practice is to conduct an individualised assessment of the job-relatedness of the conviction to the job to which the candidate applied. Another consideration in the application process is compliance with the federal Fair Credit Reporting Act, which governs the collection, assembly and use of information about consumers by consumer reporting agencies, including credit information, criminal background, motor vehicle reports, and other public record information. Though FCRA applies only to "consumer reports," employers must ensure they comply with any relevant requirements if they seek to obtain such information. Certain states and cities also prohibit the use of credit-related information when making employment decisions.

Restrictions on Application/Interview Questions

In general, federal prohibitions on employment

discrimination (see Section V below) also apply to hiring decisions. In other words, just as you cannot terminate an employee because he or she belongs to a protected category, you cannot refuse to hire an applicant on account of his or her protected status. For this reason, employers should avoid asking questions on a job application or in an interview, which are likely to reveal the applicant's membership in a protected group. Similarly, to comply with background check laws mentioned above, employers should avoid asking about arrests and/or convictions on the job application or during an interview.

AUTHORISATIONS FOR FOREIGN EMPLOYEES

Requirements for Foreign Employees to Work

Foreign nationals without permanent resident status or a work visa are not permitted to work in the United States. An employer seeking to hire a foreign national may file, on behalf of its prospective employee, a petition with the Department of Homeland Security/Citizenship and Immigration Services for an employment visa. If the petition is approved, the prospective employee must obtain a "visa stamp" from a U.S. embassy or consulate. Canadian citizens are exempt from this requirement.

Alternatively, an employer may sponsor a potential employee's application for permanent resident status, referred to as a "green card," if they are able to establish that the potential employee is a multinational executive/manager transferee, has unique skills, or is being offered a job in the United States for which the employer has been unable to recruit a U.S. worker who meets the minimum requirements of the position. Rather than hiring workers one by one, U.S. companies may engage outsourcing and staffing firms that obtain H-1B visas and hire groups of high-skilled foreign workers, who are then placed with the U.S. company as needed.

On 19 March 2020, due to precautions implemented by employers and employees associated with COVID-19, DHS announced that it would exercise prosecutorial discretion to defer the physical presence requirements associated with completion of Form I-9. This policy only applies to employers and workplaces that are operating remotely. If there are employees physically present at a work location, no exceptions are being implemented at this time for in-person verification of identity and employment eligibility documentation for Form I-9. This virtual verification option is scheduled to expire on 19 November 2020, but may be extended.

Does a Foreign Employer need to Establish or Work through a Local Entity to Hire an Employee?

As a matter of tax, state corporate law, and other regulatory requirements, it may be necessary to either establish a local entity or register a foreign entity locally, depending on the nature and scope of the business activity associated with the hiring. This needs to be investigated with tax and corporate law advisors on a case-by-case basis. Independent of these requirements, the foreign employer may be subject to federal and state income tax withholding obligations as well as payment of social security, disability, unemployment and other payroll contributions with respect to employment of individuals within the U.S.

EMPLOYMENT CONTRACTS

Minimum Requirements

Under the laws of the United States, there are no minimum requirements for an employment contract. Also, in most states, no written memorialisation of any terms is required. An employment relationship in the United States is presumed to be "at-will," i.e., terminable by either party, with or without cause or notice. Indeed, a majority of employees in the United State are employed on an "at-will" basis, without a written employment contract, and only with a written offer of employment that outlines the basic terms and conditions of their employment. Whether the employment relationship is "at-will" or pursuant to a written employment contract, parties are free to negotiate and set the terms and conditions of their relationship, so long as none of the provisions violate any federal, state or local law, rules or regulations governing the employment relationship.

Fixed-term/Open-ended Contracts

No legal provision governs fixed or unlimited term contracts. Unlike many other countries, American law does not limit the duration of a fixed-term employment contract or the circumstances under which the parties may enter into a fixed-term employment contract. In the absence of an

employment contract, employment relationships are presumed to be "at-will," terminable by either party at any time, with or without cause.

Trial Periods

No legal provision governs a formal "trial period." However, some employers prefer from a business perspective, to have an internal policy on trial periods, often referred to as "introductory periods" or "probationary periods", which generally provide for a formal performance evaluation after an initial stated period of employment (ninety 90 days). From a legal perspective, there is no real advantage to having a trial or probationary period; but there is a potential downside to it, if it causes confusion regarding the employee's at-will status.

Notice Periods

Except in certain mass dismissals or as provided for in an employment contract or a collective bargaining agreement, U.S. law does not impose a formal "notice period" to terminate an individual employment relationship. Most employees are employed "at-will" and either party can terminate the employment relationship without notice. Under the Worker Adjustment and Retraining Notification Act ("WARN Act"), employers must give 60 days' advance notice to affected employees in advance of plant closings or covered mass layoffs.

PAY EQUITY LAWS

Extent of Protection

Under the Equal Pay Act, an employer cannot discriminate between employees of the same establishment on the basis of sex, "paying wages to employees at a rate less than the rate at which the employer pays wages to employees of the opposite sex for equal work on jobs, the performance of which requires equal skill, effort and responsibility, and which are performed under similar working conditions". Further, an employer cannot lower the wages of some employees to make wages equal.

Amending Title VII, the Lilly Ledbetter Fair Pay Act of 2009 overturned Supreme Court precedent severely restricting the time period for filing unfair pay complaints, establishing that such complaints can be filed within 180 days of a discriminatory paycheck, a period which resets each time a paycheck is issued. Employer practices subject to challenge include managerial decisions about base pay or wages, job classifications, career ladder or other noncompetitive promotion denials, tenure denials and failure to respond to requests for raises.

Nearly all states also have their own "equal pay acts". Since 2016, many states have sought to broaden the pool of comparators to those performing "substantially similar work" or "comparable" work. Many of the state laws do not restrict comparison to the same establishment or geographic location. In addition, several states specifically prohibit sex-based wage discrimination, while other states prohibit wage discrimination based on protected class status. Many cities and states have passed laws restricting the collection of prior salary information during the hiring process based on concerns that setting the starting pay rate on the basis of prior salary, may have the effect of perpetuating pay discrimination. Nearly half of the states have also enacted pay transparency laws that prohibit employers from discharging, or taking any other retaliatory action against an employee, for discussing wages or compensation with another employee.

Remedies

An employer who violates the Equal Pay Act is liable to the affected employee, for the amount of wages the employee was underpaid, for liquidated damages equal to 100% of the underpaid wages, as well as for reasonable attorneys' fees and costs. Further, if the employer has retaliated against an employee for filing a complaint under the EPA, the employee is entitled to equitable relief which may include reinstatement, promotion and the payment of wages lost, as well as an additional equal amount as liquidated damages. The employer must also pay the reasonable attorneys' fees and costs of the action; compensatory and punitive damages are not available. Under Title VII pay discrimination claims, in addition to the EPA remedies available, an employee can recover compensatory and punitive damages (the amount is limited by the size of the employer. Similar remedies exist under state law.

IV. ISSUES ARISING DURING THE EMPLOYMENT RELATIONSHIP

WORKING CONDITIONS

Minimum Standards

Federal law regulates wages, working hours and overtime pay for (covered) employees, but employees in executive, administrative or professional positions are exempt, as are outside sales employees, certain skilled computer professionals, employees of certain seasonal amusement and recreational businesses, causal babysitters and persons employed as companions to the elderly or infirm.

Salary

The (national) minimum wage for all non-exempt employees of $7.25 per hour. Effective 1 January 2020, the minimum wage for federal contractors working on or in connection with contracts covered by Executive Order 13658 will be $10.60 per hour. States are free to legislate a higher minimum wage. As of January 2020, 29 states and the District of Colombia have a minimum wage higher than the national minimum.

Health and Safety in the Workplace

Employers are required to provide employees with a safe and healthy place of employment, which is free from recognised hazards (death or serious physical harm). Employers are obliged to: remedy known workplace hazards; limit the amount of hazardous chemicals workers can be exposed to; use certain safe practices and equipment; and monitor hazards and keep records of workplace injuries and illnesses. Regarding the COVID-19 pandemic, the U.S. Center for Disease Control (CDC) has issued its Guidance with detailed instructions on cleaning and disinfecting public spaces, workplaces, businesses, schools, and homes. The Guidance includes a Cleaning and Disinfection Decision Tool that distills the advice into a flow chart with different recommendations depending on whether the area is indoors, outdoors, frequently used, and the type of surface involved.

Managing COVID-19-Related Employee Issues

Below is a rundown of several types of circumstances that would require an employer to provide or considering providing leave for an employee, and the appropriate course of action:

- the government has advised that the employees stay home as they fall in a vulnerable population category.
- the employee is caring for a parent who is old and could get sick or lives with someone who falls in a vulnerable population category.
- the employee's child's day care (or school) is closed and he/she needs to take care of the child or help with schoolwork.
- the employee has been exposed to COVID-19.
- the employee's spouse has COVID-19.
- the employee has a medical condition and needs to work from home as an accommodation.
- the employee has COVID-19.

COVID-19: Best Practices

The following checklist represents a high-level overview of issues to guide your thinking about how to re-open most effectively while mitigating your business and compliance risks:

Develop a Return to Work Plan

- Consider reopening and other orders specific to your state and/or county.
- Procure supplies and make workplace modifications required for safe operations.
- Identify individuals who will be brought back to work using neutral selection criteria.
- Identify those who can continue to work remotely; consider more formal telework plans.
- Determine changes to exempt status, compensation and schedules (e.g., staggered shifts).
- Consider workshare and unemployment insurance implications.
- Determine updates that must be made to I-9.

Employment Verification Forms and E-Verify

- Anticipate unique needs of various vulnerable employee populations.
- Notify employees of return to work with established dates and, if they were terminated, rehire documents.

Implement Policies and Practices to Ensure Safe & Lawful Return to Work and New Operating Realities

- COVID-19 related protocols (screenings, medical inquiries, temperature checks, fitness for duty, use of Personal Protective Equipment (PPE), modified work practices to enhance social distancing and address infection control).
- Prepare/update existing policies to address new laws related to use of leave and/or accommodations (FFCRA leaves, state/city mandated supplemental sick leaves).
- Develop policies related to off-duty conduct.
- Impose appropriate limits on business travel (domestic and international), in-person meetings, seating proximity.
- Train employees on new policies, protocols and rules.
- Consider job description updates to reflect changes in job duties and essential job functions.
- Consider how to adhere to regulations on changes in terms and/or conditions of employment for any employees on temporary visas.
- Update immigration sponsorship policies to account for new business realities.
- Create business continuity plan(s).

Anticipate Responses to COVID-19 Related Scenarios Upon Employees' Return to Work

- Whether an employee's health, contacts or behaviors raise safety concerns.
- Employee leave requests for school closures, illness, to care for others or because they are or live with an individual in a vulnerable population.
- Employees who are capable of but unwilling to work from home.
- Employees who are asked to report to work but prefer to and able to work from home.
- Employees who share rumors or concerns of employees or customers being sick.
- Employees requesting information about another's (employee/customer) health condition.
- Employees engaging in collective or other protected activity to raise safety concerns.
- Non-exempt employees emailing and/or working outside normal business hours.

SOCIAL MEDIA AND DATA PRIVACY

Restrictions in the Workplace

While there is no specific rule prohibiting employers from restricting employees' social media use during working hours, there are certain laws, discussed below, that employers should consider, particularly with respect to any type of monitoring of employees' social media use.

Can the employer monitor, access, review the employee's electronic communications?

The Stored Communications Act generally prohibits accessing the online account of another without that individual's consent. In the context of monitoring, accessing or reviewing the employee's electronic communications, the SCA has been interpreted to allow employers to access employee communications stored on their own electronic communications services (e.g. a company provided email service), as long as access is authorised under the employer's policies, and the employer has a valid business purpose for doing so. Employee notice of the company's monitoring policies is critical. Regarding private email accounts (e.g. gmail, yahoo, etc.) on a company provided device, generally courts have held that an employer cannot access an employee's private email account. That said, some courts have concluded that an employer can monitor an employee's private email account, if the employee is using a company provided device or network, and has provided written consent to an employer's policy authorising broad monitoring practices on company provided devices/networks. When organisations decide to engage in any level of search or surveillance of their employees, they should consider what their employees' expectations are concerning privacy. In general, it is best practice to communicate to employees a well-drafted acceptable use and electronic communication policy that informs employees on what they can expect when using the organisation's systems, whether in the workplace or when working remotely.

On 1 January 2020, the California Consumer Privacy Act took effect, with some data privacy requirements paralleling the EU's General Data Protection Regulation, as applied to consumer information. Under the privacy notice provision, covered businesses are required to inform employees, as described above, with respect to the categories of personal information they collect and the purposes for which the information will be used. In addition, employees are permitted to commence a private right of action, if affected by a data breach caused by a failure of the employer to maintain reasonable safeguards.

Employee's Use of Social Media to Disparage the Employer or Divulge Confidential Information

Employers may prohibit the employee's use of social media to disparage the employer or divulge confidential information, and may discipline employees for violating such a prohibition, but must tread carefully for two main reasons: First, the employee may be protected under a federal or state whistleblower law, which generally protects employees who complain about certain company activities or conditions affecting public health and safety or violating public policy standards, as well as employees who report potential securities fraud violations. Second, employees (even those who are not unionised) have the right to engage in "concerted activity" including the right to discuss the terms and conditions of their employment - and even to criticise their employers - with co-workers and outsiders. However, these protections can be lost where the communication is disloyal or has the tendency to damage an employer's business and has been made with reckless disregard of the truth or are maliciously untrue.

EMPLOYEE BENEFITS

Social Security

U.S. law provides retirement benefits and subsidised health insurance under federal Social Security and Medicare programs. Employers are required to contribute 6.2% of each employee's salary (in 2020, on the first $137,700 of an employee's gross wages) to Social Security, as well as 1.45% of each employee's salary (without a limit on the wage base) to Medicare. Equal contributions are deducted from each employee's wages and act as an 'employee contribution'. Also, these programs provide benefits for retirees, the disabled and children of deceased workers. Social Security benefits: old-age, survivors and disability insurance. Medicare provides hospital insurance benefits.

Healthcare and Insurances

Certain large employers who do not offer affordable health insurance will be subject to an annualised employer "shared responsibility" penalty of $2,570 (indexed) per full-time employee (less the first 30 full-time employees in 2020) if the employers do not offer health insurance to at least 95% of their full-time employees and their dependents. Employers may also be required to provide employees with health insurance benefits, pursuant to a negotiated collective bargaining agreement or employment contract.

Holidays and Annual Leave

Although the United States government recognises several "national holidays" there is no federal law that requires employers to provide employees with time off for a holiday. However, it is customary for employers to provide employees with paid time-off to observe nationally and locally recognised holidays. For example, the public holidays widely observed by employers in private industry are: New Year's Day, Memorial Day (in late May), Independence Day (4th of July), Labour Day (early September), Thanksgiving Day (third Thursday in November) and Christmas Day. Some states require that employees working on enumerated holidays be paid at a higher rate of pay. Similarly, no federal law requires employers to provide employees with paid vacation time. In practice, all employers provide employees with paid vacation time. It may range from one week per year during the first few years to three weeks or more for long-serving employees. Employees represented by a union may receive more generous vacation time.

Maternity and Paternity Leave

Under the Family and Medical Leave Act, employers with fifty (50) or more employees within a seventy-five (75) mile radius are required to provide employees with twelve (12) weeks' unpaid leave in a 12-month period for the birth or placement of a child. Some state laws provide for maternity leave for employees who are not covered under the FMLA. In addition, several states provide workers with partial pay during parental leave and in general, it seems there is a trend toward state family leave laws.

Sickness and Disability Leave

Employees may be entitled to unpaid sick leave under the FMLA, which allows eligible employees to take up to twelve (12) weeks' unpaid medical leave in a 12-month period for a serious health condition that prevents the employee from performing the functions of his or her job. Though there is no national law guaranteeing paid sick leave, a number of states, counties, and cities require employers doing business within their boundaries to offer paid sick leave. Further, employers must offer paid sick leave to employees working on certain federal contracts.

On 18 March 2020, President Trump signed the Families First Coronavirus Response Act into law, requiring certain employers to provide their employees with paid sick leave and expanded family and medical leave, for specified reasons related to COVID-19. FFCRA creates two new emergency paid leave requirements that will remain in effect from 1 April 2020 through 31 December 2020. "The Emergency Paid Sick Leave Act" entitles certain employees to take up to two weeks of paid sick leave. "The Emergency Family and Medical Leave Expansion Act" amends the FMLA and permits certain employees to take up to twelve weeks of expanded family and medical leave, ten of which are paid, for COVID-19 related reasons. States have also created paid sick leave programs for certain employers.

A disabled employee may be entitled to unpaid leave under the FMLA as discussed above. In addition, workers' compensation insurance administered at the state level may provide for paid leave. Finally, while the Americans with Disabilities Act does not expressly provide for disability leave, employers are required to make reasonable accommodations for qualified employees with disabilities, which could include leave, so long as doing so does not pose an undue burden on the employer.

Pensions

Unless otherwise provided for pursuant to a collective bargaining agreement or and employment contract, employers are not required to provide employee pensions or any retirement benefits. Many American employers do provide some retirement benefit to their employees, increasingly in the form of a retirement savings plan, which is a defined contribution plan and commonly named after the section of the Internal Revenues Code: '401k' plan. Depending on the size and industry of the employer, additional benefits, while not required, are typically offered; popular employee benefits include: long term/ short term disability insurance, health insurance, life insurance, dental and vision insurance, paid parental leave, commuting/travel assistance and gym/wellness benefits.

V. ISSUES ARISING ON TERMINATION OF THE EMPLOYMENT RELATIONSHIP

TERMINATION OF EMPLOYMENT CONTRACTS

Grounds for Termination

Generally, workers employed on an "at-will" basis may be terminated, with or without cause or grounds, provided it is not for an illegal reason; notably discrimination on grounds of a category protected by law or protected "whistleblowing" activity (reporting certain activity where the employee reasonably believes that the information he or she provided relates to potential violations of specific laws by the employer). The employment contracts of executives and other highly-skilled individual often incorporate a "just cause termination" clause, mandating that the employee may only be terminated for "cause" and lists the permissible grounds.

Is Severance Pay Required?

Generally, workers employed on an "at-will" basis may be terminated, with or without cause or grounds, provided it is not for an illegal reason; notably discrimination on grounds of a category protected by law or protected "whistleblowing" activity (reporting certain activity where the employee reasonably believes that the information he or she provided relates to potential violations of specific laws by the employer). The employment contracts of executives and other highly-skilled individual often incorporate a "just cause termination" clause, mandating that the employee may only be terminated for "cause" and lists the permissible grounds.

Whistleblower Laws

Sarbanes-Oxley's whistleblower provisions create broad protection for employees of publicly held companies (and their contractors, subcontractors, and agents) who have a reasonable belief that fraud or other wrongdoing has occurred in violation of U.S. securities laws. The Dodd-Frank Act allows

for the award of monetary incentives to individuals who voluntarily provide original information relating to a violation of the securities laws, which results in the collection of monetary sanctions exceeding $1 million dollars. Some states have their own whistleblower laws, prohibiting termination or other adverse employment actions, in retaliation for good-faith reports made by employees about company activities that allegedly violate laws or regulations, or are fraudulent or criminal.

RESTRICTIVE COVENANTS

Definition and Types of Restrictive Covenants

Generally, courts hold that a covenant restricting the activities of an employee upon the termination of his or her employment with the employer will be enforced if it protects a legitimate business interest, is reasonably limited in scope, time and place, is supported by consideration and is reasonable. The following restrictive covenants are recognised and may be enforceable under the law: i) non-compete clauses; ii) non-solicitation of customers; and iii) non-solicitation of employees.

Use and Limitations of Garden Leave

Garden leave – a period during which a departing employee is paid his or her salary, but is not permitted to work – is not a typical concept in the U.S., to the surprise of some foreign employers. As the effect of garden leave is not only to prevent the employee from competing with the employer or taking confidential information, but also to carry out work of any kind for any other employer, U.S. courts may question whether there is a valid business interest in such a broad restraint, even if it is fully compensated. As it is not a common arrangement in the U.S., the federal and state laws regarding garden leave are nominal and each situation will be examined independently. Unlike in many countries, however, it should not be assumed that an extended garden leave (beyond a period reasonable for normal transition) would be valid in the U.S. if it does not satisfy restrictive covenant requirements.

TRANSFER OF UNDERTAKINGS

Employees' Rights in Case of a Transfer of Undertaking

No statute governs the employment relationship when a business transfers to new ownership. As most employees are employed "at-will," a "new employer" is free to offer employment to the employees of the seller/transferor employer or alter the terms and conditions of employment at the employment site. If a transfer of undertaking will result in a plant closing or mass layoff, as defined under the WARN Act, employees are entitled to 60 days' advance notice by the seller/old employer. If a union represents the employees of the seller, the new employer may be under a duty to bargain with the labour union and cannot change any terms and conditions of employment without first bargaining with the labour union.

Requirements for Predecessor and Successor Parties

There is no obligation for a party acquiring a business (an asset sale) to retain any of the seller's employees. However, if the new employer reorganises the workforce after the transfer, which results in a covered plant closing or mass layoff, the new employer or "take over party" must provide the employees with 60 days' advance notice. In addition, an employer who acquires a workforce consisting of unionised employees is required to bargain with the union in good faith regarding the effect of the layoff on unionised employees and, in certain situations, may be required to honor the terms and conditions of employment articulated in an existing collective bargaining agreement.

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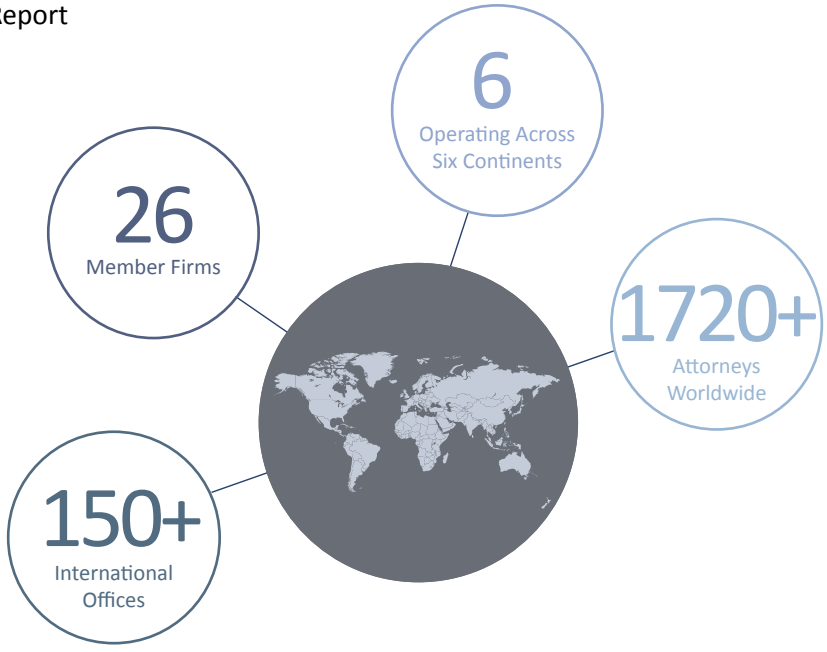

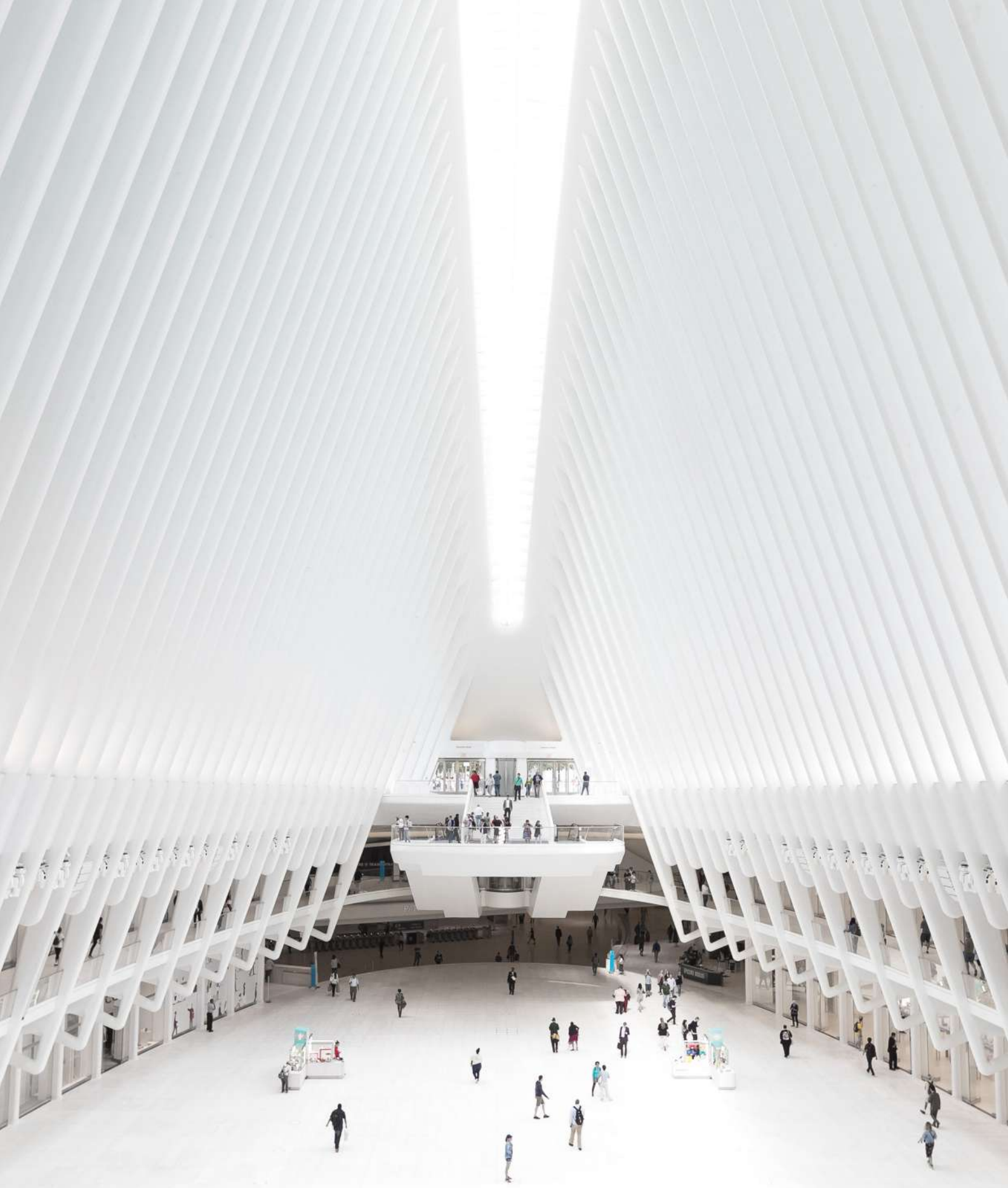

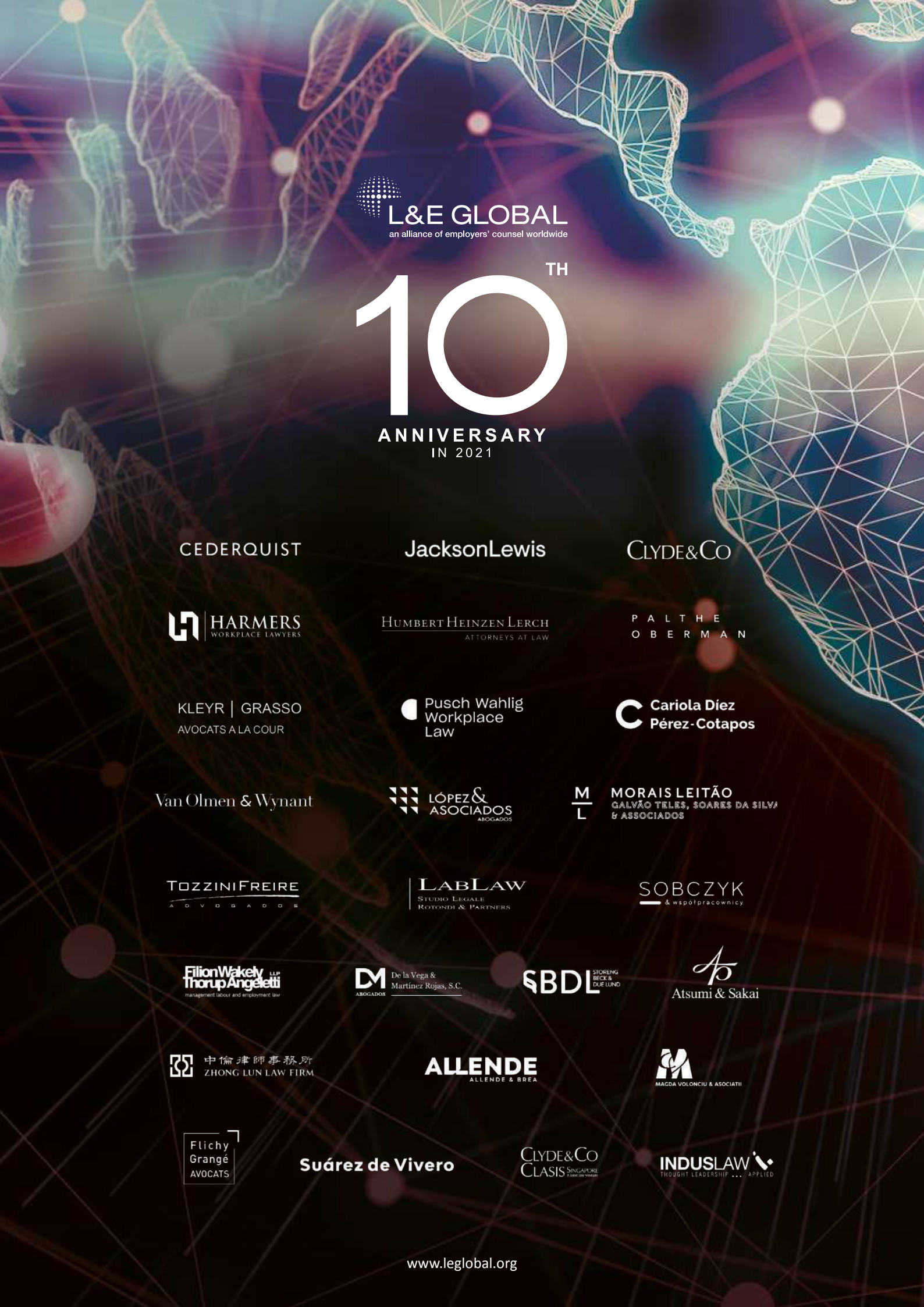

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